# Judicial Response to the PC&PNDT Act

ASIAN CENTRE FOR HUMAN RIGHTS

# Judicial Response to the PC&PNDT Act


Asian Centre For Human Rights

# Judicial Reponse to the PC&PNDT Act

Published by:

Asian Centre for Human Rights (ACHR)
C-3/441-Second Floor, Janakpuri,
New Delhi 110058, INDIA
Tel/Fax: +91 11 25620583, 25503624
Website: www.achrweb.org
Email: director@achrweb.org

First Published: July 2016



ISBN: 978-81-88987-66-1

Suggested contribution: Rs.1,000 /-

**Acknowledgement:** This report is being published as a part of the ACHR's "National Campaign for elimination of female foeticide in India", a project funded by the European Commission under the European Instrument for Human Rights and Democracy – the European Union's programme that aims to promote and support human rights and democracy worldwide. The views expressed are of the Asian Centre for Human Rights, and not of the European Commission.

# CONTENTS

# 1. Introduction

The Government of India enacted the Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PC&PNDT Act) to address the menace of sex selection leading to female foeticide. After 20 years, as per information placed by the Ministry of Health and Family Welfare before the Lok Sabha on 27.02.2015, 14 States/UTs i.e. Arunachal Pradesh, Himachal Pradesh, Kerala, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Andaman & Nicobar Island, Dadra & Nagar Haveli, Daman & Diu, Lakshadweep and Puducherry[1] had not filed a single case under the PC&PNDT Act since 1994. Further, during the same period, no conviction was secured in Andhra Pradesh, Chhattisgarh, Goa, Jharkhand, Karnataka, Tamil Nadu, Uttarakhand and West Bengal and Union Territories of Chandigarh.[2] Indeed as of 15 March 2016, only 2,152 court cases had been filed by various State Appropriate Authorities and only 306 convictions had been secured under the PC&PNDT Act.[3]

There is simply little understanding of the Act. The PC&PNDT Department of the State governments and the Union Ministry of Health and Family Welfare only upload the judgments of the Supreme Court for strict implementation of the Act. Jurisprudence on implementation of the Act such as conviction, cancellation of registration etc is hardly made available.

This publication is appears to be the first repository of the judgements under the PC&PNDT Act and aims to create technical capacities among the authorities under the Act, lawyers and judicial officers in trial of the offences under PCPNDT Act.

1. See Annexure III as referred to reply to part (a) of Lok Sabha Unstarred Question No. 799 answered on 27.02.2015 Union Minister of Health and Family Welfare, J. P. Nadda, http://164.100.47.132/LssNew/psearch/QResult16.aspx?qref=12203
2. Ibid
3. Written reply in Rajya Sabha by J. P. Nadda, Minister of Health and Family Welfare, Government of India on 15.03.2016 http://pib.nic.in/newsite/PrintRelease.aspx?relid=137946

# 2. Magnitude of sex selection: The 2011 census

The actual number of female foeticide in India is not known because of either incompetence or fudging of statistics. The Ministry of Statistics and Programme Implementation in its report, "*CHILDREN IN INDIA 2012 - A Statistical Appraisal"* of September 2012 stated that faster decline of sex ratio "led to missing of nearly 3 million girl children compared to 2 million missing boy children in 2011, compared to 2001."[4] This is based on the fact that children population of 0-6 years was 78.83 million in 2001 and it declined to 75.84 million in 2011.[5]

This assertion of the Ministry of Statistics and Programme Implementation, Government of India is patently false. The report of the Ministry of Statistics and Programme Implementation does not take into account that decadal growth of population from 1.028 billion in 2001 to 1.21 billion in 2011[6] which would have also resulted birth of more girls from 2001 to 2011 in actual terms. Further, census is conducted every 10 years and the CSR covering 0-6 years age group excludes those in 07-10 years age group and indeed does not reflect the actual number of missing girls during the decade.

According to the estimates of Asian Centre for Human Rights, during 1991 to 2011 a total of 25,49,3,480 girls went missing as a result of sex selective abortion as explained below.[7]

As per the 2011 census report, total child population in the age group of 0-6 years was 7,58,37,152 females against 8,29,52,135 males during 2001 to 2011.[8] Based on the World Health Organisation's (WHO) estimate of natural sex ratio of 105 males for every 100 females[9], for 8,29,52,135 males, there would have been around 7,90,02033 females in the age group of 0-6 years instead of 7,58,37,152 girls. This means the total number of missing girls were 3,16,4,881 i.e. 7,90,02033 females ideally to be born in the age group of 0-6 years minus 7,58,37,152 actually born in the age group of 0-6 years which is about 5,27,480 girls per age group. As the census is conducted every 10 years, it is indispensable to take into account those in the age group of 7-10 years to find out the exact number of missing girls in a decade. If a total of 3,16,4,881 girls in the age group of 0-6 years or 5,27,480 girls per age group went missing, another 21,09,920 girls in the age group of 7-10 years (5,27,480 girls per age group x 4 years) also went missing. This implies that a total of 52,74,801 girls altogether went missing during 2001 and 2011 from 0-10 years.

4. CHILDREN IN INDIA 2012 - A Statistical Appraisal, Ministry of statistics and Programme Implementation Government of Indi available at http://mospi.nic.in/mospi_new/upload/children_in_india_2012.pdf
5. Ibid
6. Census data of 2001 & 2011 available at: http://censusindia.gov.in/
7. The claim of the Ministry of Statistics and Programme Implementation Government of India in its report, "*CHILDREN IN INDIA 2012 - A Statistical Appraisal"* of September 2012 that declining ratio of girl share of girls in 0-6 years faster than that of boys of 0-6 years "has led to missing of nearly 3 million girl children compared to 2 million missing boy children in 2011, compared to 2001" is highly flawed. It does not take into account increase of population from 2001 to 2011 in absolute term which had impact on population growth rate. Further, this is not the correct figures of the missing girls in India as census is conducted every 10 years and covering 0-6 years age group excludes those in 07-10 years age group. The report is available at http://mospi.nic.in/Mospi_New/upload/Children_in_India_2012.pdf
8. Census 2011, http://censusindia.gov.in/
9. Health situation and trend assessment: Sex Ratio, WHO http://www.searo.who.int/entity/health_situation_trends/data/chi/sex-ratio/en/

Similarly, as per 2001 census, there were a total of 78,820,411 females in 0-6 years age group against 84,999,203 males.[10] Based on the WHOs' estimate of natural sex ratio of 105 males for every 100 females[11], there would have been 8,09,51,622 girls in 2001 census instead of 78,820,411 girls. This means the total number of missing girls were 1,21,31,211 (8,09,51,622 -7,88,20,411) in the age group of 0-6 or average of 20,21,869 girls missing per age group during 1991 to 2001. Taking into account those in the age group of 7-10 years, another 80,87,476 (20,21,869 x 4) also went missing during 1991 to 2001. This implies that a total of 2,02,18,687 girls were missing altogether during 1991 and 2001 in the age group of 0-10 years.

Therefore, total number of girls missing as a result of sex selection during 1991 to 2011 was 25,49,3,480 or 1,27,4674 girls every year.

The 2011 census reflected a grim picture of the missing girls in India which stands exposed from the CSR as given below:

**Table 1: Child Sex Ratio in India (2001-2011)**

| S. No. | State/UTs | Child Sex Ratio (0-6) | |
|---|---|---|---|
| | | 2001 | 2011 |
| | INDIA | 927 | 919 |
| 1 | JAMMU & KASHMIR | 941 | 862 |
| 2 | HIMACHAL PRADESH | 896 | 909 |
| 3 | PUNJAB | 798 | 846 |
| 4 | CHANDIGARH | 845 | 880 |
| 5 | UTTARAKHAND | 908 | 890 |
| 6 | HARYANA | 819 | 834 |
| 7 | NCT OF DELHI | 868 | 871 |
| 8 | RAJASTHAN | 909 | 888 |
| 9 | UTTAR PRADESH | 916 | 902 |
| 10 | BIHAR | 942 | 935 |
| 11 | SIKKIM | 963 | 957 |
| 12 | ARUNACHAL PRADESH | 964 | 972 |
| 13 | NAGALAND | 964 | 943 |
| 14 | MANIPUR | 957 | 936 |
| 15 | MIZORAM | 964 | 970 |

10. http://censusindia.gov.in/Census_Data_2001/India_at_glance/broad.aspx
11. Health situation and trend assessment: Sex Ratio, WHO http://www.searo.who.int/entity/health_situation_trends/data/chi/sex-ratio/en/

| | | | |
|---|---|---|---|
| 16 | TRIPURA | 966 | 957 |
| 17 | MEGHALAYA | 973 | 970 |
| 18 | ASSAM | 965 | 962 |
| 19 | WEST BENGAL | 960 | 956 |
| 20 | JHARKHAND | 965 | 948 |
| 21 | ODISHA | 953 | 941 |
| 22 | CHHATTISGARH | 975 | 969 |
| 23 | MADHYA PRADESH | 932 | 918 |
| 24 | GUJARAT | 883 | 890 |
| 25 | DAMAN & DIU | 926 | 904 |
| 26 | DADRA & NAGAR HAVELI | 979 | 926 |
| 27 | MAHARASHTRA | 913 | 894 |
| 28 | ANDHRA PRADESH | 961 | 939 |
| 29 | KARNATAKA | 946 | 948 |
| 30 | GOA | 938 | 942 |
| 31 | LAKSHADWEEP | 959 | 911 |
| 32 | KERALA | 960 | 964 |
| 33 | TAMIL NADU | 942 | 943 |
| 34 | PUDUCHERRY | 967 | 967 |
| 35 | A & N ISLANDS | 957 | 968 |

The following can be analysed from the table:

First, as many as in 24 States/UTs, the CSR remains much below the normal or desirable range of 950 or more girls per 1000 boys. These States/UTs include Jammu & Kashmir (862), Himachal Pradesh (909), Punjab (846), Chandigarh (880), Uttarakhand (890), Haryana (834), NCT of Delhi (871), Rajasthan (888), Uttar Pradesh (902), Bihar (935), Nagaland (943), Manipur (936), Jharkhand (948), Odisha (941), Madhya Pradesh (918), Gujarat (890), Daman & Diu (904), Dadra & Nagar Haveli (926), Maharashtra (894), Andhra Pradesh (939), Karnataka (948), Goa (942), Lakshadweep, and Tamil Nadu (943).

Second, 21 States namely Jammu & Kashmir, Uttarakhand, Rajasthan, Uttar Pradesh, Bihar, Sikkim, Nagaland, Manipur, Tripura, Meghalaya, Assam, West Bengal, Jharkhand, Odisha, Chhattisgarh, Madhya Pradesh, Daman & Diu, Dadra and Nagar Haveli, Maharashtra, Andhra Pradesh and Lakshadweep recorded declining trend of CSR in 2011 census.

Third, the CSR of 9 States/UTs have shown an increase but still far short of the desirable CSR of 950 or above in 2011 census. These include Himachal Pradesh (909), Punjab (846), Chandigarh (880), Haryana

(834), NCT of Delhi (871), Gujarat (890), Karnataka (948), Goa (942) and Tamil Nadu (943). What is disturbing is the fact that CSR of some of the States/UTs are below 900.

Fourth, States/UTs with CSR more than desirable 950 are Arunachal Pradesh (972), Sikkim (957), Mizoram (970), Tripura (957), Meghalaya (970), Assam (962), West Bengal (956), Chhattisgarh (969), Kerala (964), Puducherry (967) and Andaman and Nicobar Islands (968) but five states from the Northeast namely Nagaland, Manipur, Tripura, Meghalaya and Assam had shown a decreasing trend.

Further, the 2011 census revealed that out of the total 640 districts in the country, 429 districts had witnessed decline in CSR. Of these, 26 districts recorded drastic decline (of 50 points or more), and 52 districts reported sharp decline (of 30-49 points). An overwhelming number of districts also experienced moderate (of 10-29 points) or marginal (less than 10 points) decline in CSR. As per Census 2011, the decline in CSR had spread from largely urban and prosperous areas to rural, remote and tribal pockets of the country.[12]

The 2011 census data also revealed that CSR fell far more sharply in villages than in urban areas during 2001-2011. Though the urban CSR was far worse than that in rural areas, the fall in CSR in rural areas was around four times more than that in urban areas. Between 2001 and 2011, rural India's CSR fell by 15 points as opposed to urban India's four-point decline.[13]

12. "Missing...Mapping the Adverse Child Sex Ratio in India Census 2011" Office of the Registrar General and Census Commissioner, India http://www.censusindia.gov.in/2011census/missing.pdf
13. Sex test hits rural India, UNFPA, July 2011 available at http://www.unfpa.org/resources/sex-tests-hit-rural-india

# 3. THE PC&PNDT ACT & PC&PNDT RULES

## 3.1 The PC&PNDT Act

India enacted the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PNDT Act) to address sex selective abortion. The PNDT Act has since been amended in 2002 to make it more comprehensive and keeping in view the emerging technologies for selection of sex before and after conception and problems faced in the implementation of the Act and certain directions of the Hon'ble Supreme Court. The amended Act came into force with effect from 14 February 2003 and it was renamed as "Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994" (PC&PNDT Act).

The PC&PNDT Act, as amended in 2002[14], provides for regulation and punishment for sex determination and/or sex selection.

Section 3 of the PC&PNDT Act provides for regulation of genetic counselling centres, genetic laboratories and genetic clinics through the requirement of registration under the Act, prohibition of sex selection and sale of ultrasound machines to persons, laboratories, clinics, etc. not registered under the Act.

Section 4 provides that no such place shall be used for conducting pre-natal diagnostic techniques except for the purposes specified and requires a person conducting such techniques such as ultrasound sonography on pregnant women to keep a complete record in the manner prescribed in the Rules.

Section 5 requires written consent of pregnant woman for conducting the pre-natal diagnostic procedures and prohibits communicating the sex of foetus.

Section 6 provides that no pre-natal diagnostic techniques including sonography can be conducted for the purpose of determining the sex of a foetus and that no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultra sonography for the purpose of determining the sex of a foetus.

Sections 7 to 16 deal with Constitution of Central Supervisory Board, Section 17 deals with the Appropriate Authority and Advisory Committee.

Sections 18 to 21 deal with registration of genetic counselling centres, genetic laboratories or genetic clinics etc.

Section 22 provides prohibition of advertisement relating to pre-natal determination of sex and punishment for contravention with imprisonment for a term which may extend to three years and with fine which may

14. Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 http://pndt.gov.in/writereaddata/mainlinkFile/File50.pdf

extend to ten thousand rupees.

Section 23 provides for offences and penalties with imprisonment up to three years and fine up to Rs. 10,000. For any subsequent offences, there is imprisonment of up to five years and fine up to Rs. 50,000/1,00,000. The name of the Registered Medical Practitioner is reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed of. On conviction, the name of Registered Medical Practitioner is removed for a period of 5 years for the first offence and permanently for the subsequent offence.

Section 24 provides for punishment for abetment of offence as prescribed under sub-section (3) of section 23.

Section 25 provides for penalty for 'contravention of any provision of the Act or rules for which no specific punishment is provided' with imprisonment for a term which may extend to three months or with fine, which may extend to one thousand rupees or with both and in the case of continuing contravention with an additional fine which may extend to five hundred rupees for every day during which such contravention continues after conviction for the first such contravention.

Section 26 provides for offences by companies.

## 3.2 The PC&PNDT Rules

The Government of India notified the PNDT Rules in 1996 and further brought several important amendments in the Rules as given below:[15]

- Rule 11(2) has been amended to provide for confiscation of unregistered machines and punishment against unregistered clinics/facilities. Earlier the guilty could escape by paying penalty equal to five times of the registration fee;
- Rule 3B has been inserted providing for the Regulation of portable ultrasound machines and Regulation of services to be offered by Mobile Genetic Clinic;
- Rule 3(3)(3) has been inserted restricting the registration of medical practitioners qualified under the Act to conduct ultrasonography in maximum of two ultrasound facilities within a district. Number of hours during which the Registered Medical Practitioner would be present in each clinic would be specified clearly;
- Rule 5(1) has been amended to enhance the Registration fee for bodies under Rule 5 of the PNDT Rules 1996 from the existing Rs. 3000/- to Rs. 25000/- for Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic or Imaging Centre, and from Rs. 4000/- to Rs.

15. See Chapter 19 'Gender Issues', Annual Report 2014-15, Ministry of Health and Family Welfare, Government of India, http://www.mohfw.nic.in/WriteReadData/l892s/56321456698774563.pdf

35000/- for an institute, hospital, nursing home, or any place providing jointly the service of a Genetic Counselling Centre, Genetic Laboratory and Genetic Clinic, Ultrasound Clinic or Imaging Centre and

- Rule 13 has been amended requiring every Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre to intimate every change of employee, place, address and equipment installed, to the Appropriate Authority 30 days in advance of the expected date of such change and seek issuance of a new certificate with the changes duly incorporated.

Further, in 2014 the Government of India has notified the following amendments to the PC&PNDT Rules, 1996:[16]

- Six month training curriculum for sonologists notified on 10 January 2014;
- Revised version of Form-F notified on 4 February 2014; and
- Code of Conduct for Appropriate Authorities notified on 26 February 2014.

16. See Chapter 19 'Gender Issues', Annual Report 2014-15, Ministry of Health and Family Welfare, Government of India, http://www.mohfw.nic.in/WriteReadData/l892s/56321456698774563.pdf

# 4. Procedural Issues under the Act

## Authorities for filing complaint

Any person can file a complaint with the Appropriate Authorities (AA) established under the Act. Only if the AA fails to initiate action, then the complainant can approach the Court after 15 days. Therefore, the person who can file a complaint before the Court is the AA. In the case of *Dr. Kavita Pramod Kamble (Londhe) vs. State of Maharashtra and Anr* the Bombay High Court held that not only AAs but any officer on whom the powers are conferred by the Central Government, State Government or by the AA can institute a complaint and the court can take cognizance on a complaint made by an officer authorised in that behalf.

## Authorities for taking cognisance

As per Section 28 sub-clause 2 of the PC&PNDT Act, no court other than that of a Metropolitan Magistrate or a Judicial Magistrate First Class shall try any offence punishable under the Act. Hence exclusive jurisdiction is conferred on the Court of Metropolitan Magistrate or Judicial Magistrate First Class to take cognisance of the offence under the Act. In the case of *Dr. Mrs. Kakoly Borthakuar vs. Dr. Pramodkumar s/o G. Babar and Ors*, the issue relating to territorial jurisdiction of the court which can entertain a complaint filed under the PC&PNDT Act was raised.

## Offenders under the Act

Section 3 of the PC&PNDT Act states "no person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them".

This has to be read with Section 23 of the Act which further defines offenders as:

(1) Any medical geneticist, gynaecologist, 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 this Act or rules made thereunder shall be punishable for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees".

(3) Any person who seeks the aid of a Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or ultrasound clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging

specialist or registered medical practitioner or any other person for sex selection or for conducting pre- natal diagnostic techniques on any pregnant women for the purposes other than those specified in sub-section (2) of section 4 he shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupee.

There is presumption of innocence. The Act provides that sub-section (3) of Section 23 shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection. Indeed, Section 24 of the Act provides that a pregnant woman cannot be an offender unless the contrary is proved and she will not be liable for prosecution as the court shall presume that she was compelled by her husband or other relatives to undergo such technique and the husband and/or relatives shall be liable for the abetment of the offence.

## Role of the police

Under Section 27 of the Act, the offences punishable are cognisable, non-bailable and non-compoundable. However, the Police has no role in the implementation of the Act given the technical and medical issues involved in implementation of the Act. The entire role for implementation of the Act and filing of complaint is given to the AA who possesses the necessary medical qualifications.

## Bail provision

The offences are cognisable and non-bailable. In the case of *Subhash Gupta vs. State*, the Delhi High Court held that having regard to the serious nature of offence under this Act, applicants are not entitled for relief of anticipatory bail.

## What are the procedures for conduct of trial under the Act?

Cases under this Act are not instituted on police report. They are supposed to be conducted as warrant cases on a complaint rather than based on a police report. Hence evidence has to be recorded before framing of charge. The case of *Dr. Ravindra s/o Shivappa Karmudi vs. State of Maharashtra* clarifies this issue.

## What is the nature of evidence under the Act?

Like all penal cases, both oral and documentary evidence are used.

The oral evidence usually consist of the testimony of the pregnant woman, the person accompanying her and in the case of a decoy, the evidence of the *panch* and the NGO representative or any other person who has conducted the decoy operation. The evidence of AA is also important, as he/she is the complainant. In the case of a decoy, the documentary evidence may consist of receipt issued, Form 'F', consent letter, sonography report, prescription, clip of audio and/or video recording, marked currency etc.

## How to appreciate evidence?

The judicial officers are encouraged to keep in mind the Object and Reasons of the Act. The relationship between the doctor and patient (pregnant woman in this case) is confidential and direct evidence of pregnant woman may not be available or taken at all times. Therefore, circumstantial evidence become critical.

## How to pass final order?

There is no distinction of the offences whether punishment for conducting sex selection, disclosure of sex of foetus, non-maintenance of records and/or advertisement. Even the non-maintenance of records is not merely a technical or procedural lapse but an offence punishable up to three years and fine. The Act nonetheless provides for graded punishment - from fine to length of imprisonment for the first and subsequent offences. Nonetheless, judges are expected to pass orders to act as deterrent.

Section 23(2) of the Act instructs that the Judicial Officer to pass a specific order for removal of the name of the medical practitioner from the Register of the Medical Council for a period of five years for the first offence and permanently for the subsequent offence. It states, "*The name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.*"

## Expeditious Hearing of the Case

The Supreme Court of India in *Voluntary Health Association of Punjab vs. Union of India & Ors*[17] directed on 4 March 2013, among others, to various courts in the country through the Registrars of various High Courts to "*take steps to dispose of all pending cases under the Act, within a period of six months*". The Bombay High Court in the case of *Suhasini Umesh Karanjkar vs. Kolhapur Municipal Corporation and Others* directed to conduct trial as expeditiously as possible, preferably within one year.

17 . (2013) 4SCC 1, Voluntary Health Association of Punjab vs. Union of India & Ors

# 5. Key judgements relating to the PC&PNDT Act

## 5.1.Constitutional validity of PC&PNDT Act

**Case 1: Vinod Soni and Anr. vs Union of India, June 2005**

Bombay High Court
Vinod Soni And Anr. vs Union Of India (Uoi) on 13 June, 2005
Equivalent citations: 2005 CriLJ 3408, 2005 (3) MhLj 1131

Author: V Palshikar
Bench: V Palshikar, V Daga
JUDGMENT V.G. Palshikar, J.

1. By this petition, the petitioners who are married couple, seek to challenge the constitutional validity of Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994 (hereinafter referred to Sex Selection Act of 1994). The petition contains basically two challenges to the enactment. First, it violates Article 14 of the Constitution and second, that it violates Article 21 of the Constitution of India. At the time of argument, the learned counsel appearing for the petitioners submitted that he does not press his petition in so far as the challenge via Article 14 of the Constitution of India is concerned.

2. We are, therefore, required to consider the challenge that the provisions of Sex Selection Act of 1994 are violative of Article 21 of the Constitution of India. Article 21 reads thus:

"Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure cstablished by law."

3. This provision of Article 21, according to the learned counsel has been gradually expanded to cover several facets of life pertaining to life itself and personal liberties which an individual has, as a matter of his fundamental right. Reliance was placed on several judgments of the Supreme Court of India to elaborate the submission regarding expansion of right to live and personal liberty embodied under Article 21. in our opinion, firstly we deal with protection of life and protection of personal liberty. In so far as protection of life is concerned, it must of necessity include the question of terminating a life. This enactment basically prohibits termination of life which has come into existence. It also prohibits sex selection at pre conception stage. The challenge put in nutshell is that the personal liberty of a citizen of India includes the liberty of choosing the sex of the offspring. Therefore he, or she is entitled to undertake any such medicinal procedure which provides for determination or selection of sex, which may come into existence after conception. The submission is that the right to personal liberty extends to such selection being made in order to determine the nature of family which an individual can have in exercise of liberty quaranteed by Article

21. It inturn includes nature of sex of that family which he or she may eventually decided to have and/or develope.

4. Reliance was placed, as already stated, on several judgments of the Supreme Court of India on the enlargement of the right embodied under article 21. The right basically deals with protection of life and protection of personal liberty. Personal Liberties have been or personal life has been expanded during the passage of 55 years of the Constitution. It now includes right to pollution free water and air as held in AIR 1991 S.C. page 420 It includes right to a reasonable residence for which reliance is placed on a judgment in Shantistar Builders v. Narayan Khmalal Totame reported in AIR 1990 S.C. page 630 This right to a reasonable residence always postulates right to a reasonable residence on reasonable restrictions and for reasonable price. This right cannot be and the Supreme Court's judgment in 1990 S.C. page 630 does not create a right to a reasonable residence in any citizen, free of any cost.

5. Then reliance is placed on a Supreme Court Judgment in AIR 1989 S.C. page 677 and two earlier decisions whereby the Supreme Court has explained Article 21 and the rights bestowed thereby include right to Food, clothing, decent environment, and even protection of cultural heritage. These rights even if further expanded to the extremes of the possible elasticity of the provisions of Article 21 cannot include right to selection of sex whether preconception or post conception.

6. The Article 21 is now said to govern and hold that it is a right of every child to full development. The enactment namely Sex Selection Act of 1994 is factually enacted to further this right under article 21, which gives to every child right to full development. A child conceived is therefore entitled to under Article 21, as held by the Supreme Court, to full development whatever be the sex of that child. The determination whether at pre conception stage or otherwise is the denial of a child, the right to expantion, or if it can be so expanded right to come into existence. Apart from that the present legislation is confined only to prohibit selection of sex of the child before or after conception. The tests which are available as of today and which can incidentally result in determination of the sex of the child are prohibited. The statement of objects and reasons makes this clear. The statement reads as under.

"The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders."

Then para 4 reads thus:

"Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to conception as well as the misuse of pre-natal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended."

7. It will thus be observed that the enactment proposes to control and ban the use of this selection technique both prior to conception as well as its misuse after conception and it does not totally ban these procedures

or tests. If we notice provisions of section 4 of the Act it gives permission in when any of these tests can be administered. Sub section 2 says that no prenatal diagnostic techniques can be conducted except for the purposes of detection of any of the (1) chromosomal abnormalities, (2) genetic metabolic diseases, (3) heamoglobinopathies, (4) sex-linked genetic diseases, (5) congenital anomalies and (6) any other abnormalities or diseases as may be specified by the Central Supervisory Board. Thus, the enactment permits such tests if they are necessary to avoid abnormal child coming into existence.

8. Apart from that such cases are permitted as mentioned in sub clause 3 of section 4 where certain dangers to the pregnant woman are noticed. A perusal of those conditions which are five and which can be added to the four, existence on which is provided by the Act. It will therefore be seen that the enactment does not bring about total prohibition of any such tests. It intends to thus prohibit user and indiscriminate user of such tests to determine the sex at preconception stage or post conception stage. The right to life or personal liberty cannot be expanded to mean that the right of personal liberty includes the personal liberty to determine the sex of a child which may come into existence. The conception is a physical phenomena. It need not take place on copulation of every capable male and female. Even if both are competent and healthy to give birth to a child, conception need not necessarily follow. That being a factual medical position, claiming right to choose the sex of a child which is come into existence as a right to do or not to do something which cannot be called a right. The right to personal liberty cannot expand by any stretch of imagination,to liberty to prohibit coming into existence of a female foetus or male foetus which shall be for the Nature to decide. To claim a right to determine the existence of such foetus or possibility of such foetus come into existence, is a claim of right which may never exist. Right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself to be a right. In our opinion, therefore, the petition does not make even a prima facie case for violation of Article 21 of the Constitution of India. Hence it is dismissed. In view of the fact that the petition itself is rejected, the application for intervention is also rejected.

**Case 2: Mr. Vijay Sharma and others v. Union of India, September 2007**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY ORDINARY ORIGINAL CIVIL JURISDICTION WRIT PETITION NO.2777 OF 2005

1. Mr. Vijay Sharma
2. Mrs. Kirti Sharma,
both residing at Flat No.72, Royal, Accord, Building No.2,
Lokhandwala Complex, Andheri (West), Mumbai – 400 053 ... Petitioners

*Versus*

1. Union of India through the Ministry of Law & Justice, Ayekar Bhavan, New Marine Lines, Mumbai
2. Ministry of Health and Family,Welfare, Nirmal Bhavan, New Delhi... Respondents

Ms. Ratna Bhargavan for the petitioners.
Ms. Jyostna Pandhi with Mr. Mandar Goswavi for respondents 1 and 2.
Mr. Uday Warunjikar for the Intervenor.

CORAM: SWATANTER KUMAR, C.J. & SMT. RANJANA DESAI, J.
DATE ON WHICH THE JUDGMENT RESERVED: 2ND JULY, 2007
DATE ON WHICH THE JUDGMENT PRONOUNCED: 6TH SEPTEMBER, 2007
JUDGEMENT: (Per Smt. Ranjana Desai, J.)

1. In this petition filed under Article 226 of the Constitution of India, the petitioners have challenged the constitutional validity of sections 2, 3A, 4(5) and 6(c) of the PreConception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short, "the said Act") as amended by The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 (for short, "the Amendment Act, 2002").

2. Before dealing with the contentions raised in the petition, it must be stated that challenge to the constitutional validity of the said Act on the ground of violation of Article 21 of the Constitution of India has been rejected by this Court in Vinod Soni & Anr. v. Union of India & Ors., 2005 (3) MLJ 1131. It is not open to the petitioners to raise the same challenge again. We shall, therefore, only deal with the petitioners' contention that the said Act violates the principle of equality of law enshrined in Article 14 of the Constitution of India.

3. The petitioners are a married couple having two female children. It is their case as disclosed in the petition that they are desirous of expanding their family provided they are in a position to select the sex of the child. It is obvious from the petition that the petitioners are desirous of having a male child. According to them, they can then enjoy the love and affection of both, son and daughter simultaneously and their existing children can enjoy the company of their own brother while growing up if they are allowed to select sex of their child and have a son. The petitioners have approached various clinics for treatment for the selection of the sex of the foetus by prenatal diagnostic techniques. However, all clinics have denied treatment to them on the ground that it is prohibited under the said Act.

4. According to the petitioners, they have no intention to misuse the prenatal diagnostic techniques. They contend that they are financially sound and capable of looking after and bringing up one AJN 4 more child. They cannot be treated on par with other couples, who in order to have a male child, indulge in sex selective abortion. The provisions of the said Act cannot be made applicable without distinction. According to the petitioners, they only want to balance their family. They contend that a married couple, who is already having child belonging to one sex should be permitted to make use of the prenatal diagnostic techniques to have a child of the sex which is opposite to the sex of their existing child. In fact, ideal ratio of females to males can be maintained if the prenatal diagnostic techniques are allowed to be used. Burden of the song is that couples who are already having children of one sex should be allowed to have a child of the sex opposite to the sex of their existing children by use of the prenatal diagnostic techniques at preconception stage.

5. We have heard Ms. Ratna Bargavan, the learned counsel appearing for the petitioners. The contentions raised in the petition and in the affidavit in reply of petitioner 1 and the contentions raised in the court by the learned counsel for the petitioners can be summed up as under:

(a) The provisions of the said Act cannot be made applicable without any distinction. Couples who have a male or a female child should be allowed to make use of the prenatal diagnostic techniques to have a child of the sex opposite to the sex of their existing child to balance their family. Such couples cannot be treated on par with couples who choose the sex of foetus in order to have a male child leading to imbalance in male to female ratio. The unconstitutionality of the said Act is visible to the class of couples who are already having child/children of one sex.

(b) The Objects and Reasons of the Medical Termination of Pregnancy Act, 1997 (for short, AJN 6 "MTP Act") read with section 3(2)(i) thereof permit termination of pregnancy of a woman by a registered medical practitioner if the pregnancy would involve risk to the life of the pregnant woman or grave injury to her physical or mental health. Explanation II to section 3 states that where any pregnancy occurs as a result of failure of any devise or method used by any married woman or her husband for the purpose of limiting the number of children, anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman. However, under the said Act, a woman having children of the same sex is not allowed to use the prenatal diagnostic techniques to have children of the opposite sex. The legislature has not taken into consideration the fact that having a child of the same sex as that of the existing child/ children also causes grave mental injury to a woman. Whereas MTP Act allows abortion in case a child is conceived on account of any failure of device used by the couple for the purpose of limiting the number of children on the ground that anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman, while enacting the said Act the legislature has not considered what anguish would be caused to a prospective mother who conceives a female child or a male child for the second or third time. The legislature has not appreciated that such anguish must also be termed as grave injury to the mental health of the prospective mother. Thus, there is discrimination between women situated in similar position. The said Act, therefore, violates Article 14 of the Constitution of India. The MTP Act and the said Act are Central Acts. If by one statute certain rights are conferred upon a prospective mother, the same cannot be denied to a prospective mother by another statute originating from the same source. For this proposition, reliance is placed on the judgment of the Supreme Court in State of Tamil Nadu and Ors. v. Ananthi Ammal & Ors., AIR 1995 SC 2114.

(c) Under the MTP Act, termination of pregnancy is allowed under certain circumstances. Foeticide is sanctioned under certain circumstances. However, by sex selection before conception with the help of the prenatal diagnostic techniques, sex of the child is determined by choosing the male/female chromosome before fertilization and the fertilized egg is inserted in the womb of the mother. This does not lead to foeticide. There is, therefore, no reason to impose a blanket ban on the use of the prenatal diagnostic techniques.

(d) Under the said Act, the use of the prenatal diagnostic techniques is permitted under certain conditions by registered institutions. The words `certain conditions' should be interpreted in such a manner

that inherent uncertainty existing in section 2 of the Amendment Act, 2002 and sections 3A, 4(5) and 6(c) of the said Act as inserted by the Amendment Act, 2002 is removed and the possible hardship of the couples who are already having one child can be avoided by permitting them to have child of the sex opposite to the sex of their existing child.

(e) The intention of the legislature to regulate and prevent misuse of the prenatal diagnostic techniques is evident from the fact that the title of the Amendment Act, 2002 contains the words "Regulation and Prevention of Misuse". These words replace the words "Prohibition of Sex Selection" used in the said Act. The intention of the legislature was to regulate and prevent misuse of the prenatal diagnostic techniques and not a blanket prohibition thereof.

(f) The prenatal diagnostic techniques can be used to achieve positive result i.e. to attain an ideal male to female ratio. Due to the stringent provisions of the said Act, the prenatal diagnostic techniques are used by doctors and couples in hasty and hush hush manner which is likely to affect the mindset of prospective mothers. Fertility clinics have spwaned all over where couples who do not have children are taking treatment to get the child of their choice. Such misuse needs to be prevented by providing for an exception whereby only couples who have a child can be allowed to choose the sex of the second child provided the child they propose to have is of the sex opposite to the sex of their existing child.

(g) Section 31A of the said Act provides that the Central Government may publish an order in the Official Gazette within 3 years from the commencement of the said Act for removal of difficulties if any, in giving effect to the provisions of the said Act. The difficulties of the couples having one child need to be taken into account. It is, therefore, necessary for the Central Government to publish the necessary order in the Official Gazette and bring about necessary amendment in the said Act.

6. Strong exception is taken to the submissions of the petitioners'counsel and the contentions raised by the petitioners, by the learned counsel for the respondents. Affidavit in reply is filed by Ms. Sushma Rath, Under Secretary, Ministry of Health & Family Welfare and by Versha Deshpande, a Social Worker, whose intervention is allowed by this court considering the importance of the issues involved in this petition.

7. It is necessary to quote section 2 of the Amendment Act, 2002 and sections 3A, 4(5) and 6(c) of the said Act as inserted by the Amendment Act since the constitutional validity of the said provisions is under challenge. Section 2 of the Amendment Act, 2002 reads thus:

> "2. Substitution of long title. In the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as the principal Act), for the long title, the following long title shall be substituted, namely :
>
> "An Act to provide for the prohibition of sex selection, before or after conception, and for regulation of prenatal 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 thereto."

Sections 3A, 4(5) and 6(c) of the said Act read thus:

"3. Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics. On and from the commencement of this Act,

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) xxx xxx xxx

[3A. Prohibition of sex selection. No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them].

(4) Regulation of prenatal diagnostic techniques. On and from the commencement of this Act,

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) xxx xxx xxx

(4) xxx xxx xxx

(5) no person including a relative or husband of a woman shall seek or encourage the conduct of any sexselection technique on her or him or both.

(6) Determination of sex prohibited. On and from the commencement of this Act,

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception."

8. It is necessary to first deal with the submission that the use of the words "Regulation & Prevention of Misuse" in the Amendment Act, 2002 is indicative of the legislative intent only to regulate and prevent misuse because these words substitute the words "Prohibition of Sex Selection" in the said Act. This, in our

opinion, is a totally fallacious argument. The title of the earlier Act was the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (for short, "the 1994 Act"). It's long title prior to its amendment by the Amendment Act, 2002 was as under:

> "1. Substituted by the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 (14 of 2003), S.2, for long title (w.e.f. 142 2003). Prior to its substitution, long title read as under : "An Act to provide for the regulation of the use of prenatal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex linked disorders and for the prevention of the misuse of such techniques for the purpose of prenatal sex determination leading to female foeticide; and, for matters connected therewith or incidental thereto."
>
> By the Amendment Act, 2002, it was substituted by the following long title : "An Act to provide for the prohibition of sex selection, before or after conception, and for regulation of prenatal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sexlinked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto."

9. By the Amendment Act, 2002, the 1994 Act i.e. the Prenatal Diagnostic Techniques (Regulation & Prevention of Misuse) Act was renamed as the said Act i.e. the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. The Statement of Objects and Reasons of the Amendment Act, 2002 must be quoted. It reads thus:

> "Amendment Act 14 of 2003 –Statement of Objects and Reasons. The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 seeks to prohibit prenatal diagnostic techniques for determination of sex of the foetus leading to female foeticide. During recent years, certain inadequacies and practical difficulties in the administration of the said Act have come to the notice of the Government, which has necessitated amendments in the said Act.
>
> 2. The prenatal diagnostic techniques like amniocentesis and sonography are useful for the detention of genetic or chromosomal disorders or congenital malformations or sex linked disorders, etc. However, the amniocentesis and sonography are being used on a large scale to detect the sex of the foetus and to terminiate the pregnancy of the unborn child if found to be female. Techniques are also being developed to select the sex of child before conception. These practices and techniques are considered discriminatory to the female sex and not conducive to the dignity of the women.
>
> 3. The proliferation of the technologies mentioned above may, in future, precipitate a catastrophe, in the form of severe imbalance in malefemale ratio. The State is also duty bound to intervene

in such matters to uphold the welfare of the society, especially of the women and children. It is, therefore, necessary to enact and implement in letter and spirit a legislation to ban the preconception sex selection techniques and the misuse of prenatal diagnostic techniques for sexselective abortions and to provide for the regulation of such abortions. Such a law is also needed to uphold medical ethics and initiate the process of regulation of medical technology in the larger interests of the society.

4. Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to conception as well as the misuse of prenatal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended.

5.The Bill seeks to achieve the aforesaid objects."

10. The Statement of Objects and Reasons of the Amendment Act, 2002 therefore clearly indicates that the legislature was alarmed at the severe imbalance created in the male to female ratio on account of rampant use of the prenatal diagnostic techniques made to detect sex of the foetus and to terminate the pregnancy of the unborn child if found to be female. The legislature took note of the fact that certain techniques are being developed whereby even at preconception stage, sex of the child can be selected and, therefore, the title of the 1994 Act was amended to include the words "Preconception" and "(Prohibition of Sex Selection)" in it. The legislature categorically stated that there was a need to ban preconception sex selective techniques and made it clear that the 1994 Act was sought to be amended with a view to banning the use of sex selection techniques prior to conception as well as misuse of prenatal diagnostic techniques for sex selective abortions.

11. A look at certain important provisions of the said Act persuade us to reject the submission of the petitioners that the legislative intent is to only regulate the use of the said prenatal diagnostic techniques. "Prenatal diagnostic procedures" are defined under section 2(1) of the said Act as all gynaecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, embryo blood or any other tissue or fluid of a man or of a woman before or after conception, for being sent to a Genetic Laboratory or Genetic Clinic for conducting any type of analysis or prenatal diagnostic tests for selection of sex before or after conception.

12. "Prenatal diagnostic test" is defined under section 2(k) of the said Act as ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue or fluid of a pregnant woman or conceptus conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sexlinked diseases.

13. Section 2(j) defines prenatal diagnostic techniques. It states that prenatal diagnostic techniques include all prenatal diagnostic procedures and prenatal diagnostic tests. Prenatal diagnostic AJN 20 techniques

(for convenience, hereinafter referred to as "the said techniques") can detect the sex of the foetus. Section 3A prohibits sex selection on a woman or a man or on both of them or on any tissue embryo, conceptus, fluid or gametes derived from either or both of them and section 4 regulates use of the said techniques. Section 4(2) states that the said techniques shall not be conducted except for the purpose of detection of (i) chromosomal abnormalities; (ii) genetic metabolic diseases; (iii) heamoglobinopathies; (iv) sex linked genetic diseases; (v) congenital anomalies or any other abnormalities or diseases as may be specified by the Central Supervisory Board that too on fulfillment of any of the conditions laid down in subsection 3. Thus the said techniques are to be used only to detect abnormalities in the foetus and not for sexselection or sexselective abortions. Section 5(2) states that no person including the person conducting prenatal procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs or in any other manner. Section 6(c) prohibits determination of sex by stating that no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

14. Under the said Act machinery is created to ensure that there is no sex selection at preconception stage or thereafter and there is no prenatal determination of sex of foetus leading to female foeticide. Therefore, the submission that the use of the said techniques is only intended to be regulated, must be rejected.

15. The challenge on the ground of violation of Article 14 rests on the comparison between the said Act and the MTP Act which are Central Acts. In our opinion, the object of both the Acts and the mischief they seek to prevent difer. They cannot be compared to canvass violation of Article 14. We have already quoted the Statement of Objects and Reasons of the Amendment Act, 2002. What it seeks to ban is preconception sex selection techniques and use of prenatal diagnostic techniques for sexselective abortions. Having taken note of the alarming imbalance created in male to female ratio and steep rise in female foeticide legislature has amended the Act of 1994. It, inter alia, prohibits sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, flued or gamets derived from either or both of them. It prohibits any person to cause or allowed to be caused selection of sex before or after conception.

16. The MTP Act is an Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. Statement of Objects and Reasons of the MTP Act indicates that it concerns itself with the avoidable wastage of the mother's health, strength and sometimes life. It seeks to liberalize certain existing provisions relating to termination of pregnancy as a health measure – when there is danger to the life or risk to physical or mental health of the woman, on humanitarian grounds – such as when pregnancy arises from a sex crime like rape or intercourse with a mentally ill woman, etc. and eugenic grounds – where there is substantial risk that the child, if born, would suffer from deformities and diseases. It does not deal with sex selective abortion after conception or sex selection before or after conception.

17. It is true that under section 3(2) of the MTP Act, when two registered medical practitioners form an opinion that continuance of the pregnancy would involve a risk to the life of the pregnant woman or

grave injury to her physical or mental health, pregnancy can be terminated and, under Explanation II thereof, where any pregnancy occurs as a result of a failure of a devise used by the couple for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy is presumed to constitute a grave injury to the mental health of the woman. It must be remembered that termination of pregnancy under the MTP Act is not prompted because of the unwanted sex of the foetus. It could be a male or a female foetus. The MTP Act does not deal with sex selection. The petitioners want to equate the situation of a prospective mother under the MTP Act with the prospective mother under the said Act. They contend that anguish caused to a woman who is carrying a second or third child of the same sex as that of her existing children and who is desirous of having a child of the opposite sex also constitutes a grave injury to her mental health. According to the petitioners, this aspect has been overlooked by the legislature. They contend that an exception ought to have been carved out for such women. It is their contention that inasmuch as both these Acts are Central Acts and deal with prospective mothers if by MTP Act certain rights are conferred on a prospective mother, the same cannot be denied to the prospective mother by the said Act. We are unable to accept this submission. Apart from the fact that both the Acts operate in different fields and have different objects acceptance of the submissions of the learned counsel would frustrate the object of the said Act. A prospective mother who does not want to bear a child of a particular sex cannot be equated with a mother who wants to terminate the pregnancy not because of the foetus of the child but because of other circumstances laid down under the MTP Act. To treat her anguish as injury to mental health is to encourage sex selection which is not permissible. Therefore, by process of comparative study, the provisions of the said Act cannot be called discriminatory and, hence, violative of Article 14.

18. It is well settled that when a law is challenged as offending against the guarantee enshrined in Article 14, the first duty of the court is to examine the purpose and the policy of the Act and then to discover whether the classification made by the law has a reasonable relation to the object which the legislature seeks to obtain. The purpose or object of the Act is to be ascertained from an examination of it's title, preamble and provisions. We have done that exercise in the preceding paragraphs and we are of the considered opinion that the said Act does not violate the equality clause of the Constitution. 19. Our attention is drawn to the frightening figures which show the imbalance in male to female ratio in various parts of India. Ms. Sushma Rath, Under Secretary, Ministry of Health & Family Welfare has in her affidavit in reply stated that there is a considerable decline in the number of female children and the financially sound areas of Punjab, Haryana and Delhi are worst affected. Ms. Versha Deshpande has in her affidavit stated that the percentage of female children is on the decline in Maharashtra. The booklet titled "missing" published by the Ministry of Health & Family Welfare on which reliance is placed by respondent 1 makes an interesting reading. It captures the decline in the number of girls as compared to boys in India. It is necessary to quote two paragraphs from the same, which have caused great distress to us.

> "The sex ratio at birth is slightly favourable to boys. This means that more boys are born as compared to girls. This is a natural phenomenon. The sex ratio at birth is usually between

> 940950 girls per 1000 boys. The child sex ratio is calculated as number of girls per 1000 boys in the 06 years age group. In India, however, the 1991 Census reported a child sex ratio of 945 girls per 1000 boys which further declined to 927 during 2001 Census. Over the years, this ratio has fallen from 976 in 1961 to 964 in 1971, and 962 in 1981. A stage may soon come when it would become extremely difficult, if not impossible, to make up for the missing girls. Society needs to recognise this discrimination: girls have a right to live just as boys do. Moreover, missing numbers of iether sex, and the resulting imbalance, can destroy the social and human fabric as we know it.
>
> In States such as Haryana, Punjab, Delhi and Gujarat, this ratio has declined to less than 900 girls per 1000 boys. 70 districts in 16 States and Union Territories have recorded a more than 50 point decline in the child sex ratio during the decade 19912001. The ratio stands at a mere 770 in Kurukshetra district of Haryana, 814 in Ahmedabad, and 845 in the South West district of Delhi –even though these regions are amongst the most prosperous in the country."

20. That there is decline in the number of girls is not seriously disputed by the petitioners. According to them, the imbalance is caused by the couples who have no children and who by using the said techniques choose male child. In our opinion, no such distinction is permissible. It cannot be denied that in India there is strong bias in favour of a male child. Various causes have led to this preference. It is felt that son carries the name of the family forward and only he can perform religious rites at the time of cremation of the parents. Sons are said to provide support in the old age. Several socioeconomic and cultural factors are responsible for this craving for a son. It is unfortunate that people should still be under the influence of such outdated notions. As long as such notions exist, the girl child will always be unwanted because it is felt that she brings with her the burden of dowry. These hard realities will have to be kept in mind while dealing with the challenge raised to the constitutional validity of a statute which tries to ban sex selection before or after preconception and misuse of the said techniques leading to sex selective abortions. None can be allowed to use the said techniques for sex selection. The justification offered by the petitioners is totally unacceptable to us.

21. Certain averments made in the petition are shocking and they reinforce our conclusion that the challenge to the said Act must be thrown overboard. Ground (g) reads as under :

> "(g) If the country is not advanced socially and economically to accept a female child, it is better such children are not born. The highly advanced treatment should be accepted and utilized for achieving positive mindset."

Ground (m) reads as under :

> "(m)As long as the patriarchal system exists the AJN 29 craving for a male child is likely to be there and one cannot erase the said issue from the mindset of the people. Hence, it is necessary to balance the family with a male and female child if financial social and other circumstance permits."

22. The petitioners have boldly proclaimed that if the country is not economically and socially advanced, it is better that female children are not born. Patriarchal system is the answer for the craving for a male child. If patriarchal system or economic and social backwardness is responsible for female foeticide, efforts should be made to rectify the system and improve the socioeconomic status of the society. But this court cannot accept it as a fate accompli, permit an abject surrender to it and allow sex selection or misuse of the said techniques leading to female foeticide. The petitioners'case that the use of the said techniques can result in obtaining equal male to female ratio is nullified by their own averments. We have no doubt that if the use of the said techniques for sex selection is not banned, there will be unprecedented imbalance in male to female ratio and that will have disastrous effect on the society. The said Act must, therefore, be allowed to achieve its avowed object of preventing sex selection. In our opinion, the provisions of the said Act which are sought to be declared unconstitutional are neither arbitrary nor unreasonable and are not violative of Article 14.

23. It is then submitted that by sex selection before conception with the help of the said techniques, sex of the child is determined by using male/female chromosome before fertilization and the fertilized egg is inserted in the womb of the mother. There is, therefore, no foeticide and, hence, it is not necessary to impose any ban on the said techniques.

24. It is not possible to accept this submission. Techniques like sonography which are useful for the detection of genetic or chromosomal disorders or congenital malformations are being used to detect the sex of the foetus and to terminate the pregnancy in case the foetus is female. Similarly, preconception sex selection techniques which have now been developed make sex selection before conception possible. If prior to conception by choosing male or female chromosome sex of the child is allowed to be determined and fertilized egg is allowed to be inserted in the mother's womb that would again give scope to choose male child over female child. In such cases, even if it is assumed that there is no female foeticide, indirectly the same result is achieved. The whole idea behind sex selection before preconception is to go against the nature and secure conception of a child of one's choice. It can prevent birth of a female child. It is as bad as foeticide. It will also result in imbalance in male to female ratio. The argument that sex selection at pre-conception is an innocent act must, therefore, be rejected.

25. We have so far laid stress on the possibility of severe imbalance in male to female ratio on account of artificial reduction in the number of female children caused by the use of the said techniques. But there is yet another and more important fact of this problem. That society should not want a girl child; that efforts should be made to prevent the birth of a girl child and that society should give preference to a male child over a girl child is a matter of grave concern. Such tendency offends dignity of women. It undermines their importance. It violates woman's right to life. It violates Article 39(e) of the Constitution which states the principle of state policy that the health and strength of women is not to be abused. It ignores Article 51A(e) of the Constitution which states that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. Sex selection is therefore against the spirit of

the Constitution. It insults and humiliates womanhood. This is perhaps the greatest argument in favour of total ban on sex selection.

26. We are of the considered opinion that the provisions of the said Act as amended by the Amendment Act, 2002 are clear, unambiguous and in tune with their avowed object. There is no uncertainty in any of the provisions as alleged in the petition. Therefore, it is not necessary for the Central Government to issue any order in the Official Gazette under section 31A of the said Act for removal of difficulties on the grounds stated in the petition. This submission of the petitioners is, therefore rejected.

27. The petitioners have made a grievance that in fertility clinics which have spwaned all over, there is a misuse of the said techniques. It is contended that in the said clinics, the couples who do not have children are taking treatment to get a child of their choice. In Centre for Enquiry Into Health & Allied Themes (Cehat) and Ors. v. Union of India & Ors. (2003) 8 SCC 398, a grievance was made by a Non Governmental organization that the provisions of the said Act are not properly implemented. After considering this grievance, the Supreme Court has noted that it has already issued directions to secure compliance of the provisions of the said Act. The Supreme Court has issued further directions to the Central Government, State Government and Union Territories to ensure compliance of its earlier directions. If the said directions are followed, proper implementation of the said Act would be secured. Though the petitioners have alleged misuse of the said techniques, no particulars of the misuse have been given. In any case, it is the duty of the respondents to ensure that the provisions of the said Act are properly implemented. The respondents will have to abide by the directions of the Supreme Court. We, therefore, direct the respondents to abide by the directions issued by the Supreme Court and take all expeditious steps to prevent the misuse of the said techniques.

28. In the view that we have taken, the petition will have to be dismissed and is accordingly dismissed.

[CHIEF JUSTICE] [SMT. RANJANA DESAI, J.]

**Case 3: Amy Antoinette Mcgregor & Anr v. Directorate of Family Welfare, Delhi High Court, 24 October, 2013**

IN THE HIGH COURT OF DELHI AT NEW DELHI
W.P.(C)6332/2013
AMY ANTOINETTE MCGREGOR & ANR ..... Petitioners
Through: Mr. Karan S. Thakur, Advocate with Mr. Vikrant Goyal, Advocate.
Versus
DIRECTORATE OF FAMILY WELFARE GOVT OF NCT OF DELHI & ANR.....Respondents
Through: Ms.Nidhi Raman, Advocate for Respondent No.1. Ms.Shipra Shukla, Advocate for Respondent No.2.

Judgment Reserved on: October 04, 2013
Judgment Pronounced on: October 24 , 2013

CORAM: HON'BLE THE CHIEF JUSTICE HON'BLE MR. JUSTICE MANMOHAN
JUDGMENT :

CHIEF JUSTICE

1. This writ petition is filed by two petitioners, residents of Sydney, Australia. The first petitioner is the wife and the second is the husband. It appears that due to some medical problem the first petitioner cannot physically conceive a child. After medical examination by best doctors and taking medical advice, they found that the cause is some 'Lupus'and it is an Immuno-Suppressive Stipulation which does not physically and practically allow the embryos of the mother to thrive and properly flourish in her body. The doctors therefore advised her to proceed with a Gestational Surrogacy. It is a procedure by which one woman, the surrogate mother, carries a fertilized donor egg or embryo for the petitioner No.1. It basically involves In-Vitro Fertilization (IVF), which involves mixing of eggs and sperms outside the uterus, followed by implanting the fertilized eggs into the uterus, where the embryo will grow and develop into a baby. This is available, apart from India, in only two countries, i.e., Thailand and America, throughout the world, which offer an assured and medically secure IVF process. For a long time, the petitioners had a desire to have a child but because of the medical problem they could not conceive. Now they thought of using the above technique to get a child. However, for the sake of family balancing they intend to have one girl child and one boy child and for this purpose, in the surrogacy procedure for the petitioners, the prenatal techniques play an essential and important role. According to the petitioners, though they want a child, yet they do not want two children of the same sex in view of their principle of balanced family and accordingly they want to control the birth of same sex by using the advanced prenatal techniques.

2. For this purpose, it appears that the petitioners made an application to respondent No.1 seeking to forward it to the concerned department and in that application they made a request that the provisions of The PreConception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as 'the said Act') cannot be made applicable to them and it is also further stated that couples who have no children and wish to have a male or female children should be allowed to make use of the pre-natal diagnostic techniques to have a child of both sex to balance their family. So these couples cannot be treated at par with the couples, who choose the sex of foetus in order to have a male child leading to imbalance in male to female ratio.

3. It is further stated that the unconstitutionality of the said Act is visible to the class of couples who are not having child/children and wish to have both male and female babies. Even though they made an application seeking exemption of these couples from the said Act, there is no response from the respondent authorities. The present writ petition is, therefore, filed seeking following reliefs:-

> "i Issue a writ of mandamus or any other appropriate writ, order or direction directing the Respondent No.1 to grant a" No Objection to the petitioners with reference to their application pending disposal in their office.

> ii Issue a writ of mandamus or any other appropriate writ, order or direction thereby directing that the Pre-Natal Diagnostic Techniques Act as ultra vires with respect to its applicability to surrogacy process."

4. When the matter came up for admission, the learned counsel for the respondent No.1 furnished a letter dated 17.09.2013 which is a reply to the representation submitted by the petitioners. Vide the said letter the request made by the petitioners has been declined stating that the said Act does not permit Sex selection on the pretext of family balancing as it would result in restricting the scope and meaning of the Act, to the detriment of the Government's endeavour to reverse the trend of declining female Child Sex Ratio.

5. Thus, in view of the above reply by respondent No.1, the first relief sought by the petitioners has become infructuous. Now, for deciding the second prayer of the petitioners, let us examine the legal position.

6. The legislative purpose of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 reads as under:-

> "An Act 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 thereto."

7. The intention is, therefore, clear that one of the integral purposes of the legislation is prevention of misuse of pre-natal diagnosis for sex determination, since such determination is legislatively perceived to lead to female foeticide.

8. From a reading of the writ petition filed by the petitioners, it is clear that the assumption and the reason given is speculative and factually misconceived. The assumption of the petitioners that it is possible to identify the gender of the foetus before impregnation, has no basis in the science of genetics or any established principle of sexual reproduction currently.

9. It is not contended that the legislation is beyond the authorized legislative field of the Parliament. The singular ground of challenge is that the legislation is arbitrary and does not accommodate the 'exceptional category' of the petitioners who desire to have a balanced family comprising a male and a female child, a challenge which in substance means that the Act is unsustainable for the vice of unreasonable classification.

10. It is a well settled principle of the Doctrine of Classification that:

> **The Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.**

11. It is equally well settled principle of Doctrine of Classification that:

> **In order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of**

**the times and may assume every state of the times and may assume every state of facts which can be conceived existing at the time of legislation.**

12. These principles are so well settled that they enjoy the status of being meta principles. These are also principles of classification uniformly declared without exception in all legal jurisdictions where rule of law or principles of equality are the cornerstones of a constitutional democracy, and have been reiterated in Ram Krishna Dalmia Vs. Shri Justice S.R.Tendolkar & Ors.AIR **1958 SC 538**.

13. The challenge to the provisions of the Act on the ground of hostile discrimination and unreasonable classification is, therefore, misconceived. We need say no more.

14. The writ petition is, accordingly, dismissed.

No costs.

(CHIEF JUSTICE)
(MANMOHAN)
JUDGE

**Case 4: Saksham Foundation Charitable Society v. Union of India, Allahabad High Court, decided on 25 April 2014**

HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH
Chief Justice's Court
AFR
Case :- MISC. BENCH No. - 3517 of 2014
Petitioner :- Saksham Foundation Charitable Society Thru. G.S. [P.I.L.]
Respondents :- Union Of India, Thru. Secretary Ministry Of Health & Family
Counsel for Petitioner :- Ram Krishan, Arjun Krishna
Counsel for Respondents :- C.S.C., A.S.G.

Hon'ble Dr. Dhananjaya Yeshwant Chandrachud, Chief Justice
Hon'ble Devendra Kumar Upadhyaya, J.

These proceedings have been instituted by a Society registered under the Societies Registration Act, 1860, seeking to challenge the constitutional validity of Section 5 (2) and Clauses (a) and (b) of Section 6 of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. Apart from challenging the constitutional validity of the provisions, the following reliefs have been sought:

"B. issue a writ, order or direction in the nature of mandamus, directing the Opposite Parties to legalize the Sex Determination and make it compulsory for the person conducting the sex determination test (specifically ultrasonography) to clearly and in detail disclose the sex of the foetus in the ultrasound report

along with the print of the image of the foetus (which will be conclusive proof of the sex of the foetus) till the time it comes up with a better and more effective alternative provision for dealing with the evil practice of sex selection."

2. The first ground of challenge is that the prohibition of sex determination violates the rights of the unborn child and is, therefore, contrary to Article 21 of the Constitution of India. In the alternate, the second submission is that, it is only when a compulsory disclosure is made by the medical professional conducting an ultrasonography test of the sex of the unborn foetus, can a record be maintained of the sex of the foetus. In the absence of disclosure, it has been submitted, there is only a moral duty of the doctor not to disclose and in consequence, the female foetus is ultimately Saksham Foundation Charitable ... vs Union Of India, Thru. Secretary ... on 25 April, 2014 aborted.

3. The PC & PNDT Act, 1994 was specifically enacted 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 thereto. The Statement of Objects and Reasons accompanying the Bill, which was introduced in Parliament, is to the following effect:

"It is proposed to prohibit pre-natal 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.

2. The Bill, inter alia, provides for:-

(i) prohibition of the misuse of pre-natal diagnostic techniques for determination of sex of foetus, leading to female foeticide;

(ii) prohibition of advertisement of pre-natal diagnostic techniques for detection or determination of sex;

(iii) permission and regulation of the use of pre-natal 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.

3.The Bill seeks to achieve the aforesaid objectives.

"The Act was amended by Amending Act 14 of 2003. The Statement of Object and Reasons is instructive:

"Amendment Act 14 of 2003 - Statement of Object and Reasons. - The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 seeks to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. During recent years, certain inadequacies and practical difficulties in the administration of the said Act have come to the notice of the Government, which has necessitated amendments in the said Act.

2. The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders, etc. However, the amniocentesis and sonography are being used on a large scale to detect the sex of the foetus and to terminate the pregnancy of the unborn child if found to be female. Techniques are also being developed to select the sex of child before conception. These practices and techniques are considered discriminatory to the females sex and not conducive to the dignity of the women.

3. The proliferation of the technologies mentioned above may, in future, precipitate a catastrophe, in the form of severe imbalance in male-female ratio. The State is also duty bound to intervene in such matters to uphold the welfare of the society, especially of the women and children. It is, therefore, necessary to enact and implement in letter and spirit a legislation to ban the pre-conception sex selection techniques and the misuse of pre-natal diagnostic techniques for sex-selective abortions and to provide for the regulation of such abortions. Such a law is also needed to uphold medical ethics and initiate the process of regulation of medical technology in the larger interests of the society.

4. Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to conception as well as the misuse of pre-natal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended."

Sub-section (1) of Section 5 of the Act makes the following provisions:

"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-

(a) he has explained all known side and after effects of such procedures to the pregnant woman concerned;

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

(c) a copy of her written consent obtained under clause (b) is given to the pregnant woman."

Sub-section (2) of Section 5 of the Act, which is sought to be challenged, is to the following effect:

"(2) No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs or in any other manner."

Section 6 of the Act, is to the following effect:

"6. Determination of sex prohibited. -- On and from the commencement of this Act,

(a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;

(b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus;

(c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception."

The expression 'pre-natal diagnostic procedures' is defined under Section 2 (i) thus:

"2. (i) "pre-natal diagnostic procedures" means all gynaecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, embryo, blood or any other tissue or fluid of a man, or of a woman before or after conception, for being sent to a Genetic Laboratory or Genetic Clinic for conducting any type of analysis or pre-natal diagnostic tests for selection of sex before or after conception."

Section 3-A of the Act contains a prohibition of sex selection to the effect that no person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them.

Section 4 of the Act, which forms part of Chapter III, deals with the regulation of pre-natal diagnostic techniques and is to the following effect:

"4. Regulation of pre-natal 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 pre-natal 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) chromosomal abnormalities;

(ii) genetic metabolic diseases;

(iii) haemoglobinopathies;

(iv) sex-linked genetic diseases;

(v) congenital anomalies;

(vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board;

(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 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 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 the provisions of Section 5 or Section 6 unless contrary is proved by the person conducting such ultrasonography;

(4) no person including a relative or husband of the pregnant woman shall seek or encourage the conduct of any pre-natal diagnostic techniques on her except for the purposes specified in clause (2).

(5) no person including a relative or husband of a woman shall seek or encourage the conduct of any sex selection technique on her or him or both."

4. These provisions were enacted by Parliament in order to prohibit sex selection, before or after conception, and for regulating pre-natal diagnostic techniques for the purpose of detecting genetic abnormalities. The enactment of the legislation is to prevent the use of pre-natal diagnostic techniques which were being and continue to be misused for sex determination. The rapid decline in the ratio of females to the male population is widely attributed to the prevalent practice of sex selection. The prevalence of female foeticide constitutes the most egregious violation of human rights in our society. The Act has been enacted in this background. Sub-section (2) of Section 5 of the Act consequently contains a wholesome prohibition to the effect that no person shall communicate to a pregnant woman or her relatives or to any other person the sex of the foetus in any manner whatsoever including while conducting pre-natal diagnostic procedures. Similarly, clauses (b) and (c) of Section 6 of the Act ensure that no pre-natal diagnostic techniques including ultrasonography shall be conducted for determining the sex of foetus and that no person shall cause or allow to be caused selection of sex before or after conception.

5. Child Sex Ratio (CSR), calculated as the number of girls per thousand boys in the 0-6 years age group, has rapidly declined from 976 girls per 1000 boys in 1961 to 919 in the 2011 census. In States, such as

Punjab, Haryana, Uttar Pradesh, Madhya Pradesh, Maharashtra and Delhi, less than 850 girls are shown in the CSR for every 1000 boys. Since CSR reflects both pre-birth and post-birth discrimination against girls, the Sex Ratio at Birth (SRB) is considered to be a more accurate reflection of sex selection. SRB shows the number of girls born for every 1000 boys and, hence, is not subject to post-birth changes due to factors, such as mortality and neglect. The SRB for 2007-2009 is estimated at 906 girls for 1000 boys.

6. Sex selection practices in India are estimated to have resulted in a loss of nearly 5.7 lakh girls annually during 2001-2008. According to the estimates of the United Nations Population Fund, India1, the rapid decrease in SRB is a consequence of the convergence of three factors: (i) social preference for the male child and discrimination against women and girls; (ii) a decrease in the family size; and (iii) the rapid spread and misuse of technology. The widespread prevalence of sex selection is a clear indicator of discrimination against women and of the low status which a male dominated society attributes to women. The dominant patriarchal system is one of the fundamental causes for the social preference for sons in various communities and segments of the population.

7. "Sex' refers to the biological and physiological characteristics that define men and women. Gender is a social construct and comprehends roles, behaviours, activities and attributes that a society considers appropriate for men and women2. Dominant patriarchal notions have denied access to women to productive resources, decision making and social mobility. Opportunities within the family and at the workplace which are available to males are denied to females. These differences are not biological but reflect a deeply ingrained social attitude of a patriarchal society which denies equal status to women. In a patriarchal system, the dominance of men sanctified by social customs and conventions has resulted in an unequal access for women to social and economic opportunities that are available to men. Men control the productive and labour power of women, reproductive rights, sexuality, mobility and access to economic resources. A declining CSR is documented to have resulted in increasing violence against women and the denial of rights. Sex determination is known to lead to forced abortions. Women, both in the urban and rural areas, are subjected to psychological stress over the perceived pressure to produce a male child. Women are deserted, subjected to cruelty and deprived of their fundamental human rights in the process. Sex selection has resulted in increasing crimes related to sex, such as rape, abduction and trafficking.

8. Jean Dreze & Amartya Sen in "An Uncertain Glory - India And Its Contradictions3" dwell on the high tech face of gender disparity presented by sex selection. The relationship between traditional patriarchal values, the deprivation of the freedom of choice for women and the serious dimensions of sex selective abortions in India are analyzed in the following observations:

"In India too, the tendency to use new technology to abort female foetuses has grown in many parts of the country (particularly in the northern and western states), and women's education alone has not been able to serve as a strong barrier to this regressive movement. Indeed, there is some evidence that decisions of sex-selective abortions are often taken by the mothers themselves. What is crucially important in this context is to overcome what Justice Leila Seth has aptly called the 'patriarchical mindset'. .. What

is particularly critical in remedying the terrible biases involved in natality discrimination and sex-specific abortions is the role of women's informed and enlightened agency, including the power of women to overcome unquestioningly inherited values and attitudes. What may make a real difference in dealing with this new - and 'high tech' - face of gender disparity is the willingness, ability and courage to challenge the dominance of received and entrenched norms. When anti-female bias in action reflects the hold of traditional patriarchal values from which mothers themselves may not be immune, what is crucial is not just freedom of action but also freedom of thought and its practice. Informed critical agency is important in combating inequality of every kind, and gender inequality is no exception.

Regional patterns of sex-selective abortion in India are consistent with this understanding of the influence of patriarchal values (and of women's freedom - or the lack of it - to resist them). Looking first at the all-India picture, the situation looks most alarming. As is well known, the female-male ratio in the age group of 0-6 years has been going down over time, and in the last decade it has fallen further, from 927 girls per 1,000 boys in 2001 to 914 girls per 1,000 boys in 2011. Further, there is evidence that this decline is largely driven by the spread of sex-selective abortion. The latest demographic analysis of census as well as National Family Health Survey data from 1990 onwards suggests that the number of selective abortions of girls between 1980 and 2010 was somewhere between 4 and 12 million, and that the annual number of sex-selective abortions is now around 0.3 to 0.6 million (or roughly 2 to 4 percent of all pregnancies).."

The Annual Report to the People on Health, published in December 2011, by the Union Government in the Ministry of Health and Family Welfare, states that:

"The sex ratio among children less than 6 years of age has worsened in the last decade to 914 per 1000 males. Haryana with 830 girls per 1000 boys, Punjab with 846 girls per 1000 boys and Jammu & Kashmir with 859 girls per 1000 boys are the States with most adverse child sex ratios in the country."

The Annual Health Survey (AHS), Second Updation Bulletin 2012-13, brought out on 4 March 2014 by the Registrar General & Census Commissioner of India, also indicates the progressive decline in the Sex Ratio at Birth in the states of Uttarakhand, Rajasthan, Madhya Pradesh, Odisha, Uttar Pradesh, Bihar, Jharkhand, Assam and Chhattisgarh. A report brought out by the Public Health Foundation of India supported, inter alia, by the National Human Rights Commission and UNFPA on the implementation of the PCPNDT Act in India, has this to say about the implementation of the Act:

"Even after 15 years of its existence, only 606 cases have been filed under the Act. Out of these, 196 cases have been filed under non-registration, 153 under non-maintenance of records, 126 for communication of sex, 37 for advertisement and 94 for other violations under the Act (as on June 2009). Based on the dismal rate of convictions and continuing decline of child sex ratios, this study was undertaken to understand the reasons behind low conviction rates, loopholes in cases reaching courts and overall implementation of the Act."

The decline in the sex ratio has similarly been documented in several scholarly articles4. Ravinder Kaur, in an article titled 'Mapping the Adverse Consequences of Sex Selection and Gender Imbalance in India and China'5 has documented the emerging literature on the social consequences of the gender imbalance. The first consequence of the effect of the imbalance in the sex ratio, according to the author, is the mismatch in the marriage situation, which is referred to as the 'marriage squeeze'6:

"China has gone through a drastic fertility reduction and India is undergoing rapid fertility decline, and both countries have been sex selecting. Thus, a marriage squeeze against males is inevitable. It is important to note that the effects of the marriage squeeze are felt more than 20 years after the appearance of skewed sex ratios, as marriageable cohorts come of age. Both India and China are now experiencing a marriage squeeze, which will possibly become worse as the forecasts discussed later in this section reveal. It is important, however, to remember that the marriage squeeze, as Eklund writes in her paper, is not merely a numeric imbalance - it is affected by how marriage is socially, economically and politically constructed. ..."Such serious gender disproportion poses a major threat to the healthy, harmonious and sustainable growth of the nation's population and would trigger such crimes and social problems as abduction of women and prostitution" (The Guardian 2004)."

The second serious consequence is, according to the author, what is described in the phrase 'bare branches' in China for men who will not marry and have their own family resulting in an outbreak of crime and violence against women:

"In India, there has been early discussion of the possible links between violence and adverse sex ratios. In a much noted paper, Oldenburg (1992) argues that sex ratios tend to be more masculine in areas that are more violence-prone and where muscle power is needed to protect and acquire property, i e, more sons are needed in such places. Murder rates are high in high sex ratio districts of Uttar Pradesh. Taking up his argument and further examining the relationship between crime, gender and society, Dreze and Khera (2002) find that murder rates are indeed higher in districts with low female-male ratios, and conclude that patriarchal, male-dominated societies are likely to be more violent. It is pertinent to state that it is difficult to establish direct causality between sex ratios and their effects on other social dimensions. Yet, ignoring the available statistical and anecdotal evidence that points in the direction of a relationship between sex ratios and the marriage squeeze, and sex ratios and social order would be tantamount to not seeing the forest for the trees. Sexual crimes against women seem to be on the rise in the north and north-western areas of India that have high sex ratios. Evidence related to surplus bachelors is provided by many respondents from the high sex ratio states of Haryana and Punjab, who report that many young unmarried men roam around in groups with little to do... Kaur (2008) points out a connection between skewed sex ratios and another kind of violence that has been on the rise - the so-called "honour killings" in Haryana and western Uttar Pradesh..."

An increasing concern, especially in China, has been that the phenomenon of surplus males may lead to increasingly risky sexual behaviour, thereby resulting in a higher incidence of HIV. These are only some

of the serious consequences, the impact of which would be in the form of increased gender disparity and gender discrimination.

9. The Supreme Court in Centre for Enquiry Into Health And Allied Themes (CEHAT) & Ors vs. Union of India & Ors.7 issued detailed guidelines for the implementation of the Act. The latest guidelines, which have been formulated by the Supreme Court in its judgment dated 4 March 2013 in Voluntary Health Association of Punjab Vs. Union of India & Ors.8 are to the following effect:

"1. The Central Supervisory Board and the State and Union Territories Supervisory Boards, constituted under Sections 7 and 16A of PC&PNDT Act, would meet at least once in six months, so as to supervise and oversee how effective is the implementation of the PC&PNDT Act.

2. The State Advisory Committees and District Advisory Committees should gather information relating to the breach of the provisions of the PC&PNDT Act and the Rules and take steps to seize records, seal machines and institute legal proceedings, if they notice violation of the provisions of the PC&PNDT Act.

3. The Committees mentioned above should report the details of the charges framed and the conviction of the persons who have committed the offence, to the State Medical Councils for proper action, including suspension of the registration of the unit and cancellation of license to practice.

4. The authorities should ensure also that all Genetic Counselling Centers, Genetic Laboratories and Genetic Clinics, Infertility Clinics, Scan Centers etc. using pre-conception and pre-natal diagnostic techniques and procedures should maintain all records and all forms, required to be maintained under the Act and the Rules and the duplicate copies of the same be sent to the concerned District Authorities, in accordance with Rule 9 (8) of the Rules.

5. States and District Advisory Boards should ensure that all manufacturers and sellers of ultra-sonography machines do not sell any machine to any unregistered centre, as provided under Rule 3-A and disclose, on a quarterly basis, to the concerned State/Union Territory and Central Government, a list of persons to whom the machines have been sold, in accordance with Rule 3-A (2) of the Act.

6. There will be a direction to all Genetic Counselling Centers, Genetic Laboratories, Clinics etc. to maintain forms A, E, H and other Statutory forms provided under the Rules and if these forms are not properly maintained, appropriate action should be taken by the authorities concerned.

7. Steps should also be taken by the State Government and the authorities under the Act for mapping of all registered and unregistered ultra-sonography clinics, in three months time.

8. Steps should be taken by the State Governments and the Union Territories to educate the people of the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the State and District levels.

9. Special Cell be constituted by the State Governments and the Union Territories to monitor the progress of various cases pending in the Courts under the Act and take steps for their early disposal.

10. The authorities concerned should take steps to seize the machines which have been used illegally and contrary to the provisions of the Act and the Rules there under and the seized machines can also be confiscated under the provisions of the Code of Criminal Procedure and be sold, in accordance with law.

11. The various Courts in this country should take steps to dispose of all pending cases under the Act, within a period of six months. Communicate this order to the Registrars of various High Courts, who will take appropriate follow up action with due intimation to the concerned Courts.

All the State Governments are directed to file a status report within a period of three months from today."

While issuing these guidelines, the Supreme Court has adverted to the ground realities, as they exist, in the following observations:

"2011 Census of India, published by the Office of the Registrar General and Census Commissioner of India, would show a decline in female child sex ratio in many States of India from 2001-2011. The Annual Report on Registration of Births and Deaths - 2009, published by the Chief Registrar of NCT of Delhi would also indicate a sharp decline in the female sex ratio in almost all the Districts. Above statistics is an indication that the provisions of the Act are not properly and effectively being implemented. There has been no effective supervision or follow up action so as to achieve the object and purpose of the Act. Mushrooming of various Sonography Centres, Genetic Clinics, Genetic Counselling Centres, Genetic Laboratories, Ultrasonic Clinics, Imaging Centres in almost all parts of the country calls for more vigil and attention by the authorities under the Act. But, unfortunately, their functioning is not being properly monitored or supervised by the authorities under the Act or to find out whether they are misusing the pre-natal diagnostic techniques for determination of sex of foetus leading to foeticide."

10. We now expect that the State, which is bound by the directions which have been issued by the Supreme Court, would ensure that the directions of the Supreme Court are implemented with the highest priority.

11. Articles 15 and 16 of the Constitution, prohibit discrimination on the basis of sex. In a recent judgment of the Supreme Court in National Legal Services Authority Vs. Union of India & Ors.9, the Supreme Court has held that the prohibition of discrimination on the ground of sex encompasses discrimination on the ground of gender identity:

"Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people

differently, for the reason of not being in conformity with stereotypical generalizations of binary genders Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of "sex' under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression "sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female."

12. Gender identity has been held to be at the core of personal identity. Gender expression and presentation are, therefore, a component of the freedom of speech and expression protected by Article 19 (1) (a) of the Constitution. Recognition of gender identity is a core of the fundamental right to dignity which is comprehended by the right to life under Article 21 of the Constitution:

"Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution."

13. The constitutional validity of the PC & PNDT Act was upheld in a judgment of a Division Bench of the Bombay High Court in Vijay Sharma & Anr. Vs. Union of India & Anr.10. While rejecting the challenge, the Supreme Court observed that the hard realities of Indian social life were in the contemplation of the legislature when the law was enacted. The Bombay High Court held as follows:

"...It cannot be denied that in India there is strong bias in favour of a male child. Various causes have led to this preference. It is felt that son carries the name of the family forward and only he can perform religious rites at the time of cremation of the parents. Sons are said to provide support in the old age. Several socioeconomic and cultural factors are responsible for this craving for a son. It is unfortunate that people should still be under the influence of such outdated notions. As long as such notions exist, the girl child will always be unwanted because it is felt that she brings with her the burden of dowry. These hard realities will have to be kept in mind while dealing with the challenge raised to the constitutional validity of a statute which tries to ban sex selection before or after preconception and misuse of the said techniques leading to sex selective abortions. None can be allowed to use the said techniques for sex selection.. if the use of the said techniques for sex selection is not banned, there will be unprecedented imbalance in male to female ratio and that will have disastrous effect on the society. The said Act must, therefore, be allowed to achieve its avowed object of preventing sex selection. In our opinion, the provisions of the said Act which are sought to be declared unconstitutional are neither arbitrary nor unreasonable and are not violative of Article 14. .. That society should not want a girl child, that efforts should be made to prevent the birth of a girl child and that society should give preference to a male child over a girl child is a matter of grave concern. Such tendency offends dignity of women. It undermines their importance. It violates woman's right to life. It violates Article 39(e) of the Constitution which states the principle of state policy

that the health and strength of women is not to be abused. It ignores Article 51A(e) of the Constitution which states that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. Sex selection is therefore against the spirit of the Constitution. It insults and humiliates womanhood. This is perhaps the greatest argument in favour of total ban on sex selection."

14. We are in respectful agreement with the decision. A similar view has been taken by the Bombay High Court in another judgment in Vinod Soni & Anr. Vs. Union of India11. The Delhi High Court has similarly upheld the constitutional validity of the provisions in Amy Antoinette Mcgregor & Anr. Vs. Directorate of Family Welfare, Govt. of NCT of Delhi & Anr.12

15.Having regard to the social evil, which Parliament sought to remedy by enactment of the provisions of the Act, we see no ground to hold that the provisions, which are under challenge, are unconstitutional. Parliament had the legislative competence to enact the law, in any event, under Entry 97 of List-I of the Seventh Schedule. The provisions are not either arbitrary or violative of Article 14 of the Constitution or for that matter, violative of Article 21 of the Constitution. On the contrary, the Act is designed to ensure that the fundamental human right of the mother and of the unborn foetus is not violated by the misuse of sex selection diagnostic procedures, resulting in female foeticide.

16. The alternate submission is a point, which does not relate to constitutional validity, but to legislative policy. The Court would not be justified in interfering with the wisdom of Parliament in implementing a legislative policy in a particular manner. Whether any alternate means would better implement the legislative policy, is for Parliament to determine. The constitutional validity of the Act cannot be struck down on that ground.

17. For these reasons, we find no ground to interfere in these proceedings. The petition is, accordingly, dismissed. There shall be no order as to costs.

Order Date: 25.4.2014

RKK/AHA

(D.K. Upadhyaya, J.) (Dr. D.Y. Chandrachud, C.J.)

## 5.2. Strict implementation of the PC&PNDT Act

### Case 1: CEHAT and Others v. Union of India, September 2003

CASE NO.: Writ Petition (civil) 301 of 2000
PETITIONER: Centre for Enquiry Into Health And Allied Themes (CEHAT) & Others
RESPONDENT: Union of India & Others

DATE OF JUDGMENT: 10/09/2003
BENCH: M.B. SHAH & ASHOK BHAN.
JUDGMENT:
Shah, J.

It is an admitted fact that in Indian Society, discrimination against girl child still prevails, may be because of prevailing uncontrolled dowry system despite the Dowry Prohibition Act, as there is no change in the mind-set or also because of insufficient education and/or tradition of women being confined to household activities. Sex selection/sex determination further adds to this adversity. It is also known that number of persons condemn discrimination against women in all its forms, and agree to pursue, by appropriate means, a policy of eliminating discrimination against women, still however, we are not in a position to change mental set-up which favours a male child against a female. Advance technology is increasingly used for removal of foetus (may or may not be seen as commission of murder) but it certainly affects the sex ratio. The misuse of modern science and technology by preventing the birth of girl child by sex determination before birth and thereafter abortion is evident from the 2001 Census figures which reveal greater decline in sex ratio in the 0-6 age group in States like Haryana, Punjab, Maharashtra and Gujarat, which are economically better off.

Despite this, it is unfortunate that law which aims at preventing such practice is not implemented and, therefore, Non-Governmental Organisations are required to approach this Court for implementation of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 renamed after amendment as "The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act" (hereinafter referred to as 'the PNDT Act') which is the normal function of the Executive.

In this petition, it was inter alia prayed that as the Pre-natal Diagnostic Techniques contravene the provisions of the PNDT Act, the Central Government and the State Governments be directed to implement the provisions of the PNDT Act (a) by appointing appropriate authorities at State and District levels and the Advisory Committees; (b) the Central Government be directed to ensure that Central Supervisory Board meets every 6 months as provided under the PNDT Act; and (c) for banning of all advertisements of pre-natal sex selection including all other sex determination techniques which can be abused to selectively produce only boys either before or during pregnancy.

After filing of this petition, notices were issued and thereafter various orders from time to time were passed to see that the Act is effectively implemented.

A] On 4th May 2001, following order was passed:—

"It is unfortunate that for one reason or the other, the practice of female infanticide still prevails despite the fact that gentle touch of a daughter and her voice has soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional system of female

infanticide whereby female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advance medical techniques.

Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing full well that it is immoral and unethical as well as it may amount to an offence, foetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected overall sex ratio in various States where female infanticide is prevailing without any hindrance.

For controlling the situation, the Parliament in its wisdom enacted the Pre-natal Diagonstic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as "the PNDT Act"). The Preamble, inter alia, provides that the object of the Act is to prevent the misuse of such techniques for the purpose of pre-natal sex determination leading to female feoticide and for matters connected therewith or incidental thereto.

The Act came into force from 1st January, 1996.

It is apparent that to a large extent, the PNDT Act is not implemented by the Central Government or by the State Governments. Hence, the petitioners are required to approach this Court under Article 32 of the Constitution of India. One of the petitioners is the Centre for Enquiry Into Health and Allied Themes (CEHAT) which is a research center of Anusandhan Trust based in Pune and Mumbai. Second petitioner is Mahila Sarvangeen Utkarsh Mandal (MASUM) based in Pune and Maharashtra and the third petitioner is Dr. Sabu M. Georges who is having experience and technical knowledge in the field. After filing of this petition, this Court issued notices to the concerned parties on 9.5.2000. It took nearly one year for the various States to file their affidavits in reply/written submissions. Prima facie it appears that despite the PNDT Act being enacted by the Parliament five years back, neither the State Governments nor the Central Government has taken appropriate actions for its implementation. Hence, after considering the respective submissions made at the time of hearing of this matter, as suggested by the learned Attorney General for India, Mr. Soli J. Sorabjee following directions are issued on the basis of various provisions for the proper implementation of the PNDT Act: -

I. Directions to the Central Government

1. The Central Government is directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through appropriate releases / programmes in the electronic media. This shall also be done by Central Supervisory Board ("CSB" for short) as provided under Section 16(iii) of the PNDT Act.

2. The Central Government is directed to implement with all vigor and zeal the PNDT

Act and the Rules framed in 1996. Rule 15 provides that the intervening period between two meetings of the Advisory Committees constituted under sub-section (5) of Section 17 of the PNDT Act

to advise the appropriate authority shall not exceed 60 days. It would be seen that this Rule is strictly adhered to.

II. Directions to the Central Supervisory Board (CSB)

1. Meetings of the CSB will be held at least once in six months. [Re. Proviso to Section 9(1)] The constitution of the CSB is provided under Section 7. It empowers the Central Government to appoint ten members under Section 7(2)(e) which includes eminent medical practitioners including eminent social scientists and representatives of women welfare organizations. We hope that this power will be exercised so as to include those persons who can genuinely spare some time for implementation of the Act.
2. The CSB shall review and monitor the implementation of the Act. [Re. Section 16(ii)].
3. The CSB shall issue directions to all State/UT. Appropriate Authorities to furnish quarterly returns to the CSB giving a report on the implementation and working of the Act.

These returns should inter alia contain specific information about: -

(i) Survey of bodies specified in section 3 of the Act.

(ii) Registration of bodies specified in section 3 of the Act.

(iii) Action taken against non-registered bodies operating in violation of section 3 of the Act, inclusive of search and seizure of records.

(iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.

(v) Number and nature of awareness campaigns conducted and results flowing therefrom.

4. The CSB shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in implementation of the Act and to make recommendations to the Central Government. [Re. Section 16]
5. The CSB shall lay down a code of conduct under section 16(iv) of the Act to be observed by persons working in bodies specified therein and to ensure its publication so that public at large can know about it.
6. The CSB will require medical professional bodies/associations to create awareness against the practice of pre-natal determination of sex and female foeticide and to ensure implementation of the Act.

III. Directions to State Governments/UT Administrations

1. All State Governments/UT Administrations are directed to appoint by notification, fully empowered Appropriate Authorities at district and sub-district levels and also Advisory

Committees to aid and advise the Appropriate Authority in discharge of its functions [Re. Section 17(5)]. For the Advisory Committee also, it is hoped that members of the said Committee as provided under section 17(6)(d) should be such persons who can devote some time for the work assigned to them.

2. All State Governments/UT Administrations are directed to publish a list of the Appropriate Authorities in the print and electronic media in its respective State/UT.
3. All State Governments/UT Administrations are directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through advertisement in the print and electronic media by hoarding and other appropriate means.
4. All State Governments/UT Administrations are directed to ensure that all State/UT appropriate Authorities furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about: -
   (i) Survey of bodies specified in section 3 of the Act.
   (ii) Registration of bodies specified in section 3 of the Act.
   (iii) Action taken against non-registered bodies operating in violation of section 3 of the Act, inclusive of search and seizure of records.
   (iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.
   (v) Number and nature of awareness campaigns conducted and results flowing therefrom.

IV. Directions to Appropriate Authorities

1. Appropriate Authorities are directed to take prompt action against any person or body who issues or causes to be issued any advertisement in violation of section 22 of the Act.
2. Appropriate Authorities are directed to take prompt action against all bodies specified in section 3 of the Act as also against persons who are operating without a valid certificate of registration under the Act.
3. All State/UT Appropriate Authorities are directed to furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about: -
   (i) Survey of bodies specified in section 3 of the Act.
   (ii) Registration of bodies specified in section 3 of the Act including bodies using ultrasound machines.
   (iii) Action taken against non-registered bodies operating in violation of section 3 of the Act, inclusive of search and seizure of records.

(iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.

(v) Number and nature of awareness campaigns conducted and results flowing therefrom.

The CSB and the State Governments/Union Territories are directed to report to this Court on or before 30th July 2001. List the matter on 6.8.2001 for further directions at the bottom of the list."

B] Inspite of the above order, certain States/UTs did not file their affidavits. Matter was adjourned from time to time and on 19th September, 2001, following order was passed:—

"Heard the learned counsel for the parties and considered the affidavits filed on behalf of various States. From the said affidavits, it appears that the directions issued by this Court are not complied with.

1. At the outset, we may state that there is total slackness by the Administration in implementing the Act. Some learned counsel pointed out that even though the Genetic Counselling Centre, Genetic Laboratories or Genetic Clinics are not registered, no action is taken as provided under Section 23 of the Act, but only a warning is issued. In our view, those Centres which are not registered are required to be prosecuted by the Authorities under the provisions of the Act and there is no question of issue of warning and to permit them to continue their illegal activities.

   It is to be stated that the Appropriate Authorities or any officer of the Central or the State Government authorised in this behalf is required to file complaint under Section 28 of the Act for prosecuting the offenders.

   Further wherever at District Level, appropriate authorities are appointed, they must carry out the necessary survey of Clinics and take appropriate action in case of non-registration or non-compliance of the statutory provisions including the Rules. Appropriate authorities are not only empowered to take criminal action, but to search and seize documents, records, objects etc. of unregistered bodies under Section 30 of the Act.

2. It has been pointed out that the States/Union Territories have not submitted quarterly returns to the Central Supervisory Board on implementation of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as "the Act"). Hence it is directed that the quarterly returns to Central Supervisory Board should be submitted giving the following information:-

   (a) Survey of Centres, Laboratories/Clinics,

   (b) Registration of these bodies,

   (c) Action taken against unregistered bodies,

   (d) Search and Seizure,

(e) Number of awareness campaigns, and

(f) Results of campaigns"

C] On 7th November, 2001, learned counsel for the Union of India stated that the Central Government has decided to take concrete steps for the implementation of the Act and suggested to set up National Inspection and Monitoring Committee for the implementation of the Act. It was ordered accordingly.

D] On 11th December, 2001, it was pointed out that certain State Governments have not disclosed the names of the members of the Advisory Committee. Consequently, the State Governments were directed to publish the names of advisory committee in various districts so that if there is any complaint, any citizen can approach them. The Court further observed thus:—

"For implementation of the Act and the rules, it appears that it would be desirable if the Central

Government frames appropriate rules with regard to sale of ultrasound machines to various clinics and issue directions not to sell machines to unregistered clinics. Learned counsel Mr. Mahajan appearing for Union of India submitted that appropriate action would be taken in this direction as early as possible.""

E] On March 31, 2003, it was pointed out that in conformity with the various directions issued by this Court, the Act has been amended and titled as "The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act". It was submitted that people are not aware of the new amendment and, therefore, following reliefs were sought:—

a) direct the Union of India, State Governments / UTs and the authorities constituted under the PNDT Act to prohibit sex selection techniques and its advertisement throughout the country;

b) direct that the appropriate authorities shall also include "vehicles" with ultra sound machines etc., in their quarterly reports hereinafter as defined under Section 2(d);

c) any person or institution selling Ultra Sound machine should provide information to the appropriate State Authority in furtherance of Section 3-B of the Amended Act;

d) direct that State Supervisory Boards be constituted in accordance with the amended Section 16A in order to carry out the functions enumerated therein;

e) direct appropriate authorities to initiate suo moto legal action under the amended Section 17(iv)(e);

f) direct that the Central Supervisory Board shall publish half yearly consolidated reports based on the quarterly reports obtained from the State bodies. These reports should specifically contain information on:

1) Survey of bodies and the number of bodies registered.

2) Functioning of the regulatory bodies providing the number and dates of meetings held.

3) Action taken against non-registered bodies inclusive of search and seizure of records.

4) Complaints received and action taken pursuant thereto.

5) Nature and number of awareness programmes.

6) Direct that the Central Supervisory Board shall carry out all the additional functions as given under the amended Section 16 of the Act, in particular, to oversee the performance of various bodies constituted under the Act and take appropriate steps to ensure its proper and effective implementation.

As against this, Mr. Mahjan learned counsel appearing for the Union of India submits that on the basis of the aforesaid amendment, appropriate action has already been taken by Union of India for implementation and almost all State Governments/UTs are informed to implement the said Act and the Rules and the State Governments/UTs are directed to submit their quarterly report to the Central Supervisory Board.

Considering the amendment in the Act, in our view, it is the duty of the Union Government as well as the State Governments/UTs to implement the same as early as possible."

F] At the time of hearing, learned counsel for the petitioners submitted that appropriate directions including the steps which are required to be taken on the basis of PNDT Act and the suggestion as given in the written submission be issued.

On this aspect, learned counsel for the parties were heard.

In view of the various directions issued by this Court, as quoted above, no further directions are required except that the directions issued by this Court on 4th May, 2001, 7th November, 2001, 11th December, 2001 and 31st March, 2003 should be complied with. The Central Government / State Governments / UTs are further directed that:—

a) For effective implementation of the Act, information should be published by way of advertisements as well as on electronic media. This process should be continued till there is awareness in public that there should not be any discrimination between male and female child.

b) Quarterly reports by the appropriate authority, which are submitted to the Supervisory Board should be consolidated and published annually for information of the public at large.

c) Appropriate authorities shall maintain the records of all the meetings of the Advisory Committees.

d) The National Monitoring and Inspection Committee constituted by the Central Government for conducting periodic inspection shall continue to function till the Act is effectively implemented. The reports of this Committee be placed before the Central Supervisory Board and State Supervisory Board for any further action.

e) As provided under Rule 17(3), public would have access to the records maintained by different bodies constituted under the Act.

f) Central Supervisory Board would ensure that the following States appoint the State Supervisory Board as per the requirement of Section 16A.

1. Delhi 2. Himachal Pradesh 3. Tamil Nadu 4. Tripura 5. Uttar Pradesh.

g) As per requirement of Section 17(3)(a), the Central Supervisory Board would ensure that the following States appoint the multi-member appropriate authorities:

1. Jharkhand 2. Maharashtra 3. Tripura 4. Tamil Nadu 5. Uttar Pradesh

It will be open to the parties to approach this Court in case of any difficulty in implementing the aforesaid directions.

The Writ Petition is disposed of accordingly.

In view of the aforesaid order, pending IAs have become infructuous and are disposed of accordingly.

## Case 2: Malpani Infertility Clinic Pvt. Vs Appropriate Authority, PNDT Act, September 2004

Bombay High Court
Malpani Infertility Clinic Pvt. ... vs Appropriate Authority, Pndt Act ... on 17 September, 2004
Equivalent citations: AIR 2005 Bom 26, 2005 (1) BomCR 595, (2005) 107 BOMLR 737, 2004 (4) MhLj 1058

Author: H Gokhale
Bench: H Gokhale, N Mhatre
ORDER H.L. Gokhale, J.

1. Heard Mr. Anturkar for the petitioners. Mr. Sakhare Senior Advocate with Mr. Patil appears for respondent No. 1 and Mrs. Pawar, Additional Government Pleader for respondent No. 2.

2. This petition seeks to challenge the order dated 7th August, 2003 issued by respondent No. 1 under the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short "the PNDT Act") which suspends the registration of the 1st petitioner's Diagnostic Centre under the PNDT Act. This is an Act which has been passed by the Parliament to deal with the problem of pre-natal sex determination leading to female foeticide. A Public Interest Petition bearing Writ Petition (Civil) No. 301 of 2001 was filed in the Apex Court by an N.G.O. CEHAT (Centre for Enquiry into Health and Allied Themes) wherein a grievance was made that in spite of passing the said Act, the activities, which are prohibited under this Act, are going on. The petitioners herein intervened in that matter inasmuch as they were carrying on a Centre, called as a Diagnostic Centre, whose activities could be said to be prohibited under the said Act. They joined as respondent No. 38 in the proceedings before the Apex Court. In the Apex Court, in fact, the petitioners filed an affidavit and defended the sex

determination test on the ground of "family balancing" by filing an affidavit, though subsequently another affidavit was filed wherein an apology was tendered and it was stated that only wrong committed by them was to continue the advertisement of such an activity on web site. The Apex Court gave appropriate directions for the implementation of the Act and thereby the petition was disposed of.

3. It is material to note that above-referred affidavit containing apology was filed in the Apex Court in July, 2003. As a part of the implementation of the directions of the Supreme Court, the respondents started the prosecution of the petitioner under Section 22(3) of the said Act on 22nd July, 2003 and then came the impugned order, which is issued by the Appropriate Authority on 7th August, 2003. This order in the reference column refers to two items viz. (i) Case No. 34/S/ of 2003 filed against the petitioners in the Court of Metropolitan Magistrate, 37th Court, Esplanade, Mumbai and (ii) letter from the Additional Director, Health Services. Thereafter, the order states in second paragraph as follows :-

"As per the reference given above you are hereby informed that said Registration is suspended/cancelled with effect from 7-8-2003 in the public interest till further orders from the Court, which please note."

The registration mentioned therein is the registration of the petitioners to carry on certain activities as permitted under the said Act for a period of five years and which is issued to the petitioners sometimes in January, 2002.

4. Mr. Anturkar, learned Counsel appearing for the petitioners, submitted that this order was uncalled for. He further submitted that the only Section to which this order can be related, is Section 20 of the said Act. Sub-section (1) of Section 20 of the said Act requires a show cause notice to be given to the person concerned or to the Centre concerned on a complaint being received or on a suo motu basis by the appropriate Authority. Thereafter, under Sub-Section (2) of Section 20 of the said Act, a hearing is contemplated and thereafter if the Authority is satisfied that there is a breach of the provisions of this Act or the rules that it may, without prejudice to any criminal action, suspend the registration. Mr. Anturkar submitted that, in the present case, no notice has been given to the petitioners nor. has there been any hearing and, therefore, the impugned order is bad in law! He further submitted that, according to the petitioners, they are no longer carrying on the disputed activities and the only mistake committed by them was not to update the web site, which, according to him, has now been done.

5. Mr. Sakhare, learned senior Counsel appearing for respondent No. 1 and Mrs. Pawar, learned Additional Government Pleader appearing for respondent No. 2, submitted that the petition ought not to be entertained for the reason that an Appeal is available under Section 21 of the said Act to the Appellate Authority. As far as this submission is concerned, Mr. Anturkar submitted that against the order of the appropriate Authority, an Appeal is available to the Additional Director of Health Services and since it is that officer, who has written a letter leading to the suspension, the Appeal will be meaningless. It was suggested to Mr. Anturkar that an Appeal may be preferred to the Principal Secretary of the Health Department since under Section 21 of the said Act, the Appeal lies to the State Government. Mr. Anturkar, however, submitted that the then Principal Secretary one Mr. Manmohan Singh had written a letter in July, 2003 taking certain

position on this controversy. He, therefore, submitted that it will be difficult to expect a fair hearing from this Secretary. Ms. Pawar, learned Additional Government Pleader appearing for respondent No. 2, pointed out that Mr. Manmohan Singh is now no longer the Principal Secretary in the Health Department and the concerned Principal Secretary is one Mr. Navin Kumar. However, in spite of this, Mr. Anturkar submitted that it would be better that this Court itself may go into the aspect of this matter.

6. Mr. Sakhare, learned senior Counsel appearing for respondent No. 1, submitted that an Appeal having been provided, it ought to be first exhausted. As far as this submission is concerned, undoubtedly there is some merit therein. However, the principle of exhaustion of internal remedies is a rule of self restriction as far as the powers of the High Court are concerned. That being so, if a party feels that there is no use in resorting to the remedy inasmuch as it is like going from Caesar to Caesar and if the party wants the grievance to be redressed in the High Court, the High Court cannot prevent the party from doing so.

7. In view of this position; we have heard Mr. Anturkar. As stated above, he has referred to the provisions of Sub-sections (1) and (2) of Section 20. As against this, it is material to note that Sub-section (3) of Section 20, provides for a suspension of the registration and that power can be exercised notwithstanding anything contained in Sub-sections (1) and (2) for the reasons to be recorded in writing. Mr. Anturkar submitted that even if this Sub-section (3) is pressed into service, that Sub-section requires reasons to be given in writing. In our view, there is a clear reference to the prosecution lodged against the petitioners in the reference clause. The petitioners, very much knew that a Public Interest Petition was filed in the Apex Court. They have filed an affidavit in that proceedings. Thereafter, they had tendered an apology as stated above in July, 2003. Thereafter on 22nd July, 2003, they knew that they were prosecuted. This being the position, if the appropriate Authority refers to that prosecution and issues an order of suspension, in our view, there is a sufficient mention of the reasons for the Authority which have led it to take the action.

8. Mr. Anturkar submitted that in the affidavit filed by the Authority, they have stated that this is an action of cancellation. Inasmuch as Sub-section (3) of Section 20 does not provide for a cancellation, this order cannot be considered as an order of cancellation. It can only be treated as an order of suspension which will mean suspension till the hearing and disposal of the prosecution which has been mentioned in the order. In our view, such an action has to be permitted to the Authority concerned. If the Authority has some material before it, which, prima facie, it had, at the relevant time, it ought to have such a power to suspend the activities of such a nature. If such power is not read into the Section, the provisions of a welfare enactment will be rendered nugatory. It is only a particular kind of activity that has been stopped and the Authority concerned has seized two machines. The 2nd and 3rd petitioners are Gynaecologists and their practice as Gynaecologists is not prevented in any manner whatsoever. In a situation like this, where there is a conflict of private interest to carry on a particular activity which the public Authority considers as damaging to the social interest, surely, the power under the Statute has to be read as an enabling power. In the instant case, in our view, Sub-section (3) of Section 20 provides an adequate power to the Authority concerned to suspend the licence.

9. Mr. Sakhare appearing for respondent No. 1 and Ms. Pawar, Additional Government Pleader for respondent No. 2, have referred to two affidavits filed by the respondents' officers, which mention violation of various rules including Rule 6(2) 4(i)(ii) and 9(i) of the Rules framed under the said Act as well as Section 23(i) which empowers the prosecution. They drew our attention to a statement of one of the patients attending the Clinic pointing out the purpose for which she went there and the assurance given to her. Inasmuch as such prosecution has been lodged, if the Public Authority forms an opinion that pending that prosecution, a particular activity should be suspended, we do not think that there is any error on its part and it is not necessary that when the reasons are required to be given in writing, there ought to be a detailed discussion. A reference to the prosecution is sufficient as the reason for the action and the same is provided in the order.

10. In the circumstances, there is no substance in the petition and the same is dismissed. The interim order passed earlier is vacated. Mr. Anturkar applies for extension of the stay for a period of four weeks. However, in view of the circumstances leading to the impugned order, we are not inclined to extend the stay.

11. Authenticated copy of this order be made available to the parties.

**Case 3: Hemanta Rath v. Union of India and Ors, February 2008**

Orissa High Court
Hemanta Rath vs Union Of India (Uoi) And Ors. on 14 February, 2008
Equivalent citations: AIR 2008 Ori 71, 2008 I OLR 916

Author: A Ganguly
Bench: A Ganguly, B Mahapatra
JUDGMENT A.K. Ganguly, C.J.

1. This writ petition has been filed in public interest by one Hemanta Rath, who describes himself to be a Social Activist and also claims to function as the President of Deaf and Dumb Society in the district of Khurda.

2. In this petition a complaint is made that the State of Orissa is not implementing the provisions of Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter called 'PNDT Act') even though the said Act was brought into existence in 1996 and was amended in order to make its provisions more effective by the Amendment Act 14 of 2003. The said amendment has come into existence with effect from 14-2-2003.

3. The said Public Interest Litigation was filed noticing series of news items in the newspapers and in the electronic media to the effect that there have been recovery of hundreds of skeletons, skulls, body parts of children from different parts of the State. The petitioner asserts that recovery of such huge body parts has shocked the common man and from the news item, it also transpires that these things were found from an area which is close to various Nursing Homes and Clinics. It is also alleged that in India, there is notorious practices of female foeticide and infanticide.

4. This has been made possible in view of the development of scientific techniques for determination of sex. Since it is determined that it is a female foetus, there is a tendency of terminating such pregnancy. Normally such medical technology has been developed in order to guard against the genetic and other disorder of the child in the mother's womb and for detecting diseases, such as, HIV and VD. But such techniques are misused by Medical Practitioners as a device for determination of the sex of the foetus and if it is a female one, the same is aborted to prevent the birth of a female child.

5. In order to prevent such malpractices, the said Act was enacted and under Section 7 of the said Act, the Central Government has to constitute a Board to be known as The Central Supervisory Board.

6. The State Government has also the statutory obligation to constitute such a Board under Section 16A of the said Act. Section 17 of the said Act casts an obligation both on the Central Government and the State Government to appoint one or more Appropriate Authorities for the whole or part of the State for the purposes of implementation of the said Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide. Under Section 17(5) of the said Act, the Central Government or the State Government shall constitute an Advisory Committee for each Appropriate Authority for advising the Appropriate Authority in the discharge of its functions and shall appoint one of the members of the Advisory Committee to be its Chairman. Under Section 28 of the said Act, a Court can take cognizance of the offence under the said Act only on a complaint made by the Appropriate Authority.

7. It has been complained in the petition that without constitution of appropriate Authority, the provisions of Section 28 become nugatory. Therefore, the complaint in the petition is that there is total inaction both on the part of State Government and the Central Government in the matter of implementing the provisions of the said Act which was enacted for preventing infanticide and foeticide. The said Act has come into existence in order to protect the appropriate male and female ratio in the society so that there will be no social imbalance. Apart from that this Court feels that the said Act has a broader human right perspective inasmuch as it has been enacted to prevent the killing of a foetus on a gender bias. This is against the essence of our Constitutional principles.

8. In this matter, affidavits have been filed by both the State Government and Central Government. On behalf of the State Government affidavit has been filed by the Principal Secretary to Government, Health and Family Welfare Department, Bhubanes-war in which it has been stated that in view of the report in the newspapers, immediate steps were taken by lodging cases and the cases have been handed over to the State Crime Branch as a result of which there has been arrest of doctors and some of the members of the staff of Nursing Homes and Ultrasound Clinics. In support of the statement, Annexure A/1 has been enclosed. It is also stated that the human body parts recovered from Forest Park area of Bhubaneswar were sent to Forensic Medicine and Toxicology (FM & T) Department, SCB Medical College and Hospital, Cuttack for necessary examination. On such examination it appeared that the specimens recovered are formalin preserved specimens of surgically removed human body parts. They were not cases of foeticide. In support of the same, report of Professor and Head of the Department

of F.M. & T which was received from Chief Medical Officer, Bhubaneswar has been disclosed. It is also stated that the Government have formed a State Task Force Committee under the Chairmanship of Chief Secretary, Orissa with Principal Secretary, Home, Principal Secretary, Family & F. W., Secretary, Women & Child Development Department as members to monitor the implementation of Ultrasound Clinics and Nursing Homes. The said Committee has been formed to see that the rules on Preconception & Pre-natal Diagnostic Technique (PNDT) Act, 1994 and Medical Termination of Pregnancy (MTP) Act, 1971 are scrupulously followed. It has been stated that Task Force has been formed at the district level with the Collector, Superintendent of Police and C.D. M.O. to inspect all such centers. It is also averred that the State Level Advisory Committee was held on 18-8-2007 and newly constituted State Level Supervisory Board chaired by Minister of Health & Family Welfare was held on 29-9-2007 in order to review and monitor the progress and implementation of the said Act. The District Advisory Committee have also met in different districts to take stock of the situation.

9. However, it has not been stated in the said affidavit whether the bodies have been created by the State Government under Section 17 of the said Act nor it has been stated whether any steps have been taken under Section 28 of the said Act for filing of complaint. Such complaint can only be filed by the Appropriate Authority. So the petitioner's grievance is that if appropriate authority has not been created, no complaint can be filed under Section 28 of the said Act appears to be well founded. It has been stated that in Orissa, the male-female ratio is better than in other parts of the State. But this Court is of the view that this cannot be the reason why the provisions of the said Act shall not be implemented.

10. In the counter affidavit which has been filed on behalf of the Central Government by the Director in the Ministry of Health and Family Welfare, Government of India, it has been stated that it is for the State of Orissa to take steps as per Sections 17 and 17A of the said Act. It has been stated in the affidavit filed by the Central Government that the said Act was created to prevent the Preconception and Pre-Natal Diagnostic Tests for determination of sex. The object of the said Act is as follows:

An act 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 thereto.

11. It has been stated that sensitization steps have been taken under the said Act and awareness generation programme has also been held against sex selection. It has been stated that Government of India has launched 'Save the Girl Child Campaign' and the said Campaign was part of the Republic Day Parade, 2004-2005. So far as the State of Orissa is concerned, the following steps appeared to have been taken as has been stated in the said affidavit. "State Supervisory Board reconstituted under the Chairmanship of Hon'ble Minister, Health & Family Welfare. Meeting was held on 29-9-2007.

State Advisory Committee has also been reconstituted and meeting has been held on 18-8-2007.

Multi Member State Appropriate Authority has been formed.

District Level Advisory Committee reconstituted.

State Task Force formed under Chairmanship of Chief Secretary to monitory the checking of Nursing Homes and other diagnostic centers where sex determination can be done and the MTP Centres.

District Task Force has been formed under the Chairmanship of Collector and includes S.P., C.D.M.O., District Social Welfare Officer as members.

A1. The clinical establishments of the district irrespective of their involvement with the Ultra Sound activity/MTP have been inspected. Total No. of Nursing Homes inspected 495, out of which 345 are registered, 150 are unregistered, 127 were sealed. Total No. of Ultra Sound Clinics inspected 388, out of which 368 are registered, 20 are unregistered, 65. Ultra Sound Clinics were sealed. Out of which FIR lodged against 5 at Nayagarh and 1 at Ganjam District. Total No. of MTP Centres inspected 167, out of which 159 are registered, 8 are unregistered, 27 sealed. FIR lodged against 1 MTP Center in Ganjam District. Instructions have been issued to the district authorities implementing the PCPNDT Act to be more vigilant in monitoring and inspection of the clinical establishment cum ultra sound clinics regularly. Again instructions have been issued to call for the meeting of District Advisory Committee bi-monthly to monitor the clinical activities individually in the district. It is also instructed to initiate legal action against the clinical establishment of ultra sound clinic and MTP Centers violating the Act.

Awareness campaigns for the public, service taker and service provider on legal issues relating to the PCPNDT Act, at District level.

ASHA and AWW will be involved for creating awareness among the rural people and in this context they will be oriented during their induction training about PCPNDT Act and its punishment for its violation. Again SHGs functioning at village level will be involved in the said Programme.

Legal services provider to create legal awareness of the service for propagation of the message against the pre-natal sex determination.

1. Display of hoardings in different public places, hospitals, Private Institutions regarding PCPNDT Act and punishment prescribed under different sections for both service provider and service taker. Wide publication of the Act by which the non-government organizations or any public person can file complaint against the law violator.
2. Every month in the District level monthly meeting PCPNDT will be discussed as the pivot point.
3. Awareness will be created by WCD Department at district level about the rights of the female child as equal with the male child by which son preference can be eliminated.

12. On perusal of the said affidavit, it appears that the State Advisory Committee if at all has been reconstituted in the month of August, 2007 and the meeting of such Committee was held on 29-9-2007, the Government Notification showing constitution of such a Committee, however has not been disclosed.

13. This Court therefore, directs that if Appropriate Authorities as contemplated under Section 17 of the said Act and as defined under Section 2(a) of the said Act has been constituted, such Authority must act strictly in terms of the provisions of the said Act. If, however, such Committee has not been constituted, such Committee must be constituted within a period of six weeks from the date of service of the order upon the Chief Secretary of the State. After constitution of the said Committee, it must take strict measures to implement the provisions of the said Act. The said Act has been enacted to serve public purpose and the Constitutional end as is clear from the object of the Act quoted hereinabove. Therefore, the State is under both a statutory and Constitutional obligation to implement the provisions of the said Act.

14. This writ petition is therefore disposed of with the direction upon the State Government to strictly implement the provisions of the said Act. which has been enacted in 1994. It appears that the response of the State Government is very delayed and it appears that only in 2007, some kind of Committees have been formed. Whether such Committees are in accordance with the provisions of the said Act cannot be examined by the Court, since the Gazette Notification constituting such Committee has not been disclosed.

15. However, this Court reiterates that if such Committee in compliance with the said Act has not been constituted, such Committee must be constituted within the period mentioned hereinabove and after constitution of such Committee, the said Committee must act for strict implementation of the provisions of the said Act. No costs.

B.N. Mahapatra, J.

16. I agree.

**Case 4: Suo Moto v. State of Gujarat, September 2008**

CRREF/420/2008
IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
CRIMINAL REFERENCE No. 4 of 2008
With
**CRIMINAL REFERENCE No. 3 of 2008**

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, 1950 or any order made thereunder ? **NO**

5 Whether it is to be circulated to the civil judge? Yes

**to all Judicial Magistrate in the State (FC)**

**SUO MOTU - Applicant(s)**
Versus
STATE OF GUJARAT - Respondent(s)
Appearance :
SUO MOTU for Applicant(s) : 1,
MR SUNIT S SHAH PUBLIC PROSECUTOR for Respondent(s) : 1,

CORAM : HONOURABLE MR JUSTICE M.S. SHAH
HONOURABLE MR.JUSTICE D.H.WAGHELA and
**HONOURABLE MR.JUSTICE AKIL KURESHI**
**Date : 30/09/2008**
**CAV JUDGMENT**

**(Per : HONOURABLE MR.JUSTICE D.H.WAGHELA)**

**1.** By these References, learned single Judge has referred the following issues for consideration and opinion:

> "(i) Whether under the provisions of section 28 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, a Court can take cognizance of an offence under the Act on a complaint made by any officer authorised in this behalf by the Appropriate Authority?
>
> (ii) Whether the provisions of the proviso to sub-section (3) of section 4 of the PNDT Act require that the complaint should contain specific allegations regarding the contravention of the provisions of sections 5 and 6 of the Act?
>
> (iii) Whether the burden lies on the authority to prove that there was contravention of the provisions of section 5 or 6 of the PNDT Act?
>
> (iv) Whether any deficiency of inaccuracy in filing Form-F as required under the statutory provisions is merely a procedural lapse?"

**2.** Above issues have come to be referred on account of the learned single Judge not agreeing with the following observations and conclusions expressed by another learned single Judge in **Dr. Manish C. Dave**

**v. State of Gujarat [2008 (1) GLH 475]**:

> "10. ....Therefore, the complaint should be filed by Appropriate Authority or any officer authorised in this behalf by the Central Government of State Government and the 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. Admittedly, the complaints were not filed by Appropriate Authority or any officer authorised in this behalf. There is nothing on record to show that the persons who have filed the complaints have given notice as per Section 28 (b) of the Act. In view of these facts, I am of the view that the complaints become bad in law.
>
> "15. From a bare perusal of the complaints, it is apparent that it is not the case of the authority that provisions of Section 5 or 6 are applicable inasmuch as the authority has not been able to show or even alleged that (i) any pregnant woman or her relative or any other person has been communicated the sex of foetus by the petitioners or (ii) at any place and by any person, including the person conducting ultrasonography, there has been either sex determination or sex selection. In absence of such specific allegations in the complaint, it cannot be said that provisions of sections 5 and 6 of the Act would be attracted.
>
> "16. Reading the proviso to section 3, it is to be presumed that the deficiency or inaccuracy in the record would amount to contraventions of the provisions of section 5 or section 6 of the Act. As a natural consequence, in view of such deficiency or inaccuracy, there should be allegation of contravention of provisions of sections 5 and 6 of the Act. In the present case, there are no specific allegations in the complaint pertaining to the provisions of sections 5 and 6. Apart from that, the language of sections 5 and 6 is prohibitory in nature and therefore the burden of proof will be on the authority to prove that there was contravention and thereupon to rely on the provisions of Statutory Form-F for filing criminal complaint.
>
> "18. As far as section 4 (3) is concerned, it is the case of the petitioners that the register is maintained with all the columns which fall within the four corners of the duties and functions of the petitioners. Apart from that, no opportunity is afforded to the petitioners to prove contrary and put up their case. Further, such deficiency or inaccuracy, at least so far as the present proceedings are concerned, is merely a procedural lapse, which do not in any manner contravene the provisions of sections 5 and 6 of the Act.
>
> "19. In view of the above, when it is not established that there is contravention of the provisions of Sections 5 or 6, the contention regarding any inaccuracy or deficiency in Form-F will not be applicable and therefore the complaints themselves are not maintainable. I am, therefore, of the view that the complaints do not prima facie establish any alleged offence against the petitioners."

The questions referred in Reference No.4 of 2008 include the issue referred in Reference No.3 of 2008 and they are heard and disposed as references under Rule 5 of the Gujarat High Court Rules, 1993.

**3.** The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short "the Act") is enacted for the avowed purpose of prohibiting 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 thereto. Relevant statutory provisions of the Act, as amended by the Act 14 of 2003, read as under:

**"2** Definitions-

In this Act, unless the context otherwise requires-

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

(i) "pre-natal diagnostic procedures" means all gynaecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, embryo, blood or any other tissue or fluid of a man, or of a woman before or after conception, for being sent to a Genetic Laboratory or Genetic Clinic for conducting any type of analysis or pre-natal diagnostic tests for selection of sex before or after conception;

(j) "Pre-natal diagnostic techniques" includes all pre-natal diagnostic procedures and pre-natal diagnostic tests;

(k) "pre-natal diagnostic test" means ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue or fluid of a pregnant woman or conceptus conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex-linked diseases;

(l) "prescribed" means prescribed by rules made under this Act.

## CHAPTER III

REGULATION OF PRE-NATAL DIAGNOSTIC TECHNIQUES

**4. Regulation of pre-natal diagnostic techniques**-

On and from the commencement of this Act -

(1) no place including a registered Geneteic Counselling Centre or Genetic Laboratory or Genetic Clinic 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);

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

(i) chromosomal abnormalities;

(ii) genetic metabolic diseases;

(iii) haemoglobinopathies;

(iv) sex-linked genetic diseases;

(v) congenital anomalies;

(vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board;

(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 two or more spontaneous abortions or foetal loss;

(iii) he 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 conditions as may be specified by the 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 the provisions of section 5 or section 6 unless contrary is proved by the person conducting such ultrasonography;

(4) no person including a relative or husband of the pregnant woman shall seek or encourage the conduct of any pre-natal diagnostic techniques on her except for the purposes specified in clause (2);

(5) no person including a relative or husband of a woman shall seek or encourage the conduct of any sex-selection technique on her or him or both.

**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-

(a) he has explained all known side and after effects of such procedures to the pregnant woman concerned;

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

(c) a copy of her written consent obtained under clause (b) is given to the pregnant woman.

(2) No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs, or in any other manner.

6. Determination of sex prohibited-

On and from the commencement of this Act-

(a) no Genetic Counselling Centre or Genetic Laboratory or Geneteic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Cinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;

(b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus.

(c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

## CHAPTER V

APPROPRIATE AUTHORITY AND ADVISORY COMMITTEE

**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 the 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 or 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 investigation 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 Board 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.

## CHAPTER VII
OFFENCES AND PENALTIES

22. ... ... ...

**23. Offences and penalties:-**

(1) Any medical geneticist, gynaecologist, 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 this Act or rules made thereunder shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.

(2) The name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.

(3) Any person who seeks the aid of any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or ultrasound clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging specialist or registered medical practitioner or any other person for sex selection or for conducting pre-natal diagnostic techniques on any pregnant woman for the purposes other than those specified in sub-section (2) of section 4, he shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees.

(4) For the removal of doubts, it is hereby provided, that the provisions of sub-section (3) shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection.

**28. Cognizance of offences-**

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

(a) he 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) person who has given notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority, of the alleged offence and for his intention to make a complaint to the court.

Explanation.- For the purpose of this clause, "person" includes a social organisation.

## CHAPTER VIII
MISCELLANEOUS

**29. Maintenance of records-**

(1) All records, charts, forms, reports, consent letters and all the 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."

**3.1** In exercise of the powers conferred by section 32 of the Act, the Central Government has made the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (for short, "the Rules") of which following provisions, as amended by notification [G.S.R.109 (E)] dated 14.02.2003, may be relevant:

"9. Maintenance and preservation of records-

(1) Every Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre shall maintain a register showing, in serial order, the names and addresses of the men or women given counselling, subjected to pre-natal diagnostic procedures or pre-natal diagnostic tests, the names of their spouses or fathers 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 counselled 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, in respect of each man or woman subjected to any pre-natal diagnostic procedure/technique/test, shall be as specified in Form F.

(5) The Appropriate Authority shall maintain a permanent record of applications for grant or renewal of certificate of registration as specified in Form H. Letters of intimation of every change of employee, place, address and equipment installed shall also be preserved as permanent records.

(6) All case related records, forms of consent, laboratory results, microscopic pictures, sonographic plates or slides, recommendations and letters shall be preserved by the Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic or Imaging Centre for a period of two years from the date of completion of counselling, pre-natal diagnostic procedure or pre-natal diagnostic test, as the case may be. In the event of any legal proceedings, the record shall be preserved till final disposal of legal proceedings, or till the expiry of the said period of two years, whichever is later.

(7) In case the Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic or Ultrasound Clinic or Imaging Centre maintains records on computer or other electronic equipment, a printed copy of the record shall be taken and preserved after authentication by a person responsible for such record.

(8) Every Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre shall send a complete report in respect of all pre-conception or pregnancy related procedures/ techniques/tests conducted by them in respect of each month by 5th day of the following month to the concerned Appropriate Authority.

**10. Conditions for conducting pre-natal diagnostic procedures-**

(1) Before conducting preimplantation genetic diagnosis, or any pre-natal diagnostic technique/test/ procedure, such as amniocentesis, chorionic villi biopsy, foetoscopy, foetal skin or organ biopsy or cordocentesis, a written consent, as specified in Form G, in a language the person undergoing such procedure understands, shall be obtained from her/him:

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.

(1A) Any person conducting ultrasonography/image scanning on a pregnant woman shall give a declaration on each report on ultrasonography/image scanning that he/she has neither detected nor disclosed the sex of foetus of the pregnant woman to any body. The pregnant woman shall before undergoing ultrasonography/ image scanning delcare that she does not want to know the sex of her foetus.

(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."

**"14. Conditions for analysis or test and pre-natal diagnostic procedures-**

(1) No Genetic Laboratory shall accept for analysis or test any sample, unless referred to it by a Genetic Clinic.

(2) Every pre-natal diagnostic procedure shall invariably be immediately preceded by locating the foetus and placenta through ultrasonography, and the pre-natal diagnostic procedure shall be done under direct ultrasonographic mnitoring so as to prevent any damage to the foetus and placenta."

**"18. Code of conduct to be observed by persons working at Genetic Counselling Centres, Genetic Laboratories, Genetic Clinics, Ultrasound Clinics, Imaging Centre, etc.**

All persons including the owners, employee or any other persons associated with Genetic Counselling Centres, Genetic Laboratories, Genetic Clinics, Ultrasound Clinics, Imaging Centres registered under the Act/these Rules shall-

(i) not conduct or associate with, or help in carrying out detection or disclosure of sex of foetus in any manner;

(ii) not employ or cause to be employed any person not possessing qualifications necessary for carrying out pre-natal diagnostic techniques/ procedures and tests including ultrasonography;

(iii) not conduct or cause to be conducted or aid in conducting by himself or through any other person any techniques or procedure for selection of sex before or after conception or for detection of sex of foetus except for the purposes specified in sub-section (2) of section 4 of the Act;

(iv) not conduct or cause to be conducted or aid in conducting by himself or through any other person any techniques or test or procedure under the Act at a place other than a place registered under the Act/these Rules;

(v) ensure that no provision of the Act and these rules are violated in any manner;

(vi) ensure that the person, conducting any techniques, test or procedure leading to detection of sex of foetus for purposes not covered under section 4 (2) of the Act or selection of sex before or after conception, is informed that such procedures lead to violation of the Act and these rules which are punishable offences;

(vii) help the law enforcing agencies in bringing to book the violators of the provisions of the Act and these Rules;

(viii) display his/her name and designation prominently on the dress worn by him/her;

(ix) write his/her name and designation in full under his/her signature;

(x) on no account conduct or allow/cause to be conducted female foeticide;

(xi) not commit any other act of professional misconduct."

**3.2** Form-F prescribed for maintaining the records under

Rule 9 (4) and Rule 10 (1A) is as under:

"FORM F (See proviso to section 4 (3), rule 9(4) and rule 10 (1A) FORM FOR MAINTENANCE OF RECORD IN RESPEPCT OF PREGNANT WOMAN BY GENETIC CLINIC/ULTRASOUND CLINIC/IMAGING CENTRE.

1. Name and address of the Genetic Clinic/ Ultrasound Clinic/Imaging Centre.
2. Registration No.
3. Patient's name and her age
4. Number of children with sex of each child
5. Husband's/Father's name
6. Full address with Tel.No.,if any.

7. Referred by (full name and address of Doctor(s)/Genetic Counselling Centre (referral note to be preserved carefully with the case papers)/self referral.

8. Last menstrual period/weeks of pregnancy

9. History of genetic/medical disease in themselves family (specify)

Basis of diagnosis:

(a) Clinical

(b) Bio-chemical

(c) Cytogenetic

(d) Other (e.g. radiological, ultrasonography etc., specify)

10. Indication for pre-natal diagnosis

A. Previous child/children with:

(i) Chromosomal disorders

(ii) Metabolic disorders

(iii) Congenital anomaly

(iv) Mental retardation

(v) Haemoglobinopathy

(vi) Sex linked disorders

(vii) Single gene disorder

(viii) Any other (specify)

B. Advanced maternal age (35 years)

C. Mother/father/sibling has genetic disease (specify)

D. Other (specify)

11. Procedures carried out (with name and registration No. of Gynaecologist/ Radiologist/Registered Medical Practitioner who performed it).

Non-Invasive

(i) Ultrasound (specify purpose for which ultrasound is to be done during pregnancy) (list of indications for ultrasonography of pregnant women are given in the note below).

Invasive

(ii) Amniocentesis

(iii) Chorionic Villi aspiration

(iv) Foetal biopsy

(v) Cordocentesis

(vi) Any other (specify)

12. Any complication of procedure-please specify
13. Laboratory tests recommended

(i) Chromosomal studies

(ii) Biochemical studies

(iii) Molecular studies

(iv) Preimplantation genetic diagnosis

14. Result of

(a) pre-natal diagnostic procedure (give details)

(b) Ultrasonography Normal/Abnormal (specify abnormality detected,if any)

15. Date(s) on which procedures carried out.
16. Date of which consent obtained (In case of invasive)
17. The result of pre-natal diagnostic procedure were conveyed to.....on.....
18. Was MTP advised/conducted?
19. Date on which MTP carried out.

Name, Signature and Registration number of the Gynaecologist/ Radiologist/ Director of the Clinic.

Date.....

Place.....

DECLALRATION OF PREGNANT WOMAN I, Ms.....(name of the pregnant woman), declare that by undergoing ultrasonography/image scanning etc. I do not want to know the sex of my foetus.

Signature/Thumb impression of pregnant woman DECLARATION OF DOCTOR/PERSON CONDUCTING ULTRASONOGRAPHY/IMAGE SCANNING I,.....(name of the person conducting ultrasonography/ image scanning) declare that while conducting ultrasonography/image scanning on

Ms.....(name of the pregnant woman), I have neither detected nor disclosed the sex of her foetus to anybody in any manner.

Name and signature of the person conducting the sonography/image scanning/Director or owner of genetic clinic/ultrasound clinic/imaging centre.

Important Notes:-

(i) Ultrasound is not indicated/advised/performed to determine the sex of foetus except for diagnosis of sex-linked diseases such as Duchenne Muscular Dystropy, Haemophilia A& B etc.

(ii) During pregnancy Ultrasonography should only be performed when indicated. The following is the representative list of indications for ultrasound during pregnancy:-

(1) to (23) .....

..... ....."

**4.** It was argued by learned Public Prosecutor Mr.Sunit Shah that the Appropriate Authority for the State being a multi-member body, delegation of authority for filing a complaint was essential and explicit in the provisions of section 28 of the Act. He also submitted that in view of increasing incidence of female foeticide and adverse sex-ratio in the society, the legislature has advisedly made stringent provisions for preventing misuse of the pre-natal diagnostic techniques. The maintenance and preservation of records particularly in case of pregnant women undergoing ultrasonography, under the pain of heavy penalties, was part of a strategy to curb the misuse of diagnostic techniques and without such compulsion to keep the records in the prescribed manner, it would be well nigh impossible to trace and prove the offences under the Act. The requirement of maintaining the records was itself an effective check against commission of other offences, according to the submission. Per contra, it was submitted that the provisions of sub-section (3) of section 4 were procedural and any lapse in maintaining the record could not be equated with substantive offences of contravention of the provisions of section 5 or 6. It was submitted that even a minor, formal, technical or accidental slip in filling the forms or keeping the record cannot be the basis of allegation of inaccuracy or deficiency and should not be allowed to expose the person conducting ultrasonography on a pregnant woman to prosecution for serious offences and cast upon him an impossible burden of proving all the ingredients of sections 5 and 6 of the Act.

**5.** A conjoint reading of the above provisions would clearly indicate a well-knit legislative scheme for ensuring a strict and vigilant enforcement of the provisions of the Act directed against female foeticide and misuse of pre-natal diagnostic techniques. In fact, the use of those techniques are restricted to the purpose of detection of any of the abnormalities or diseases enumerated in sub-section (2) of section 4 of the Act. The provisions are stricter in case of conduct of pre-natal diagnostic techniques on a pregnant woman, requiring her written consent and determination of sex of a foetus is prohibited by the provisions of sections 5 and 6. Constitution of 'Appropriate Authority' under section 17 is clearly meant to ensure

proper and vigorous implementation of the Act; and it is expressly prescribed as one of its functions to take legal action against the use of any sex-selection technique. That authority, where appointed for the whole of a State or Union Territory, has to consist of three members. And when it is appointed for a part of the State or a Union Territory, it could consist of an officer of such rank as the Government concerned may deem fit.

**6.** The provisions of section 28 clearly provide for taking cognizance of an offence under the Act only upon a complaint being made by any of the four categories of complainants, viz:

(1) the Appropriate Authority concerned;

(2) any officer authorised in that behalf by the Central Government or State Government;

(3) any officer authorised in that behalf by the Appropriate Authority; and (4) a person, which includes a social organisation, who has given notice as prescribed in section 28 (1) (b).

Use of the words "Appropriate Authority" twice, at the beginning and end of clause (a) of sub-section (1) of section 28, clearly conveys that complaint could be made by an officer who is authorised in that behalf by the Central Government, the State Government or the Appropriate Authority, besides the Appropriate Authority itself. The power to delegate and authorise an officer to make a complaint is clearly conferred upon all the three authorities under the provisions of section 28, and, therefore, a Court can take cognizance of an offence under the Act on a complaint made by any officer authorised in that behalf by the Appropriate Authority. The first issue is answered accordingly.

7. As seen earlier, the Act and the Rules made thereunder provide for an elaborate scheme to ensure proper implementation of the relevant legal provisions and the possible loop-holes in strict and full compliance are sought to be plugged by detailed provisions for maintenance and preservation of records. In order to fully operationalise the restrictions and injunctions contained in the Act in general and in sections 4, 5 and 6 in particular, to regulate the use of pre-natal diagnostic technique, to make the pregnant woman and the person conducting the pre-natal diagnostic tests and procedures aware of the legal and other consequences and to prohibit determination of sex, the Rules prescribe the detailed forms in which records have to be maintained. Thus the Rules are made and forms are prescribed in aid of the Act and they are so important for implementation of the Act and for prosecution of the offenders, that any improper maintenance of such record is itself made equivalent to violation of the provisions of sections 5 and 6, by virtue of the proviso to sub-section (3) of section 4 of the Act. It must, however, be noted that the proviso would apply only in cases of ultrasonography conducted on a pregnant woman. And any deficiency or inaccuracy in the prescribed record would amount to contravention of the provisions of sections 5 and 6 unless and until contrary is proved by the person conducting such ultrasonography. The deeming provision is restricted to the cases of ultrasonography on pregnant women and the person conducting ultrasonography is, during the course of trial or other proceeding, entitled to prove that the provisions of sections 5 and 6 were, in fact, not violated.

**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. Thus the burden shifts on to the person accused of not maintaining the prescribed record, after any inaccuracy or deficiency is established, and he gets the opportunity to prove that the provisions of sections 5 and 6 were not contravened in any respect. Although it is apparently a heavy burden, it is legal, proper and justified in view of the importance of the Rules regarding maintenance of record in the prescribed forms and the likely failure of the Act and its purpose if procedural requirements were flouted. The proviso to sub-section (3) of section 4 is crystal clear about the maintenance of the record in prescribed manner being an independent offence amounting to violation of section 5 or 6 and, therefore, the complaint need not necessarily also allege violation of the provisions of section 5 or 6 of the Act. A rebuttable presumption of violation of the provisions of section 5 or 6 will arise on proof of deficiency or inaccuracy in maintaining the record in the prescribed manner and equivalence with those provisions would arise for punishment as well as for disproving their violation by the accused person. That being the scheme of these provisions, it would be wholly inappropriate to quash the complaint alleging inaccuracy or deficiency in maintenance of the prescribed record only on the ground that violation of section 5 or 6 of the Act was not alleged or made out in the complaint. 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.

**9**. Upon above analysis and appreciation of the scheme and provisions of the Act and Rules made thereunder, opinion on issues referred to the larger bench is as under:

(i) Under the provisions of section 28 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 ("the PNDT Act"), a Court can take cognizance of an offence under the Act on a complaint made by any officer authorised in that behalf by the Appropriate Authority.

(ii) The proviso to sub-section (3) of section 4 of the PNDT Act does not require that the complaint alleging inaccuracy or deficiency in maintaining record in the prescribed manner should also contain allegation of contravention of the provisions of section 5 or 6 of the PNDT Act.

(iii) In a case based upon allegation of deficiency or inaccuracy in maintenance of record in the prescribed manner as required under sub-section (3) of section 4 of the PNDT Act, the burden to prove that there was contravention of the provisions of section 5 or 6 does not lie upon the prosecution.

(iv) Deficiency or inaccuracy in filling Form F prescribed under Rule 9 of the Rules made under the PNDT 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 PNDT 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.

(v) The judgment in **Dr.Manish C. Dave v. State of Gujarat** reported in 2008 (1) GLH 475 stands overruled to the extent it is inconsistent with the above opinion. The references stand disposed accordingly.

Sd/-(M.S.Shah, J.)
Sd/-(D.H.Waghela, J.)
Sd/- (Akil Kureshi, J.)
(KMG Thilake)

**Case 5: Gaurav Goyal v. State of Haryana, July 2009**

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
Civil Writ Petition No.15152 of 2007
Date of decision: 7th July, 2009
Gaurav Goyal ... Petitioner
Versus
State of Haryana... Respondent

CORAM: HON'BLE MR. JUSTICE T.S. THAKUR HOB'BLE MR. JUSTICE KANWALJIT SINGH AHLUWALIA Present: Mr. Ashwinie Kumar Bansal, Advocate for the petitioner.

Mr. Onkar Singh Batalvi, Advocate for Dr. Anmol Rattan Sidhu, Assistant Solicitor General of India. Mr. Randhir Singh, Additional Advocate General Haryana. Notes: 1. Whether reporters of local newspapers may be allowed to see the judgment?

2. To be referred to the reporters or not?

3. Whether the judgment should be reported in the Digest? T.S. THAKUR, CJ. (ORAL) In this petition filed in public interest, petitioner prays for a mandamus directing the respondents to conduct an inquiry into the 250 illegal abortions of female foetuses leading to recovery of large quantity of foetal remains from a 20 feet deep Well/ underground septic tank at Buala Nursing Home, Pataudi, District Gurgaon, as reported in a section of the press. Petitioner also prays for mandamus directing the respondents to take appropriate action against those guilty of negligence in discharge of their official functions leading to uninterrupted abortions of female foetuses.

When this petition came up before us for orders on 24th October, 2008, it was pointed out by Mr. Ashwinie Bansal, counsel appearing for the petitioner that while an inquiry had been conducted by the Divisional Commissioner, Patiala in a somewhat similar incident involving abortion of female foetus in the district of Patiala and while action against those found involved in the said incident has been initiated, but no inquiry, administrative or otherwise, has been conducted in a similar incident involving recovery of foetal material from the place mentioned earlier. It was submitted that conducting of an appropriate administrative inquiry by the Divisional Commissioner into the said episode would not only bring to light the true facts but would also be a basis for taking action against those found negligent in discharge of their duties. This Court, finding merit with that submission, had directed the Divisional Commissioner, Gurgaon to hold an administrative inquiry into the recovery of female foetuses from the septic tank Buala Nursing Home, Pataudi, District Gurgaon and also identify those who prima facie seem to be guilty of any lapses in the discharge of their official duties, leading to the said incident. The role of officers responsible for the implementation of PNDT Act, 1994, as amended in year 2002, was also directed to be examined by the Divisional Commissioner and to suggest remedial measures to prevent such incident in future. Report of the Divisional Commissioner was directed to reach this Court not later than three months from the date a copy of that order was made available to Mr.Rameshwar Malik, counsel for the respondent.

In compliance with the above direction, an inquiry has been conducted by the Divisional Commissioner, Gurgaon and report thereof place on record before us. The Divisional Commissioner, Gurgaon has inter alia dealt with the lapses on the part of medical authorities in the implementation and enforcement of the provisions of the Act aforementioned and identified following four doctors as persons, who had neglected in performance of their duties:

1. Dr. D.V. Saharan, Civil Surgeon, Gurgaon;
2. Dr. S.S. Dalal, Civil Surgeon, Gurgaon;
3. Dr. M.D. Sharma, DFWO, Gurgaon; and
4. Dr. Jai Narain, SMO, CHC Pataudi.

The report deals with individual roles of these doctors and the manner in which they are said to have committed dereliction in discharge of their duties. The report also makes certain other suggestions and

remedial measures that are required to be taken to prevent episodes like the ones under scrutiny, taking place in future. This includes proper information system at village level to be run through multi-purpose health workers network and regular and timely inflow of inputs to prevent distortions and to spread awareness and guidance among such cases. The report also recommends proactive approach in the matter of spreading awareness among the people regarding the provisions of the Act and submission of prompt forensic reports, software in ultrasound machines, authorization, legal advisory support and video recording of raids etc. Mr. Bansal submits that while respondents have, pursuant to the report of the Divisional Commissioner, initiated action against two of the doctors indicted in the report, no action has been taken against the remaining two. He urges that there is no justification for the authorities to sit over against the remaining two doctors, who have been prima facie found to be blameworthy and therefore, not to be proceeded against.

Mr. Randhir Singh, however submits that action has already been initiated against three out of four doctors, as per the report submitted by the Divisional Commissioner and chargesheets have already been served upon the two doctors, namely Dr. M.D. Sharma and Dr. Jai Narain. So far as Dr. D.V. Saharan is concerned, the same, according to Mr.Randhir Singh, is being served upon him within a fortnight. Similarly, the respondents, according to Mr. Randhir Singh, are ready to examine the case of Dr.S.S. Dalal also and take whatever action may be called for against the said officer for any dereliction of duty.

These submissions, in our opinion, should allay the apprehension of Mr. Ashwinie Bansal that the respondents are dragging their feet in the matter of taking appropriate action against the doctors found negligent in the discharge of their duties. All the same, we see no difficulty in directing the respondents to expedite the proceedings against the doctors mentioned above, on the basis of the report and to take the same to its logical conclusion, expeditiously, but not later than six months from the date chargesheets are served.

Mr. Bansal next submitted that the notifications under the Pre- conception and Pre-natal Diagnostic Techniques (Prohibition of sex selection) Act, 1994 had not been published by the Government in the official gazette, which has led to many doctors escaping action against them. He refers to a notification dated 24th October, 1997 appointing Civil Surgeon of Districts as appropriate authorities for the PNDT Act which notification was not, on account of official apathy, published in the Government gazette. Counsel further submits that the said notification has not been published in the official gazette, even till date.

This position was not disputed by Mr. Randhir Singh, who has filed a brief note, in which it is inter alia stated that the non-publication of the notification in question, in the official gazette, had come to the notice of the State Government recently and that non-publication was on account of some error committed by the printing press. The government is, according to Mr. Singh, examining the feasibility of either issuing a fresh notification with retrospective effect or an ordinance that would validate the notification already issued.

We do not consider it necessary at this stage to examine whether the remedial steps, which the Government is contemplating, would meet the requirements of law, for that question does not immediately arise for our consideration. All that we need say is that non- publication of an important statutory notification in the official gazette adversely reflects upon the official machinery of the State Government charged with implementing an important legislation like the PNDT ACT. It is regrettable that for a period of over 12 years non publication of the notification in question never came to the notice of the authorities concerned. Mr. Randhir Singh, however points out that most of the steps needed to be taken in terms of the provisions of the Act, have already been taken and a notification nominating a multi-member State appropriate authority has been duly issued and published in the official gazette. He further stats that a State Supervisory Board has also been constituted apart from the State and District Advisory Committees.

In the circumstances, therefore, nothing further remains to be done or survives for consideration, in this petition, which can be disposed of in the light of observations made above.

We, accordingly dispose of this petition with the direction that proceedings already initiated, or to be initiated, shall be expedited by the concerned authorities and appropriate action taken against all those found to be violating provisions of the Act, or derelicting the discharge of their duties for the same.

No costs.

[T. S. THAKUR] CHIEF JUSTICE [KANWALJIT SINGH AHLUWALIA] JUDGE

**Case 6: Court on its own motion v. State of Punjab & Ors, July 2009**

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH
Civil Writ Petition No.17964 of 2007
Date of decision: 31st July, 2009
Court on its own motion... Petitioner
Versus
State of Punjab and others ... Respondents

CORAM: HON'BLE MR. JUSTICE T.S. THAKUR
HOB'BLE MR. JUSTICE KANWALJIT SINGH AHLUWALIA
**Present:**
Mr. Onkar Singh Batalvi, Advocate for Union of India.
Mr. Randhir Singh, Additional Advocate General Haryana.
Mr. Rupinder Khosla, Additional Advocate General Punjab.

**Notes:**

1. Whether reporters of local newspapers may be allowed to see the judgment?

2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the Digest?

KANWALJIT SINGH AHLUWALIA, J.

Alarmed by declining girl child sex ratio in this part of the country and to curb social menace of female foeticide, this Court had taken cognizance of a newspaper report published in Hindustan Times, Chandigarh on November 17, 2007 under the caption "Efforts to improve sex ratio in for a huge blow" "Sex-determination kits enter state" and had issued suo-motu notice to States of Punjab, Haryana and Union of India.

In response thereto, Director, Health Service, Family Welfare, Punjab filed his affidavit and appended affidavits of the Civil Surgeons posted at all Districts falling within the State of Punjab to say that various teams were constituted and surprise inspections/raids were undertaken and that no sex determination kits (hereinafter referred to as 'the kits') were available in the State of Punjab.

The Chairperson of the State Appropriate Authority constituted under Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as 'PNDT Act') cum Director General, Health Services, Haryana submitted a status- report by way of an affidavit and stated therein that strict instructions were issued to concerned officers to keep a strict vigil on use of baby gender determination kits in all the districts. It was further submitted that all Civil Surgeons posted in the districts of State of Haryana reported that kits are neither used nor available in the local market in the respective districts. It was further stated that import of such kits is not permitted in India by Drug Controller General, India.

A detailed affidavit was filed by the Director (PNDT), Ministry of Health and Family Welfare, Govt. of India. In the affidavit so filed, it was stated that the department of the deponent is concerned with the falling girl child sex ratio and have noticed the following figures which have emerged in the census 2001:

> "Child sex ratio for the age group of 0-6 years in 2001 is 927 girls per thousand boys against 945 recorded in 1991 Census. The encouraging trend in the sex ratio during 1991- 2000 was marred by the decline of 18 points in the sex ratio of children aged 6 years or below."
>
> Having spelt its concern, various effective steps taken by the Ministry of Health and Family Welfare, Govt. of India have also been conveyed in the affidavit. It has been stated that PNDT Act and its rules have been amended and the Act has been made more comprehensive and the enforcement authorities have been empowered with the necessary teeth. It was further stated that a Central Supervisory Board has been constituted to monitor falling child sex ratio and periodical meetings are being held under the chairpersonship of Minister of Health and Family

Welfare. It was averred that necessary programme to educate, generate awareness and sensitize public opinion makers is being carried and necessary expenses for the same are being provided and incurred. It has been further mentioned that State Governments have been funded through Rural Child Health Programme for implementation plan 2007-08 drawn for implementation of various activities under the PNDT Act and to give incentive to birth of girl child. The affidavit also provides information that sensitization on sex ratio issue has been made part of the curriculum for ANM (Auxiliary Nurse Midwife) under National Rural Health Mission scheme. Furthermore, a National Inspection and Monitoring Committee has been constituted. The affidavit further states that National Support and Monitoring Cell consisting of social scientists to evolve mechanism that the actual wrong doers are apprehended, is active. Furthermore, an annual report on the implementation of PNDT Act is published and a web site to inform the public about the information and activities undertaken by the Ministry of Health and Family Welfare regarding PNDT Act is going to be launched separately. But till now, this information is available on the web-site of Ministry of Health and Family Welfare. A toll-free telephone under the PNDT Division of the Ministry, to lodge complaints and assess information, is being installed and awareness programme under the scheme "Save the Girl Child Campaign" is being propagated. Regarding gender testing kits, it has been stated that Reliance India Mobile was carrying a programme "Plan a Baby", under which tips were given to enhance the probability of bearing a mail child. On the issue taken up by the Ministry, such programme has been discontinued by the mobile service provider.

A perusal of the affidavit reveals that PNDT Wing of the Ministry of Health and Family Welfare is fully conscious regarding availability of Sex Determination Kits in the grey market and through website channels and has drawn a comprehensive plan to block all the sources, from which such kits can be available. The affidavit notices that popular internet search engine 'Google' was providing link to sources of websites like 'www.GenSelect.com, www.4-gender-selection.com', which offer Sex Determination Kits for small fee. The affidavit states that all the websites offering the facilities were hosted by private organizations from overseas countries and in order to block the offending websites, Union Secretary, Health and Family Welfare has requested the Secretary Home to prevail upon the Computer Emergency Response Team (CERT - In). The Cabinet Secretariat was also approached to convene a meeting of all the concerned Secretaries. Union Department of Health and Family Welfare is also contemplating to approach Ministry of Postal and Customs to intercept Sex Determination Kits imported from abroad.

The affidavit further expresses Government's worry that availability of Gender Testing Kits/ Sex Determination Kits through www.pregnancystore.com advertisements has assumed alarming proportion in the country, especially in the elite states of the country like, Delhi and Punjab. It states that this is likely to effect the Government's efforts in curbing female foeticide, containing the declining child sex ratio and ushering in a healthy gender ratio in the country. Therefore, to curb availability of such kits, the department had sought the cooperation of the Customs Department and had approached Central

Board of Excise and Customs, Department of Revenue not to allow import of Gender Testing Kits/ Sex Determination Kits from abroad and if any such article, through any mode, is received, same be intercepted and confiscated.

After filing of the affidavit, this court had called upon the Chairman, Central Board of Excise and Customs to file an affidavit. An affidavit was filed on behalf of the Chairman, Central Board of Excise and Customs, Department of Revenue, New Delhi. In the affidavit, it was stated that the Director General of Revenue Intelligence has been asked to collect data and identify the import of such kits to enable the Department to take action against them. It was further revealed in the affidavit that the data regarding import of Gender Testing Kits/ Sex Determination Kits for the last three years was gathered and the same does not show import of such kits. To effectively control availability of such kits, inter-ministerial committee has also held two meetings.

After perusal of the affidavits submitted before us by the concerned officials, we are satisfied that the officers of the Union and the two State Governments are conscious that availability of Gender Testing Kits/ Sex Determination Kits will cause harm to the efforts of the Governments to propagate, educate, sensitize and cause awareness among the various walks of the society regarding ills of female foeticide and therefore, effective adequate steps are being taken to make availability of Gender Testing Kits/ Sex Determination Kits scarce. Not only a mandate has been issued against the imports but the various functionaries of the Governments are vigilant and making efforts in right earnest to quell import of such kits in the grey market and through regulated means.

Having expressed our satisfaction, we dispose of present writ petition with the hope that all the concerned officials of the State Governments shall act in harmony and continue with their strenuous efforts to eliminate availability of Gender Testing Kits/ Sex Determination Kits, so that the laudable object and mission of the Governments stated in their affidavits to curb female foeticide is realized.

We propose no order as to costs.

[T. S. THAKUR]
CHIEF JUSTICE

[KANWALJIT SINGH AHLUWALIA]
JUDGE

July 31, 2009

**Case 7: Dr. Mrs. Sudha Samir v. State of Haryana and others etc, February 2010**

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
Civil Writ Petition No.18365 of 2009
Date of decision:03.02.2010

**I.** Dr. Mrs. Sudha Samir ....Petitioner

versus
State of Haryana and others ...Respondents
**II. Civil Writ Petition No.19740 of 2009**
Dr. Mrs. Maninder Ahuja ....Petitioner
versus
State of Haryana and others ...Respondents
**III. Civil Writ Petition No.19794 of 2009**
Dr. R.D.Negi ....Petitioner
versus
State of Haryana and others ...Respondents

**CORAM: HON'BLE MR. JUSTICE K. KANNAN**

**Present:** Mr. Hemen Aggarwal, Advocate, for the petitioners.
Mr. Ravi Dutt Sharma, Deputy Advocate General, Haryana.
Ms. Deepali Puri, Advocate, for respondent No.3.

1. Whether reporters of local papers may be allowed to see the judgment ?

2. To be referred to the reporters or not ?

3. Whether the judgment should be reported in the digest ?

**K. Kannan, J. (Oral)**

1. The batch of writ petitions challenges the impugned order of suspension of registration under the Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter called 'the PNDT Act'). The suspension had been done after a show cause notice was issued under Section 20, when on an inspection, the authorities had come to a provisional conclusion that the petitioners were indulging in acts that were prohibited under the Act. It appears that an appeal had been filed by all the petitioners under Section 21 of the Act and it confirmed the decision of the appropriate authority and hence, they challenge the decisions by means of the batch of writ petitions.

2. The contention of the counsel appearing on behalf of the petitioners is that the appropriate authority constituted under the Act shall be notified in the official gazette and admittedly the gazette publication was made only on 21.07.2009. At the time when the impugned show cause notices were issued and the action for suspension had been taken, the gazette notification had not been made and therefore, the entire action under Section 20 of the Act ought to fail. The response to this contention by the counsel for the respondent is that the Government had issued an ordinance to validate certain acts done by various authorities prior to the gazette notification through the Preconception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Haryana Validation Ordinance, 2009 issued on 21st July, 2009. The ordinance purports to validate of the acts and proceedings done by appropriate authorities on the ground that the notification of the Act had been made on 24.10.1997 and the ordinance is intended to save certain acts taken by the appropriate authority, which under Section 17(2), he is competent to do. It

is seen that the ordinance was subsequently introduced as a Bill on 30th July, 2009 in the State Assembly and also brought as an enactment subsequently. The learned counsel sought to contend that the ordinance itself has been repealed and that the 2009 ordinance will not have any effect. It must be noticed that the ordinance was repealed in order to substitute it by an enactment passed in an Assembly through a Bill. When the substituted enactment itself is not in challenge which validates the acts done by the appropriate authority even prior to the gazette publication on 21.07.2009, the petitioners' challenge to the show cause notices and the substantial orders of the competent authority cannot survive for adjudication before this Court. The petitioners may have independent remedy to challenge the validity of the Act, itself but so long as the Act is in its place, the action initiated by the appropriate authority cannot be assailed on the ground that when it was done, the gazette notification had not been issued.

3. The writ petitions are, accordingly, dismissed.

(K.KANNAN)
**JUDGE**
03.02.2010

**Case 8: Dr. Devender Bohra v. State of Haryana and others, April 2010**

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH
**Civil Writ Petition No.14759 of 2009**
Date of decision: 27.04.2010
Dr. Devender Bohra ….Petitioner
versus
State of Haryana and others…Respondents

**CORAM: HON'BLE MR. JUSTICE K. KANNAN**

**Present:** Mr. Anil Ghanghas, Advocate, for the petitioner.
Mr. Ravi Dutt Sharma, Deputy Advocate General, Haryana, for the respondents.

1. Whether reporters of local papers may be allowed to see the judgment? **Yes.**

2. To be referred to the reporters or not? **Yes.**

3. Whether the judgment should be reported in the digest? **Yes.**

**K.Kannan, J**

**I. The subject of challenge – suspension of registration**

1. The petitioner challenges the order of suspension of registration of a sonogram installed in the hospital run by the petitioner and sealing of the equipment. By the impugned notice issued on 27.11.2008, the petitioner had been directed to make an arrangement of qualified Sonologist as per the provisions of the Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act (hereinafter called the 'PNDT Act'). The suspension notice was subject of a challenge in appeal to a Government under Section 21 before the appropriate authority and it was dismissed by order dated 13.03.2009. The suspension notice and the order passed in the appeal are the matters in challenge through this writ petition. By an ordinance issued in 2009 called the Pre-conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Haryana Validation Ordinance, 2009, the appropriate authority had been notified and it validated all acts done in the name of appropriate authority even prior to the date of the notification. The ordinance is also the subject of challenge but no arguments were advanced and I proceed to dispose of the writ petition only in so far as it contains the challenge to the order of suspension of the registration under the PNDT Act.

**II. The basis of challenge- MBBS degree is no different from BAMS for the purpose of registration**

2. It is an admitted fact that at the time when the registration of the equipment was made in the hands of the petitioner, there had been a medical practitioner, who had held a medical qualification recognized under the Indian Medical Council Act but subsequently he had resigned from the petitioner's hospital and there had been no Sonologist or imaging specialist resulting in the suspension of the licence. The petitioner's challenge is on the basis that he had a medical qualification recognized by the Central Council of Indian Medicines and according to the petitioner, as a person, who has a BAMS (Bachelor in Ayurvedic Medicine & Surgery) qualification, he shall be permitted to have the registration in the same manner as the person, who has a MMBS (Bachelor of Medicine and Bachelor of Surgery) degree. The petitioner complains that the suspension of licence amounted to gross breach fundamental right to equality and operated as discriminatory. According to the petitioner, the equipment is necessary for the very same reason as an allopath practicing medicine and the petitioner could not be denied the right of registration and the use of the equipment.

**III. The scheme of PNDT Act relating to registration**

3. Significantly the writ petition does not challenge the vires of the Act or the rules which have been framed thereunder. The challenge, however, is to a notification issued under Section 17(2) with retrospective effect which also was not pressed at the time of arguments. The Act imposes a system of registration of persons having the equipment to prevent the prevalent misuse by securing the data that could be collected by the user of the equipment for foeticide. The declared object of the Act 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 thereto. It is not denied that the petitioner has installed an elector sonogram in his hospital which is capable in carrying out "pre-natal diagnostic procedure". The Act seeks to regulate the functioning of genetic counselling centres, genetic laboratories or genetic clinics by imposing restrictions of the user of a sonogram for conducting activities relating to certain pre-natal diagnostic techniques. The regulation includes the necessity of having to employ a person, who shall possess the qualifications, as may be prescribed and restricts also the place where any pre-natal diagnostic technique is conducted. Section 3-A specifically prohibits a person including a specialist in the field of infertility from conducting the sex selection of a woman or a man or of both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them. Section 3-B contains the prohibition on sale of ultrasound machine, etc., to persons, who are not registered under the Act. The need for registration of a person, who possesses an ultrasound machine is obviously to ensure that the sex identification which is possible through the ultrasound machine is done in a controlled area of persons, who use it for appropriate diagnostic purposes, for detecting certain abnormalities which are specified under Section 4(2) of the PNDT Act. The said provision states:-

> "No pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely:-
>
> *(i) chromosomal abnormalities;*
>
> *(ii) genetic metabolic diseases;*
>
> *(iii) haemoglobinopathies;*
>
> *(iv) sex-linked genetic diseases;*
>
> *(v) congenital anomalies;*
>
> *(vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board."*

**IV. The relevant Rules relating to registration – Persons who shall be appointed**

4. The pre-natal diagnostic technique itself could be carried out only, if a person who is qualified, undertakes such an examination, records in writing certain conditions which are spelt out under Clause (3) of Section 4. Section 5 prohibits the communication of the sex of the foetus, which is again intended to prevent the misuse of such information. Section 6 prohibits the determination of sex by any genetic counselling centre or genetic laboratory or genetic clinic. The provisions of the Act are carried through the rules of the year 1996 and Rule 3 specifies the qualification of employees for 3 classes namely, (i) genetic counselling centre; (ii) genetic laboratory and (iii) genetic clinic/ultrasound clinic/imaging centre. For each one of these classes, the Rules specify the respective qualifications of persons, who shall be employed. A genetic counselling centre could not be established without a gynaecologist or a paediatrician or a medical geneticist. A genetic laboratory shall have a person, who is either a medical geneticist or a lab technician having certain degrees. A genetic clinic/ultrasound clinic/imaging centre shall have a gynaecologist having

experience of performing at least 20 procedures and a Sonologist, Imaging specialist, Radiologist or Registered Medical Practitioner having Post-Graduate degree or diploma or six months training or one year experience in sonography or image scanning or there shall be a medical geneticist. The expressions "medical geneticist", "Gynaecologist", "Sonologist", "Medical Practitioner" have all been defined. A "medical geneticist" is defined under Section 2(g) as follows:-

> *" "medical geneticist" includes a person who possesses a degree or diploma in genetic science in the fields of sex selection and pre-natal diagnostic techniques or has experience of not less than two years in any of these fields after obtaining-*
>
> *(i) any one of the medical qualifications recognised under the Indian Medical Council Act, 1956 (102 of 1956); or*
>
> *(ii) a post-graduate degree in biological sciences;"*

A "Sonologist" or a "Imaging specialist" is defined under Section 2(p), which reads as follows:-

> *" "sonologist or imaging specialist" means a person who possesses any one of the medical qualifications recognized under the Indian Medical Council Act, 1956 (102 of 1956) or who possesses a post-graduate qualification in ultrasonography or imaging techniques or radiology;"*

Appendix to the Rules sets out the forms under which the certificate of registration shall be issued. Form-A which is a form of application for registration of an ultrasound clinic/imaging centre requires a declaration that the organization that installs the equipments has understood the provisions of the Act and all the employees have also been explained under the Act and the Rules. Form-B is the certificate of registration issued for a particular period of time and Form-C is for rejection of application for grant/renewal of registration; Form-D specifies the form of maintenance of records by genetic counselling centre; Form-E by the genetic laboratory and Form-F for genetic clinic/ultrasound clinic/imaging centre.

**V. Government notification permitting use of the machine by a BAMS degree holder is irrelevant for testing the competence for obtaining registration under the relevant rules**

5. The attempt of the petitioner's counsel was to show that the Indian Medical Council Act and the Indian Medicine Central Council Act of 1970 fulfill the same object and, therefore, even a person registered as a practitioner under Indian Medicine Central Council Act shall also be competent to install a sonogram. The entire submissions of the counsel appearing for the petitioner are misdirected in assuming that since two enactments contained a same objective namely of constituting a medical council and for maintenance of certain registration of practitioners, there cannot be a discrimination between the practitioners of Indian Medicine and practitioners of Allopathic system. If the Act requires the possession of certain degrees and if the petitioner does not possess the same, there ends the issue and the question of allowing the petitioner to continue the registration does not arise. It is a simple open and shut case of a petitioner, who is not a 'medical practitioner' and who is not therefore registered under the Indian Medical Council

Act of 1956. If the admitted position is that his name has not been registered in the State Medical register and the Act read with the rules specifically require that the person, who possesses the equipment to have such a certain qualification, then the petitioner could have no further argument to advance. I have already outlined three classes of organizations mentioned under Rule 3 and the prohibition of sale of ultrasound machine to any such organization which is not registered under the Act. It may be that a practitioner under the Indian medicine system may have a requirement for detection of foetus abnormalities for appropriate treatment, but if the Act requires the person to have a particular qualification to possess the sonogram, it will be futile to question the legislative wisdom in a reply to a notice for suspension of registration that he should be treated as competent to make use of the equipment for the purpose of registration. Without a challenge to the provisions of the Act or the Rules themselves, the petitioner has no legs to stand. The petition is wholly misconceived, for, even at the time of arguments, the learned counsel made a dogged insistance in pressing for a parity in treatment of a medical practitioner registered under the Indian Medical Council Act and a practitioner registered under the Indian Medicine Central Act. The right to use an ultrasound machine by a BAMS degree holder through a notification issued by the Deputy Secretary, Health on behalf of the Secretary to Government, Haryana, on 12.04.2004, is used by the petitioner to justify that if he had been permitted to use the ultrasound machine by the notification, the respondents would be estopped from passing impugned order. A notification by the State allowing the user cannot expand the legislative intent or the Rules which have been framed under the Act. The notification must be understood in the strictest sense of making possible a practitioner of Indian medicine having a BAMS degree to assess the values or interpreting the imaging secured through the ultrasound machines. It cannot be used for legitimizing even the possession of the equipment without a registration under the relevant rules or claim that registration must be made *de hors* the rules. The notification issued by the Government in the year 2004 is no more than a certification of competence to use the modern technological innovations and it cannot displace the requirement of Rule 3 of the PNDT Act.

6. The writ petition is frivolous and it is dismissed with cost assessed at Rs.10,000/-.

**(K.KANNAN)**

**JUDGE**

27.04.2010.

**Case 9: State Chapter v. 5 State Appropriate Authorities, November 2011**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO.1939/2011

Radiological & Imaging Association (State Chapter),through Dr.Jignesh Gokuldas Thakker, its PC-PNDT Co-ordinator for the Indian Radiological & Imaging Association, having its office at C/o Shri.Sai Diagnostic Centre, Post Office Road,Jalna, Maharashtra State ... Petitioner

Vs.

1. Union of India & Ors.
Through Secretary,Ministry of
Health and Family Welfare, Nirman
Bhawan, New Delhi 110 001

2. State of Maharashtra,
Through its Secretary, Ministry
of Health and Family Welfare,
Having his address at Mantralaya, Mumbai.

3. Medical Officer of Health,
Brihanmumbai Mahanagarpalika,
Dahisar Ward, Mumbai.

4. Additional Director,
Health Services, Kutumb Kalyan
Bhavan, PNDT Division, Pune

5. State Appropriate Authority
Arogya Bhavan, Mumbai

.... Respondents

Ms.Anita Bhaktwani for petitioner
Mr.A.M.Sethna for U.O.I.
Mr.N.P.Pandit,AGP for Res.2 and 5
Ms.Gharpure for BMC
Mr.Uday P.Warunjikar for Intervener

CORAM: P. B. MAJMUDAR &
MRS. MRIDULA BHATKAR, JJ.
DATE: 17th November,2011 ORAL JUDGMENT (Per P.B.Majmudar,J.)

Rule.

2 Rule returnable forthwith. With the consent of the parties the petition is heard finally at the stage of admission.

3 This petition is filed by Radiological & Imaging Association (State Chapter) challenging the decision dated 28/7/2011 taken by the Appropriate Authority i.e. the Medical Health Officer of Dahisar Ward.

The petitioner has also prayed that Respondent nos.2 to 5 may be directed to frame appropriate guidelines as regards the circumstances and manner of sealing the machinery and the modus operandi for removal of the seal by way of clarification of the provisions of Section 30 of the Pre-Conception and Pre-Natal Diagnostics Techniques Wpl 1939/2011 (Prohibition of Sex Selection) Act, 2003 (Act 14 of 2003)(for short PC-PNDT Act). According to the petitioner, when the portable ultra sound Sonography machine is permissible for treating the patients, direction given by the Officer restraining the members of the Petitioner Association from taking the machine out of the premises of the institution is arbitrary, illegal, and in violation of Articles 14 and 21 of the Constitution of India.

On behalf of the petitioner, learned counsel Ms.Bhaktwani vehemently argued that portable sonography machine is available in view of the modern technology. A patient whose physical condition is serious and if he is unable to travel immediately to the hospital, he can get the medical benefit immediately, if he is subjected to sonography in a given case at his residence. It is submitted that it is not open for the Authority to restrict the portable sonography machine as according to her sonography machine is meant for taking it from one place to another like a laptop. Learned counsel further vehemently submitted that such type of restriction is de-hors the provisions of PC-PNDT Act, 1994. It is submitted that in a given case there may be a patient who may not be pregnant lady and in such case also it is necessary to do sonography of such patient and if there is restriction on the movement Wpl 1939/2011 of a portable sonography machine such patient will be deprived of getting the benefit of sonography immediately. It is submitted that the restriction is based on an apprehension of misuse of such portable machine, however, such misuse is possible in the clinic itself. It is submitted that the impugned communication is not consistent with the provisions of law. The restrictions imposed are without any authority of law and in view of the same the impugned communication is required to be set aside and this Court may ask the concerned authority to frame the guidelines in this behalf. Union of India as well as the State of Maharashtra should frame the guidelines in this behalf and they should frame appropriate policy decision regarding the sealing of all sonography machines.

5 Mr.Sethna, learned counsel appearing for Union of India submitted that the concerned officer of the Corporation has taken correct decision by restricting the transportation of such ultra sound sonography machine out side the said Institute as according to him if such transportation is permitted, there is every chance of such machines being misused with a view to find out the sex of the child in the womb. It is submitted by Mr.Sethna that so far as the sonography is concerned, it cannot be said that the patient cannot go to a particular Wpl 1939/2011 hospital or clinic for getting done the sonography and it is not such an urgent thing that the patient cannot wait. It is submitted that there is likelihood of misuse if sonography machine is required to be taken out side the Institute or the Hospital as in a given case it will not be possible for the authority to monitor this aspect and such machine if taken to the residence of a patient or a pregnant lady for determination of sex of a foetus, and it comes to the knowledge of such lady, there is every possibility that it may result in removal of female foetus by termination of pregnancy. It is submitted that considering the provisions of the Act such prevention is justified to prevent such abuse.

The submissions are on the basis of the instructions received by him from the Ministry of Health and Family Welfare.

6 Mr.Pandit, learned AGP, vehemently opposed the petition.

It is submitted that there are all chances of misuse if the portable sonography machine is allowed to be taken out of the Institute and if there is some apprehension that the machine is likely to be misused, there is nothing wrong on the part of the concerned officer who issued such communication.

7 Mr.Warunjikar appearing for newly added respondent no.5 Wpl 1939/2011 who is social worker and member of National Level Monitoring Committee established under the Act, argued that, if such portable sonography machine is allowed to be taken out of the Institute there is great danger of it being misused. He states that in the city of Mumbai sex ratio of male and female has come down by 30% in last 10 years and now the actual ratio is 1000 boys and 880 girls. It is submitted that it is in the interest of the society that this portable sonography machine should not be allowed to be misused as some may take disadvantage of such a machine only with a view to identify the sex of the child in womb.

8 We have heard the learned counsel at length. The principal question which is required to be considered is "whether the direction issued by the concerned officer at Page -74 is required to be interfered with by this Court and as to whether such direction is justified or it will infringe the fundamental rights of the Petitioner-Association ?"

9 At this stage reference of provisions of PC PNDT Act,1994 is required to be made. At the time of amending the Act the relevant provisions of the Act are amended as follows.

Wpl 1939/2011 Amendment Act 14 of 2003- Statement of Objects and Reasons-

1 The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 seeks to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. During recent years, certain inadequacies and practical difficulties in the administration of the said Act have come to the notice of the Government, which has necessitated amendments in the said Act.

2 The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders,etc.. However, the amniocentesis and sonography are being used on a large scale to detect the sex of the foetus and to terminate the pregnancy of the unborn child if found to be female.

Techniques are also being developed to select the sex of child before conception. These practices and techniques are considered discriminatory to the female sex and not conducive to the dignity of the woman.

The impugned order is pertaining to the institute is covered under the definition of "Genetic Clinic", which reads as follows.

> " Genetic Clinic" means a clinic, institute, hospital, nursing home or any place, by whatever name called, which is used for conducting pre-natal diagnostic procedure. Explanation- For the purposes of this clause, "Genetic Clinic" includes a vehicle, where ultrasound machine or imaging machine or scanner or other equipment capable of determining sex of the foetus or a portable equipment which has the potential for detection of sex during pregnancy or selection of sex before conception, us used ;
>
> Wpl 1939/2011 10 It is required to be noted that it is a very sorry state of affairs that even today in our country people are trying to undertake the determination of sex of the child in womb. Unfortunate tendency is going on in various parts of the country to discourage the birth of female child. No society can exist without a woman and for the growth of the human race and nation men and women both are equally important. It may be true as argued by the counsel for the petitioner that even if few bad elements in the society who are indulged in such activitiy of sex determination and removing foetus from the womb, the axe should not fall on all. However, it is required to be noted that the only scientific way which will be available to cut the possible abuse is by enacting proper law, rules and guidelines in that behalf. Possibility cannot be ruled out of misuse of such machine if it is taken out of the Institute for the sole purpose of sex determination in the womb. It is required to be noted that ultra sonography is a diagnostic technique which utilizes sound waves and reflections. It is not a medicine and the said machine does not provide any treatment to the patient.

Considering the same, in our view t in a case where a patient cannot wait till he is taken to the particular clinic for sonography and the portable machine has been taken to this residence, the possibility of Wpl 1939/2011 evil and misuse cannot be ruled out. In our view, if the society is fully made conscious and change in attitude takes place to forget the distinction between male and female, till then all remedial measures are required to be taken to curb the misuse of modern technology which is likely to be misused to achieve the dishonest and illegal purpose. It may be true as argued by the counsel for the petitioner that even in an Institute also there are possibility of such misuse of sonography machine. So far as the hospitals are concerned, even if a particular doctor is doing illegal activities, it is at his own risk and appropriate data is available in such a case which cannot be possible if the machine is taken out of the principal place.

11 Considering such aspect, in our view the direction issued by the Authority is in consonance with the provisions of the Act and only with a view to prevent possible misuse of such machine. It cannot be disputed that such a machine can be utilised for prenatal diagnosis even at the place where the machine is taken outside the clinic. It is required to be noted that ultra sonography is one of the prenatal diagnosis technique as prescribed under the Act. As pointed out earlier, unfortunately there are cases where such techniques are being misused to detect sex of the foetus and termination of pregnancy of Wpl 1939/2011 unwanted female child. In our view even if there is only one case out of millions this Court may not interfere with such a policy decision which in our view is the most scientific and in the interest of the society.

Considering the said aspect, it cannot be said that any fundamental right either under Article 14or 19 is violated as the Petitioner-Association can carry out its activity within the Institute itself and at the recognized place. The restriction imposed by the concerned officer is the most reasonable and in public interest and does not violate the fundamental right of the petitioner in any manner. Ultimately the public interest at large is required to be taken into account and the decision taken by the concerned officer is in consonance with the provisions of the Act.

12 The MHO, an appropriate, authority under the Act has issued these directions under sections 17 and 17-A of the Act in respect of implementation of the Act. Thus, the directions are issued by the MHO on the basis of his experience and the collection of data of the instances he had come across of the mis use of the ultra sound sonography machine. In the notice, MHO has mentioned that the movement or shifting of the said machine is not permissible. For the purpose of understanding the word " institute" we have to refer the Wpl 1939/2011 definition of Genetic Clinic under Section 2(d) (supra). Thus, the movement of the machine is prohibited qua Act. It is to be noted that the State and the Appropriate Authority are taking various steps to prevent the misuse of the machine used by the radiologist. We gainfully refer to the judgment delivered by the Division Bench of this Court dated 26/8/2011 in W.P. No.797/2011 filed by Radiological and Imaging Association (State Chapter- Jalna) Vs.Union of India and Ors..

A circular was issued by the Collector and the District Magistrate of Kolhapur on 10/3/2010 whereby all the radiologists and sonologists were called upon to install a device "silent observer" in their ultra sound sonography machine to identify and prevent the illegal use of the said machine for sex determination. Said instructions were challenged in the Writ Petition. The Division Bench upheld the instructions and dismissed the petition. Thus, the directions given by the MHO in the notice under challenge in the present case are consistent with the provisions and the object of the Act. It is made clear that this notice and our decision are applicable to the machines in the institutes and genetic clinics as mentioned under the Act. The direction given by the concerned officer is, therefore, in public interest and in consonance with the provisions of the Act.

13 Learned AGP states that the direction is applicable to the entire State of Maharashtra though such restrictive order is passed by the Ward Officer,Dahisar. Mr.Sethna states that as per the stand taken by the Ministry of Health, the decision taken by the concerned officer is in accordance with law and for the rest of the part of the Country, appropriate directions may be issued in this behalf which will not restrict only a particular State but it will be applicable uniformally to the whole country. Since this stand is taken by the Government of India, it is for the concerned Ministry to act as it deems fit and we are not required to say anything in this behalf.

14 At this stage Mr.Warunjikar placed on record copy of Chart declaring the sex ratio as per the Census-2011 report.

For what is stated above, the petition is dismissed.

Rule discharged.

(MRS.MRIDULA BHATKAR, J. ) ( P.B.MAJMUDAR, J. ) Wpl 1939/2011

**Case 10: Voluntary Health Association of Punjab vs. Union of India & Ors, March 2013**

Reportable

IN THE SUPREME COURT OF INDIA

EXTRAORDINARY CIVIL WRIT JURISDICTION

WRIT PETITION (CIVIL) NO. 349 OF 2006

Voluntary Health Association of Punjab ..Petitioner
Versus
Union of India & Others.. Respondents

**O R D E R**

Indian society's discrimination towards female child still exists due to various reasons which has its roots in the social behaviour and prejudices against the female child and, due to the evils of the dowry system, still prevailing in the society, in spite of its prohibition under the Dowry Prohibition Act. The decline in the female child ratio all over the country leads to an irresistible conclusion that the practice of eliminating female foetus by the use of pre-natal diagnostic techniques is widely prevalent in this country. Complaints are many, where at least few of the medical professionals do perform Sex Selective Abortion having full knowledge that the sole reason for abortion is because it is a female foetus. The provisions of the Medical Termination of Pregnancy Act, 1971 are also being consciously violated and misused.

The Parliament wanted to prevent the same and enacted the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex- Selection) Act, 1994 (for short 'the Act') which has its roots in Article 15(2) of the Constitution of India. The Act is a welfare legislation. The Parliament was fully conscious of the fact that the increasing imbalance between men and women leads to increased crime against women, trafficking, sexual assault, polygamy etc. Unfortunately, facts reveal that perpetrators of the crime also belong to the educated middle class and often they do not perceive the gravity of the crime.

This Court, as early as, in 2001 in Centre for Enquiry into Health and Allied Themes v. Union of India (2001) 5 SCC 577 had noticed the misuse of the Act and gave various directions for its proper implementation. Non-compliance of various directions was noticed by this Court again in Centre for Enquiry into Health and Allied Themes v. Union of India (2003) 8 SCC 398 and this Court gave various other directions.

Having noticed that those directions as well as the provisions of the Act are not being properly implemented by the various States and Union Territories, we passed an order on 8.1.2013 directing personal appearance of the Health Secretaries of the States of Punjab, Haryana, NCT Delhi, Rajasthan, Uttar Pradesh, Bihar and Maharashtra, to examine what steps they have taken for the proper and effective implementation of the provisions of the Act as well as the various directions issued by this Court.

We notice that, even though, the Union of India has constituted the Central Supervisory Board and most of the States and Union Territories have constituted State Supervisory Boards, Appropriate Authorities, Advisory Committees etc. under the Act, but their functioning are far from satisfactory. 2011 Census of India, published by the Office of the Registrar General and Census Commissioner of India, would show a decline in female child sex ratio in many States of India from 2001-2011. The Annual Report on Registration of Births and Deaths - 2009, published by the Chief Registrar of NCT of Delhi would also indicate a sharp decline in the female sex ratio in almost all the Districts. Above statistics is an indication that the provisions of the Act are not properly and effectively being implemented. There has been no effective supervision or follow up action so as to achieve the object and purpose of the Act. Mushrooming of various Sonography Centres, Genetic Clinics, Genetic Counselling Centres, Genetic Laboratories, Ultrasonic Clinics, Imaging Centres in almost all parts of the country calls for more vigil and attention by the authorities under the Act. But, unfortunately, their functioning is not being properly monitored or supervised by the authorities under the Act or to find out whether they are misusing the pre-natal diagnostic techniques for determination of sex of foetus leading to foeticide.

The Union of India has filed an affidavit in September 2011 giving the details of the prosecutions launched under the Act and the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex-Selection) Rules, 1996 (for short 'the Rules'), up to June 2011. We have gone through the chart as well as the data made available by various States, which depicts a sorry and an alarming state of affairs. Lack of proper supervision and effective implementation of the Act by various States, are clearly demonstrated by the details made available to this Court. However, State of Maharashtra has comparatively a better track record. Seldom, the ultrasound machines used for such sex determination in violation of the provisions of the Act are seized and, even if seized, they are being released to the violators of the law only to repeat the crime. Hardly few cases end in conviction. Cases booked under the Act are pending disposal for several years in many Courts in the country and nobody takes any interest in their disposal and hence, seldom, those cases end in conviction and sentences, a fact well known to the violators of law. Many of the ultra-sonography clinics seldom maintain any record as per rules and, in respect of the pregnant women, no records are kept for their treatment and the provisions of the Act and the Rules are being violated with impunity.

The Central Government vide GSR 80(E) dated 7.2.2002 issued a notification amending the Act and regulating usage of mobile machines capable of detecting the sex of the foetus, including portable ultrasonic machines, except in cases to provide birth services to patients when used within its registered premises as part of the Mobile Medical Unit offering a bouquet or other medical and health services. The

Central Government also vide GSR 418(E) dated 4.6.2012 has notified an amendment by inserting a new Rule 3.3(3) with an object to regulate illegal registrations of medical practitioners in genetic clinics, and also amended Rule 5(1) by increasing the application fee for registration of every genetic clinic, genetic counselling centre, genetic laboratory, ultrasound clinic or imaging centre and amended Rule 13 by providing that an advance notice by any centre for intimation of every change in place, intimation of employees and address. Many of the clinics are totally unaware of those amendments and are carrying on the same practises. In such circumstances, the following directions are given:

1. The Central Supervisory Board and the State and Union Territories upervisory Boards, constituted under Sections 7 and 16A of PN&PNDT Act, would meet at least once in six months, so as to supervise and oversee how effective is the implementation of the PN&PNDT Act.

2. The State Advisory Committees and District Advisory Committees should gather information relating to the breach of the provisions of the PN&PNDT Act and the Rules and take steps to seize records, seal machines and institute legal proceedings, if they notice violation of the provisions of the PN&PNDT Act.

3. The Committees mentioned above should report the details of the charges framed and the conviction of the persons who have committed the offence, to the State Medical Councils for proper action, including suspension of the registration of the unit and cancellation of licence to practice.

4. The authorities should ensure also that all Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics, Infertility Clinics, Scan Centres etc. using pre-conception and pre-natal diagnostic techniques and procedures should maintain all records and all forms, required to be maintained under the Act and the Rules and the duplicate copies of the same be sent to the concerned District Authorities, in accordance with Rule 9(8) of the Rules.

5. States and District Advisory Boards should ensure that all manufacturers and sellers of ultra-sonography machines do not sell any machine to any unregistered centre, as provided under Rule 3-A and disclose, on a quarterly basis, to the concerned State/Union Territory and Central Government, a list of persons to whom the machines have been sold, in accordance with Rule 3-A(2) of the Act.

6. There will be a direction to all Genetic Counselling Centres, Genetic Laboratories, Clinics etc. to maintain forms A, E, H and other Statutory forms provided under the Rules and if these forms are not properly maintained, appropriate action should be taken by the authorities concerned.

7. Steps should also be taken by the State Government and the authorities under the Act for mapping of all registered and unregistered ultra-sonography clinics, in three months time.

8. Steps should be taken by the State Governments and the Union Territories to educate the people of the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the State and District levels.

9. Special Cell be constituted by the State Governments and the Union Territories to monitor the progress of various cases pending in the Courts under the Act and take steps for their early disposal.

10. The authorities concerned should take steps to seize the machines which have been used illegally and contrary to the provisions of the Act and the Rules thereunder and the seized machines can also be confiscated under the provisions of the Code of Criminal Procedure and be sold, in accordance with law.

11. The various Courts in this country should take steps to dispose of all pending cases under the Act, within a period of six months. Communicate this order to the Registrars of various High Courts, who will take appropriate follow up action with due intimation to the concerned Courts.

All the State Governments are directed to file a status report within period of three months from today.

Ordered accordingly.

.....J. (K. S. RADHAKRISHNAN)

New Delhi,
March 04, 2013.

IN THE SUPREME COURT OF INDIA
EXTRAORDINARY CIVIL WRIT JURISDICTION
WRIT PETITION (CIVIL) NO. 349 OF 2006

Voluntary Health Association of Punjab ... Petitioner
Versus
Union of India and others ... Respondents

**ORDER**

Dipak Misra, J.

I respectfully concur with the delineation and the directions enumerated in seriatim by my respected learned Brother. However, regard being had to the signification of the issue, the magnitude of the problem in praesenti, and the colossal cataclysm that can visit this country in future unless apposite awareness is spread, I intend to add something pertaining to the direction No. (8).

2. To have a comprehensive view I think it seemly to reproduce the said direction: -

> "8. Steps should be taken by the State Governments and the Union Territories to educate the people of the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the State and District levels."

3. It is common knowledge that the State Governments and Union Territories some times hold workshops as well as awareness camps at the State and District levels which have the characteristic of a routine performance, sans sincerity, bereft of seriousness and shorn of meaning. It is embedded on

data-orientation. It does not require Solomon's wisdom to realize that there has not yet been effective implementation of the provisions of the Act, for there has not only been total lethargy and laxity but also failure on the part of the authorities to give accent on social, cultural, psychological and legal awareness that a female foetus is not to be destroyed for many a reason apart from command of the law. Needless to emphasise, there has to be awareness of the legal provisions and the consequences that have been provided for violation of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex-Selection) Act, 1994 (for brevity "the Act") but, a significant one, the awareness in other spheres are absolutely necessitous for concretizing the purposes of the Act.

4. Be it noted, this is not for the first time that this Court is showing its concern. It has also been done before. In Centre for Enquiry into Health and Allied Themes (CEHAT) and others v. Union of India and others[1], the two-Judge Bench commenced the judgment stating that the practice of female infanticide still prevails despite the fact that the gentle touch of a daughter and her voice has a soothing effect on the parents. The Court also commented on the immoral and unethical part of it as well as on the involvement of the qualified and unqualified doctors or compounders to abort the foetus of a girl child. It is apposite to state here that certain directions were given in the said decision.

5. Female foeticide has its roots in the social thinking which is fundamentally based on certain erroneous notions, ego-centric traditions, pervert perception of societal norms, and obsession with ideas which are totally individualistic sans the collective good. All involved in female foeticide deliberately forget to realize that when the foetus of a girl child is destroyed, a woman of future is crucified. To put it differently, the present generation invites the sufferings on its own and also sows the seeds of suffering for the future generation, as in the ultimate eventuate, the sex ratio gets affected and leads to manifold social problems. I may hasten to add that no awareness campaign can ever be complete unless there is real focus on the prowess of women and the need for women empowerment.

6. On many an occasion this Court has expressed its anguish over this problem in many a realm. Dealing with the unfortunate tradition of demand of dowry from the girl's parents at the time of marriage despite the same being a criminal offence, a two-Judge Bench in State of H.P. v. Nikku Ram and others[2] has expressed its agony thus: -

> "Dowry, dowry and dowry. This is the painful repetition which confronts, and at times haunts, many parents of a girl child in this holy land of ours where, in good old days the belief was :
>
> "???? ????????? ????????? ?????? ???? ?????:" ["Yatra naryastu pujyante ramante tatra dewatah"] (where woman is worshipped, there is abode of God). We have mentioned about dowry thrice, because this demand is made on three occasions: (i) before marriage; (ii) at the time of marriage; and (iii) after the marriage. Greed being limitless, the demands become insatiable in many cases, followed by torture on the girl, leading to either suicide in some cases or murder in some."

The aforesaid passage clearly reflects the degree of anguish of this Court in regard to the treatment meted out to the women in this country.

7. It is not out of place to state here that the restricted and constricted thinking with regard to a girl child eventually leads to female foeticide. A foetus in the womb, because she is likely to be born as a girl child, is not allowed to see the mother earth. In M.C. Mehta v. State of Tamil Nadu and others[3], a three-Judge Bench, while dealing with the magnitude of the problem in engagement of the child labour in various hazardous factories or mines, etc., speaking through Hansaria, J., commenced the judgment thus: -

> "I am the child.
>
> All the word waits for my coming.
>
> All the earth watches with interest to see what I shall become.
>
> Civilization hangs in the balance.
>
> For what I am, the world of tomorrow will be.
>
> I am the child.
>
> You hold in your hand my destiny.
>
> You determine, largely, whether I shall succeed or fail,
>
> Give me, I pray you, these things that make for happiness.
>
> Train me, I beg you, that I may be a blessing to the world."

8. The aforesaid lines from Mamie Gene Cole were treated as an appeal by this Court and the Bench reproduced the famous line from William Wordsworth "child is the father of the man". I have reproduced the same to highlight that this Court has laid special emphasis on the term "child" as a child feels that the entire world waits for his/her coming. A female child, as stated earlier, becomes a woman. Its life-spark cannot be extinguished in the womb, for such an act would certainly bring disaster to the society. On such an act the collective can neither laugh today nor tomorrow. There shall be tears and tears all the way because eventually the spirit of humanity is comatosed.

9. Vishwakavi Rabindranath Tagore, while speaking about a child, had said thus: -

> "Every child comes with the message that God is not yet discouraged of man."

10. Long back, speaking about human baby, Charles Dickens had said thus:-

> "Every baby born into the world is a finer one than the last."

11. A woman has to be regarded as an equal partner in the life of a man. It has to be borne in mind that she has also the equal role in the society, i.e., thinking, participating and leadership. The legislature has brought the present piece of legislation with an intention to provide for 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. The purpose of the enactment can only be actualised and its object fruitfully realized when the authorities under the Act carry out their functions with devotion, dedication and commitment and further there is awakened awareness with regard to the role of women in a society.

12. It would not be an exaggeration to say that a society that does not respect its women cannot be treated to be civilized. In the first part of the last century Swami Vivekanand had said:-

> "Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind."

13. When a female foeticide takes place, every woman who mothers the child must remember that she is killing her own child despite being a mother. That is what abortion would mean in social terms. Abortion of a female child in its conceptual eventuality leads to killing of a woman. Law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it, morality decries it and social science abhors it. Henrik Ibsen emphasized on the individualism of woman. John Milton treated her to be the best of all God's work. In this context, it will be appropriate to quote a few lines from Democracy in America by Alexis De Tocqueville: -

> "If I were asked ... to what the singular prosperity and growing strength of that people [Americans] ought mainly to be attributed, I should reply: to the superiority of their women."

14. At this stage, I may with profit reproduce two paragraphs from Ajit Savant Majagvai v. State of Karnataka[4]: -

> "3. Social thinkers, philosophers, dramatists, poets and writers have eulogised the female species of the human race and have always used beautiful epithets to describe her temperament and personality and have not deviated from that path even while speaking of her odd behaviour, at times. Even in sarcasm, they have not crossed the literary limit and have adhered to a particular standard of nobility of language. Even when a member of her own species, Madame

> De Stael, remarked "I am glad that I am not a man; for then I should have to marry a woman", there was wit in it. When Shakespeare wrote, "Age cannot wither her; nor custom stale, her infinite variety", there again was wit.
>
> Notwithstanding that these writers have cried hoarse for respect for "woman", notwithstanding that Schiller said "Honour women! They entwine and weave heavenly roses in our earthly life" and notwithstanding that the Mahabharata mentioned her as the source of salvation, crime against "woman" continues to rise and has, today undoubtedly, risen to alarming proportions.
>
> 4. It is unfortunate that in an age where people are described as civilised, crime against "female" is committed even when the child is in the womb as the "female" foetus is often destroyed to prevent the birth of a female child. If that child comes into existence, she starts her life as a daughter, then becomes a wife and in due course, a mother. She rocks the cradle to rear up her infant, bestows all her love on the child and as the child grows in age, she gives to the child all that she has in her own personality. She shapes the destiny and character of the child. To be cruel to such a creature is unthinkable. To torment a wife can only be described as the most hated and derisive act of a human being."
>
> [Emphasis supplied]

15. In Madhu Kishwar v. State of Bihar[5] this Court had stated that Indian women have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination.

16. The way women had suffered has been aptly reflected by an author who has spoken with quite a speck of sensibility: -

> "Dowry is an intractable disease for women, a bed of arrows for annihilating self-respect, but without the boon of wishful death."

17. Long back, Charles Fourier had stated "The extension of women's rights is the basic principle of all social progress".

18. Recapitulating from the past, I may refer to certain sayings in the Smritis which put women in an elevated position. This Court in Nikku Ram's case (supra) had already reproduced the first line of the "Shloka". The second line of the same which is also significant is as follows: -

> "???? ?????? ? ????????? ????????????????: ???????:"
>
> [Yatra tastu na pujyante sarvastatraphalah kriyah]

A free translation of the aforesaid is reproduced below:-

"All the actions become unproductive in a place, where they are not treated with proper respect and dignity."

19. Another wise man of the past had his own way of putting it:

"??????????????????????????????: |

?????????? ???????: ??????: ??????????????: ||"

[Bhartr bhratr pitrijnati swasruswasuradevaraih| Bandhubhisca

striyah pujyah bhusnachhadanasnaih||].

A free translation of the aforesaid is as follows:-

"The women are to be respected equally on par with husbands, brothers, fathers, relatives, in-laws and other kith and kin and while respecting, the women gifts like ornaments, garments, etc. should be given as token of honour."

20. Yet again, the sagacity got reflected in following lines: -

"????? ???? ??????: ???????????? |

?????? ?????????? ????????????? ?????? ||"

[Atulam yatra tattejah sarvadevasarirajam| Ekastham tadabhunnari vyaptalokatrayam tvisa||]

A free translation of the aforesaid is reproduced below:-

"The incomparable valour (effulgence) born from the physical frames of all the gods, spreading the three worlds by its radiance and combining together took the form of a woman."

21. From the past, I travel to the present and respectfully notice what Lord Denning had to say about the equality of women and their role in the society: -

"A woman feels as keenly, thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom – to develop her personality to the full as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important of the family. Neither can do without the other. Neither is above the other or under the other. They are equals."

22. I have referred to certain pronouncements of this Court, the sayings of the sagacious ones, thinkers, poets, philosophers and jurists about the child and women only to emphasise that they play a seminal

role in the society. The innocence of a child and the creative intelligence of a woman can never ever be brushed aside or marginalized. Civilization of a country is known how it respects its women. It is the requisite of the present day that people are made aware that it is obligatory to treat the women with respect and dignity so that humanism in its conceptual essentiality remains alive. Each member of the society is required to develop a scientific temper in the modern context because that is the social need of the present. A cosmetic awareness campaign would never subserve the purpose. The authorities of the Government, the Non-Governmental Organisations and other volunteers are required to remember that there has to be awareness camps which are really effective. The people involved with the same must take it up as a service, a crusade. They must understand and accept that it is an art as well as a science and not simple arithmetic. It cannot take the colour of a routine speech. The awareness camps should not be founded on the theory of Euclidian geometry. It must engulf the concept of social vigilance with an analytical mind and radiate into the marrows of the society. If awareness campaigns are not appositely conducted, the needed guidance for the people would be without meaning and things shall fall apart and everyone would try to take shelter in cynical escapism.

It is difficult to precisely state how an awareness camp is to be conducted. It will depend upon what kind and strata of people are being addressed to. The persons involved in such awareness campaign are required to equip themselves with constitutional concepts, culture, philosophy, religion, scriptural commands and injunctions, the mandate of the law as engrafted under the Act and above all the development of modern science. It needs no special emphasis to state that in awareness camps while the deterrent facets of law are required to be accentuated upon, simultaneously the desirability of law to be followed with spiritual obeisance, regard being had to the purpose of the Act, has to be stressed upon. The seemly synchronization shall bring the required effect. That apart, documentary films can be shown to highlight the need; and instill the idea in the mind of the public at large, for when mind becomes strong, mountains do melt. The people involved in the awareness campaigns should have boldness and courage. There should not be any iota of confusion or perplexity in their thought or action. They should treat it as a problem and think that a problem has to be understood in a proper manner to afford a solution. They should bear in mind that they are required to change the mindset of the people, the grammar of the society and unacceptable beliefs inherent in the populace. It should be clearly spelt out that female foeticide is the worst type of dehumanisation of the human race.

23. I have highlighted the aforesaid aspects so that when awareness campaigns are held, they are kept in view, for that is the object and purpose to have real awareness.

24. The matter be listed as directed.

.....J.

[Dipak Misra]

New Delhi; March 04, 2013.

**Case 11: The Court on its own motion v. the State of Jharkhand, July 2014**

IN THE HIGH COURT OF JHARKHAND AT RANCHI
W.P (PIL) No. 3504 of 2014
Court On its Own Motio.....Petitioner
Versus
The Union of India & Others .....Respondents

CORAM: HON'BLE THE CHIEF JUSTICE.
HON'BLE MR. JUSTICE AMITAV K. GUPTA

For the Petitioner : Mr.Mukesh Kumar, Amicus Curiae
For the Respondents : Mr. Rajesh Kumar, G.P. V

---

Dated the 8th August, 2014

Having read the news item published in Hindustan Times (English Edition) dated 3rd July, 2014 regarding alarming increase in pre-natal sex determination amongst the pregnant women in Jharkhand, the Court vide order dated 7th August, 2014 has taken suo motu cognizance and registered it as a Public Interest Litigation.

2. We have heard Mr. Mukesh Kumar, learned Amicus Curiae and Mr. Rajesh Kumar, learned G.P.V.

In the order dated 07.08.2014 the Court in paragraph 2 observed as under:

> "2. The highest number of such abortions has been reported from East Singhbhumi.e 23.6% and in Ranchi 17%. The average sex ratio at birth in Jharkhand is 928 females per 1000 males as per Annual Health Survey, 2011-12. The low sex ratio at birth and an increase in number of abortions after sex determination tests at ultrasound centres in Jharkhand indicate that the government measures to curb pre-netal gender determination have gone in a toss. It is also reported in the above newspaper that the surge in pre-natal sex determination is attributed to the fact that since 2012 the Health Department and its nodal organization Jharkhand Rural Health Mission Society (JRHMS) have not conducted any large scale drive to enforce the laws against such tests. The Health Department raided 404 rogue ceners and sealed 39 of them last year, but most of the owners have been left off after warnings."

03. Further the Court directed the respondents to inform the Court about the following points:-

i. The registration obtained by those Genetic Counseling Centre/Genetic Laboratory/Genetic Clinic functioning in the State of Jharkhand.

ii. Number of Genetic Counseling Centre/Genetic Laboratory/Genetic Clinic functioning in the State of Jharkhand.

iii. The action taken in respect of those centres, who are functioning without registration.

iv. Other relevant details

4. Pursuant to the order of this court the Respondent No. 2 filed counter affidavit stating therein that no Genetic Counseling Centre/Genetic Laboratory/ Genetic Clinic are registered or functional in the State of Jharkhand and there are two other bodies like IVF centers/Infertility cure centers using equipments/technique capable of making sex selection before or after conception. Total number of registered Ultrasonography Clinic in the State is 695. It is further submitted that the direction to all District Appropriate Authorities are issued to submit action taken against inspected and sealed clinics and also the instruction have been given for awareness and inspection of the Ultrasonography.

5. The learned Amicus Curiae, Mr. Mukesh Kumar, has drawn our attention to the recent judgment of the Hon'ble Supreme Court in the case of Voluntary Health Association of Punjab Vs. Union of India &Ors. reported in (2013) 4 SCC 1 wherein the Hon'ble Supreme Court issued several directions for implementation of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 is issued to all the State Government and also to file compliance report within three months. Paragraph 9 of the aforesaid decision reads as follows:-

> 9. In such circumstances, the following directions are given: 9.1. The Central Supervisory Board and the State and Union Territories Supervisory Boards, constituted under Sections 7 and 16-A of PN & PNDT Act, would meet at least once in six months, so as to supervise and oversee how effective is the implementation of the PN & PNDT Act.
>
> 9.2. The State Advisory Committees and District Advisory Committees should gather information relating to the breach of the provisions of the PN & PNDT Act and the Rules and take steps to seize records, seal machines and institute legal proceedings, if they notice violation of the provisions of the PN & PNDT Act.
>
> 9.3. The committees mentioned above should report the details of the charges framed and the conviction of the persons who have committed the offence, to the State Medical Councils for proper action, including suspension of the registration of the unit and cancellation of licence to practice. 9.4. The authorities should ensure also that all genetic counsellingcentres, genetic laboratories and genetic clinics, infertility clinics, scan centres, etc. using pre-conception and pre-natal diagnostic techniques and procedures should maintain all records and all forms, required to be maintained under the Act and the Rules and the duplicate copies of the same be sent to the district authorities concerned, in accordance with Rule 9(8) of the Rules.
>
> 9.5. States and District Advisory Boards should ensure that all manufacturers and sellers of ultrasonography machines do not sell any machine to any unregistered centre, as provided under Rule 3-A and disclose, on a quarterly basis, to the State/Union Territory concerned and the Central Government, a list of persons to whom the machines have been sold, in accordance with Rule 3-A(2) of the Rules.

9.6. There will be a direction to all genetic counsellingcentres, genetic laboratories, clinics, etc. to maintain Forms A, E, H and other statutory forms provided under the Rules and if these forms are not properly maintained, appropriate action should be taken by the authorities concerned.

9.7. Steps should also be taken by the State Government and the authorities under the Act for mapping of all registered and unregistered ultrasonography clinics, in three months' time. 9.8. Steps should be taken by the State Governments and the Union Territories to educate the people of the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the State and district levels.

9.9. Special cell be constituted by the State Governments and the Union Territories to monitor the progress of various cases pending in the courts under the Act and take steps for their early disposal.

9.10. The authorities concerned should take steps to seize the machines which have been used illegally and contrary to the provisions of the Act and the Rules thereunder and the seized machines can also be confiscated under the provisions of the Code of Criminal Procedure and be sold, in accordance with law. 9.11. The various courts in this country should take steps to dispose of all pending cases under the Act, within a period of six months. Communicate this order to the Registrars of various High Courts, who will take appropriate follow-up action with due intimation to the courts concerned.

6. From perusal of the aforesaid judgment it appears that the subject matter of the present PIL is also the subject matter before the Hon'ble Supreme Court and the Hon'ble Supreme Court is also monitoring the case. The present Public Interest Litigation is disposed of with a direction to the respondents to make strict compliance of the order passed in Voluntary Health Association of Punjab (Supra.) in its letter and spirit.

7. We place on record the valuable assistance rendered by learned Amicus Curiae, Mr. Mukesh Kumar.

(R.Banumathi, CJ) (Amitav K.Gupta,J)

**Case 12: S. K. Gupta v. Union of India & ors, April 2015**

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR
D.B. Civil Writ Petition (PIL) No.3270/2012
S.K.Gupta V/s Union of India & ors.
Date of Order::- 15.4.2015

PRESENT
HON'BLE CHIEF JUSTICE MR.SUNIL AMBWANI
HON'BLE MR. JUSTICE PRAKASH GUPTA
Mr.Tanveer Ahmed for the petitioner.

Mr.S.K.Gupta, petitioner present in person.
Mr.G.S.Gill, AAG with Mr.H.S.Kandpal Mr.B.S.Chhaba for the respondents.

**ORDER**

**(Reportable) BY THE COURT (Per Hon'ble Sunil Ambwani, CJ)**

1. This writ petition in public interest has been filed by a Senior Advocate of the Court deeply concerned with the increasing crime of female feticide and the consequent missing girl child in the State of Rajasthan, in which the Implied Sex Ratio at Birth has gone down from 924 girls to 1000 boys in 1994-2000, to 897 girls per 1000 boys in 2004-10, as against the Nation ratio of 935 in 1994-2000, to 923 in 2004-10. A prayer has been made to take steps, some of which are for implementation of the laws and the others to wake up the State Government to its statutory responsibility, against the crime.

2. In the State of Rajasthan, the Child Sex Ratio has been declining consistently from 916 girls per 1000 boys in 1991 to 909 in 2001 and 888 in 2011. The decline is significantly higher in the urban areas, though both rural and urban recorded child sex ratio of girls below 900 in accordance with the Census of 2011 (Mapping the Adverse Child Sex Ratio in India). It was also discovered in the census that in the Districts like Dausa, Tonk, Jaipur and Sikar, the child sex ratio of girls has further plummeted by 35 points. The problem has worsened in Sikar and Jhunjhunu with these becoming the hotspots of declining girl child ratio in the State. In addition to these Districts, the ratio has dipped below 900 in Nagaur, Jodhpur, Pali, Jalore and Sirohi.

3. The petitioner has prayed for several directions including taking appropriate steps on the legislative/ executive/administrative side to stop any further declining of child sex ratio; discourage dowry system/ female feticide/sex selection/ sex determination/selecting abortion/discriminated abortion; to direct for financial assistance and schemes for improvement of the female children whether it concerns their birth/ nutrition/education/marriage property rights/maintenance and other related matters; reducing expenditure on marriages; fixing number of guests in the marriage ceremonies; filing of video recording of marriage with the Registrar of Marriage; compulsory registration of marriages; preparation of list of presents in the marriages in accordance with the **Dowry Prohibition (Maintenance of List of Present to the Bride and Bridegroom) Rules, 1985**; issuance of marriage certificate unless the provisions of Dowry Prohibition Act have been complied with; monitoring of working of Dowry Prohibition Officers and Advisory Boards under section 8(b) of the **Dowry Prohibition Act, 1961**; to appoint Empowered Committee for implementation of directions issued by Hon'ble Supreme Court in CEHAT & others case; enforcement of **Preconception and Pre-natal Diagnostic Techniques (Prohibition 3 of Sex Selection) Act, 1994** (for short, "the PCPNDT Act of 1994"); pass orders for synchronization and coordination of different department in carrying out the objects of the relevant laws.

4. The Court appreciates the research and efforts made by the petitioner for various steps, which will definitely discourage female feticides and stop the declining of sex ratio of girl child in the State of

Rajasthan. We are informed that the Hon'ble Supreme Court is regularly monitoring the directions issued by it in **Voluntary Health Ass.of Punjab V/s Union of India** and ors. (Writ Petition (s) (Civil) No.(s).349/2006) and that in the last order dated 18.2.2015, the Supreme Court has issued directions to file report of compliance fixing the matter on 15th April, 2015.

5. In this writ petition, orders were passed beginning from 30.3.2012, which may be summarized as follows:-

30.3.2012

The Court directed the trial court to frame charges in the pending cases, wherever charges have not been framed, within a period of two months, seeking extension of time from the High Court in case of any delay in framing charges.

11.5.2012

Noticing that bailable and non-bailable warrants have been issued against large number of accused, which are pending compliance, the Director General of Police was directed to ensure service of the bailable and non-bailable warrants, with direction to SPs of all concerned Districts to take necessary steps. The Registrar General was directed to look into the cases where matters are pending at the stage of framing of charges and submit compliance report. Direction was issued for completion of trial within six months.

23.5.2012

Directions were issued to use hi-tech software like silent observer, active tracker etc., so that sonography centres may be forced to have a complete record of each sonography test for inspection. They may also be required to transmit online duly and completed filled in "F" Form to the appropriate authorities within 24 hours of the sonography. Reliance was placed on a judgment of the Bombay High Court in **Radiological & Imaging Association V/s Union of India & ors**. (Writ Petition No.797/2011) decided on 26.8.2011, upholding the decision of the Collector in requiring the ultrasound clinics to submit information in 'F' form on-line within 24 hours and for installation of silent observer on the ultra sound machine. The Court was satisfied that the State Government has responded in the matter and requested the Additional Advocate General to persuade the State government to issue directions. It was noticed that the State has created PCPNDT Cell vide order dated 22.5.2012 and that under section 17(4) of the PCPNDT Act, the State Government has decided that all sonography machines shall be connected to active tracker and the entire record, chart, forms, reports etc. shall be maintained as per provisions of Section 29 of the PCPNDT Act read with Rule 9 of **The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules of 1996** (for short "the Rules of 1996"). Seeking compliance of connecting active tracker to each sonography centre machine in the State, the Court also

noticed that orders have been issued on 22.5.2012 by the State Government to transmit Form "F" online on the website 5 of the Government i.e. "hamaribeti.nic.in".

Direction was issued to connect active tracker to each sonography centre machine within four months and in case of failure, the non-compliance will be treated as contempt of court under Article 215 of the Constitution of India as well as under Contempt of Courts Act, 1971.

28.5.2012

An order filed by the State Government issued for directing implementation of the directions of the Court, was taken on record.

6.7.2012

It was noticed that since active tracker is brand name of one of the products, the similar product manufactured by other companies are not excluded.

5.9.2012

The Court observed that the Government of Rajasthan has linked the applicant, namely, Magnum Opus IT Consulting Private Limited on its web portal and the statement of Additional Advocate General that they are going to give similar treatment to Visionindia Software Export Limited was taken on record.

9.10.2012

The Court considered the application for issuing incentive scheme where the daughters have performed last rites of their parents; application to take measures for cutting the wedding expenses and fixing ceiling on number of guests and wedding menu; application for direction to State Government to come out with pension scheme for the parents of daughters only. Noticing the objections of Additional Advocate General that 6 such matters are not for adjudication of the Court, the Court did not find any good ground to issue any direction and the applications were accordingly disposed of.

1.11.2012

The Court noticing its earlier orders made the orders absolute and disposed of the writ petition as well as the letters.

4.3.2013

Application was filed for reviving the proceedings, on which taking notice of several letters sent by the trial courts for extension of time, the Court observed that charges must have been framed in most of the matters by the time the matter has come up for orders and extended the time by further two months.

4.7.2013

The Court extended the time for framing charges in cases of violation of PCPNDT Act by another three months.

25.10.2013

Noticing its earlier orders, the Court granted two months further time to complete the trial in the cases under PCPNDT Act.

3.2.2014

The Court considered some more letters received from presiding officers of Kota and Ajmer seeking further time of six months and reluctantly granted further three months time to complete the process of framing charges as well as trial.

4.4.2014

The Court extended the time for further period of three months in all PCPNDT Act cases to complete the recording of 7 the evidence/framing charge/disposal of the proceedings.

11.7.2014

The Registrar General was directed to circulate the copy of order dated 4.4.2014 to all the concerned courts. 28.7.2014 The progress reports submitted by the Special PCPNDT Courts at Ajmer, Bharatpur, Bikaner, Jodhpur Metropolitan, Jaipur Metropolitan, Kota and Udaipur were perused and it was found that information has not been updated. The compilations were directed to be updated, giving next dates and also the likely time by which the proceedings would be disposed of finally.

16.9.2014

The Court perused the report of the Registrar General dated 11.9.2014 relating to the PCPNDT Courts at Ajmer, Bharatpur, Bikaner, Jodhpur Metropolitan, Jaipur Metropolitan, Kota and Udaipur and noticed that except for a few cases the charge sheets have not been filed in the pending cases and that in some of the cases, the proceedings have been stayed at the stage of revision by the District Judges. The Court noticed that not a single conviction has been recorded in the State of Rajasthan. The Court allowed the counsel appearing for the parties to inspect the files and to find out the reasons and deficiencies on which the trials are being delayed. The Registrar General was required to submit next report by 15.11.2014.

25.11.2014

The Court perused the reports of the PCPNDT Courts at Ajmer, Bharatpur, Bikaner, Jaipur Metropolitan, Jodhpur 8 Metropolitan, Kota and Udaipur and found that in more than 50% cases, either there is an interim order in a criminal revision by the Sessions Judge or by the High Court. In Bikaner,

15 prosecutions were pending at the stage of arguments, or charges, or pre-charge and there was stay on further proceedings by the High Court. In other Districts, the files summoned by the High Court have not been returned back. Observing its deep pain and anguish, the Court directed that counsels will take out inspections of the files; the Member-Secretary, Rajasthan State Legal Services Authority will organize special workshops for the special courts entrusted with the trial of offences under the PCPNDT Act; the Registrar General to list all the criminal cases, including applications under section 482 Cr.P.C., criminal revisions, criminal appeals in pending matters of PCPNDT Act expeditiously before appropriate Benches within a period of two months; District and Sessions to expedite the revisions where trials are pending and proceedings of trial have been stayed and to decide the same within three months' Special Magistrates to expedite the trials and to conclude them within six months and not to await orders where there are no interim orders passed in the criminal revisions or applications under section 482 Cr.P.C.

23.2.2015

The Court found from the report submitted by O.S.D. (F& I) for the Registrar General, Rajasthan High Court, Jodhpur that as against the pendency of 368 cases in 7 Special Courts, only 2 cases were disposed of in the month of January, 2015. The maximum number of cases (138) are 9 pending with the Special ACJM, PCPNDT Act Cases, Jaipur Metropolitan where only one case was decided in January, 2015. Shri S.K.Gupta, petitioner was required to submit his suggestions for positive and purposeful implementation of the PCPNDT Act.

6. Shri S.K.Gupta, petitioner filed an application suggesting various measures, namely,-

(1) The amendment in Rule 3(3) of the Rules of 1996 made in the year 2012 has permitted and authorized the medical practitioner to conduct and engage himself in any genetic clinic/ultrasound clinic/imaging centre at two places. He has suggested that such authorized medical practitioner/ geneticist, gynecologist may be permitted to render his services at one place, which is registered under the Act.

(2) The PCPNDT clinics may be directed to inform the particulars of the doctors attached to the registered place to the appropriate authority and to ensure one lab/centre-one sonologist.

(3) The doctors must sign the sonography reports and in no case digital signature may be allowed.

(4) Every sale of sonography machine under section 3(B) of the PCPNDT Act is required to be reported to the State Appropriate Authority. The manufacturing companies and dealers may also be subjected to report the sale to the appropriate authority of the Government.

(5) A GPS may be required to be attached to check the mobility of the machine in case of the hidden sale.

(6) The active trackers have been installed on sonography machines, for which control room may be ordered to be established and a nodal officer for continuous checking of control room server may be ordered to be appointed.

(7) The punishment under section 23(1) of the PCPNDT Act for three years and fine of Rs.10,000/- should be made more stringent and for subsequent offences, Rs.5 lacs or proportionate to the profits/income of the clinics in the past there to five years be directed to be imposed. Similarly, under section 23(2), the fine may be enhanced to Rs.10 lacs.

(8) Since every order is appealable and for which manner has not been prescribed, the Rule may be amended providing for annexing the copy of the order alongwith appeal and the appeal must mention necessary facts and grounds.

(9) Rule 11(2) of the Rules of 1996 under the heading "facilities for inspection" providing for release of machines on payment of penalty equal to five times of the registration fee to the appropriate authority with an undertaking not to undertake detection of sex of foetus or selection of sex before or after conception, be set aside.

(10) Directions be given in respect of expediting the trials for summoning witnesses at pre-charge evidence stage by bailable warrants through the concerned Superintendent of Police and for adherence with the provisions of the Criminal Procedure Code for enforcing attendance of witnesses within three weeks.

(11) Whenever any appropriate authority exercises its powers, seizes any machines, then it shall be required to report to the concerned Magistrate having its jurisdiction for taking cognizance and on which court may proceed for confiscation accordingly.

(12) The practitioners/persons working/serving at the Lab/Clinics must disclose their qualifications to the State Appropriate Authority and where any enquiry has been initiated against them relating to the PCPNDT Act, the report may be ordered to be submitted before the High Court.

(13) Decoy operations may be implemented and the persons voluntarily giving information about ill-practices must be honoured so as to invite more and more participation. The money seized from the doctors be given as reward to the persons engaged in decoy scheme.

(14) All Judicial Magistrates/Metropolitan Magistrates may be ordered that wherever the Special Courts are not established, they may take cognizance and conduct enquiry and trial of the matters relating to PCPNDT Act.

7. Mr.G.S.Gill, learned Additional Advocate General for the State of Rajasthan, after expressing his gratitude to the Court for taking interest in the matter, has detailed the initiatives taken by the State Government in the affidavit of Shri Kishana Ram, Project Director, R.C.H., Medical and Health Department, Rajasthan, Jaipur. He stated that the State Government is seriously concerned with the implementation of the provisions of the PCPNDT Act and for taking other measures for improving the child sex ratio, which has fallen in the State of Rajasthan to 888 against Nation ratio 914. He has detailed the steps taken by the State Government for birth control, which makes the persons disqualified for employment or contesting Panchayati Raj and Local Bodies elections, having more than two children and has highlighted the following steps taken by the State Government:-

(1) Constitution of State Appropriate Authority vide Government order dated 25.4.2014.

(2) Constitution of District Level Appropriate Authority and Sub Divisional Level Appropriate Authority vide Government order dated 11.1.2012. At district level, the District Collector has been notified as District Appropriate Authority and at subdivisional level, the Sub Divisional Officer has been notified as Sub Divisional Appropriate Authority under the PCPNDT Act.

(3) Constitution of State Inspection Teams vide Government order dated 11.11.2013, with powers of search and seizure under Rule 12 of the Rules of 1996.

(4) So far as the implementation is concerned, it is stated that 2331 ultra sonography centres have been registered so far, out of which, 192 centres are in the Government sectors and the remaining 2139 in the private sectors. A total number of 6722 inspections were done, in which after adopting due process 354 centres have been de-registered. In 158 matters, the enquiry is in progress and their licenses have been suspended. The matters of 21 doctors have been referred, on which, their registration have been suspended by the Rajasthan Medical Council.

(5) It is reported that 67 cases have been decided by various courts in which the accused have been given the benefit of probation or only fine has been imposed or punishment till rising of the Court has been awarded. A request has been made that the courts may be instructed not to be liberal with these offences. Although most of the offences are technical in nature for not filling up forms, since 13 the convictions are based on presumptions in these matters where production of witnesses is very difficult, the proviso to sub-section (3) of Section 4 amounts to contravention by raising a presumption.

(6) It is stated that Special Courts have been set up in 7 divisional headquarters and a special police station having its jurisdiction in whole area of the State of Rajasthan has been established at Jaipur by notification dated 17.9.2012.

(7) Under the Mukhbir Yojna, the award has been increased to Rs.one lac and so far 9 persons have been given the award.

(8) The tracking device has been made compulsory in all functional sonography centres.

(9) It is reported that a software known as "IMPACT" has been developed to save daughter. It is integrated system for monitoring PCPNDT Act. The software is first of its kind and has been awarded SKOTCH order of merit of 2013. Its salient features have been highlighted in the report as follows:-

**"Salient Features of the IMPACT Software:-**

- Record of registered sonography cenrtre was not available at one place and now it is possible to view the registered centre in State and detail of registered centre made available on clinic
- Many centre who does not care about registration renewal can be found on website and necessary action can be taken for these centres.

- Online Renewal of registration process available in the software, with integrated flow of full process to renew the registration.
- Auto SMS generation for awareness of the pregnant women and her family regarding complaint, if she want to lodge complaint against centres on 104 toll free number.
- Red alert feature for doctors or centres owner if any pregnant women or her relatives force doctor for sex determination of the foetus.
- SMS based solution provided to the centre and also to the department which help the centre and department higher authority to monitor the activity.
- Every sonography machine has a tracking device which records the sonography report. It provides the data to department in the case of suspicious activity.
- Information system which provide the machine on/off status to the higher authority to track the activity.
- Online monthly/quarterly progress report is being sent by district PCPNDT coordinators about districts.
- Online seizure/suspension, complaint and FIR report are available in the software.
- Feedback system which provide a facility to user to send suggestion or query for better implementation of the software."

(10) It is stated that the web based online software, providing for form-F reporting from centers to Government, has been developed using ASP.net for front end and SQL Server 2008 R2 as back end. It has pull and push SMS integration provided by NICSMS gateway for better monitoring by government authority. The website has been passed through security audit and has been certified for hosting website by security auditors. He has requested for demo of the software.

(11) It is reported that a number of programmes have been initiated for public awakening such as "Badhai Sandesh" where girl child is born from 1st October, 2014 and involvement of various NGOs and Government organizations in the Scheme called "Beti Bachao Beti Padhao" introduced in 10 districts of Rajasthan, which have comparatively lesser child sex ratio. The scheme is running under the Chairmanship of the Principal Secretary, Medical and Health Department. Asha software popularly known "ASHA SOFT' is a timely and seamless online payment developed by NIC for payment under the various schemes to the beneficiary.

8. The female feticide is a horrible crime committed against humanity, for which every person in the State has to take responsibility. The crime is committed on account of deeply rooted prejudice against the girl child in the Society. In the State of Rajasthan, the magnitude of crime requires more serious steps to be taken than what has been done so far. We are satisfied with the concern shown by the State Government and the efforts made by it for better implementation of the PCPNDT Act by developing software and

launching various schemes for encouraging the development of girl child and discouraging female feticide. These steps however, are not adequate, as hardly any conviction has been secured. The deterrent effect, by punishing those, who are guilty of the crime of female feticide, has not been felt sufficiently.

9. The crime of female feticide is conceived in secrecy and is executed with deceit, with the help of doctors running ultra sonography centres. The PCPNDT Act does not appear to have deterred the medical profession sufficiently, to avoid ultrasound sonography test to determine sex of the foetus. The State Government and the Courts have constitutional and statutory responsibility to reduce the opportunities of committing crime and to apprehend the perpetrators of the crime. The directions issued in this regard in the public interest litigation initiated by Shri S.K.Gupta, a public spirited Advocate, in last three years, have not resulted into any desired impact on the reduction of female feticide in the State. On a conservative estimate, more than 5000 sex determination tests are being carried out in the State every day in the 2331 registered sonography centres and a large number operating without obtaining registration. Out of these, only 192 centres are in the Government sectors and the remaining 2139 in the private sectors. The medical 16 fraternity cannot deny its role in the crime committed against the humanity. Without the sex determination tests, the illegal abortion of female foetus is not possible, as no one in the Society will take a risk of aborting male foetus.

10. Considering the slow pace of implementation of PCPNDT Act, after reviewing the situation, we issue the following directions:-

(1) The Law Enforcement Agencies are directed to increase their vigilance over the unregistered PCPNDT clinics. Whenever any unregistered PCPNDT clinic is found, the ultrasound sonography machine should be immediately seized and the seizure be reported to the State Appropriate Authority and the Magistrate to initiate proceedings for its confiscation. The ultrasound sonography machine shall not be released by the Courts until the conclusion of the proceedings under the PCPNDT Act.

(2) All the registered Medical Practitioners, authorized by amendment in Rule 3(3) of the PCPNDT Rules of 1996 made in the year 2012, to carry out the sonography test, shall sign the sonography reports. The digital signatures will not be allowed. Each and every report will be accompanied with the photo copy or printed copy of the registration certificate of the PCPNDT clinic.

(3) Every sale of the ultrasound sonography machine whether static or portable under section 3(B) of the PCPNDT Act will be reported by the manufacturers to the State Appropriate Authority. The manufacturing companies and dealers will obtain sufficient proof of the registration or application for registration before sale of the machine. The reporting will also include the sale of the second hand 17 ultrasound sonography machine with the proof of sale to be registered as PCPNDT clinic. Every sale of machine in violation of these directions will be treated as unauthorized sale, on which the machine will be liable to be seized.

(4) A GPS will be required to be attached to check the location of the ultrasound sonography machine. Every manufacturer will instal a GPS system at the time of sale of machine for tracing the location

of the ultrasound sonography machine. The State Appropriate Authority will develop the technical know how of attaching a GPS on every machine within a period of three months. After three months, the sale of ultrasound sonography machine without attaching GPS system will not be permitted.

(5) The active trackers installed on sonography machines are of no use until the control rooms are established. The State Government will ensure that sufficient number of control rooms are established and a nodal officer is appointed for continuous monitoring of control room servers.

(6) Until the Rules are amended, providing for a procedure for an appeal against the order under the PCPNDT Act, it is provided that the appeal may be filed within a period of 30 days beyond which the appellant will have to give sufficient reasons for filing the appeal to the satisfaction of the Appellate Authority, and that a copy of the order will be annexed with the grounds of memorandum of appeal. The appeal must be decided expeditiously and as far as possible within a period of six months.

(7) The order under Rule 11(2) of the PCPNDT Rules of 1996 for release of machines on payment of penalty equal to five 18 times of the registration fee on reporting any violation of PCPNDT Act or Rules will not be passed until the Appropriate Authority is fully satisfied with the undertaking of compliance of the PCPNDT Act and Rules. It will be within the authority of the Appropriate Authority to take any security including bank guarantee for releasing the ultrasound sonogrpahy machine and where the offence has been reported to the Magistrate, the State Appropriate Authority will not have any power to release the machine. These powers will be exercised by the Magistrate, where the criminal case is pending consideration, subject to the same conditions as are prescribed in Rule 11(2) of the PCPNDT Rules of 1996.

(8) The State Government is directed to establish Special PCPNDT Courts in the Districts of Sri-Ganganagar, Hanumangarh, Churu, Jhunjhunu, Sikar and Alwar, where the situation of female feticide has worsened, as evidenced by the fall in the girl child sex ratio in these Districts. The State Government will establish the Special PCPNDT Courts in these Districts in addition to the seven PCPNDT Courts in the State of Rajasthan, within a period of three months.

(9) The Courts where the cases under the PCPNDT Act are pending or the Courts in which the revisions are pending, are directed to expedite the proceedings and conclude the trial within a period of six months. These directions are in addition to the directions issued earlier by this Court to conclude the trials. Any pendency of trial under the PCPNDT Act beyond six months, will be taken adversely by the High Court on its administrative side.

(10) The Society at large has to be vigilant about the 19 pernicious practice of female feticide, which is conceived in secrecy and executed in deceit in connivance with the medical practitioners. The members of the Society are given freedom to report these crimes to the State Appropriate Authority and the District Appropriate Authority. The complaints addressed to the District Magistrate or any other Appropriate Authority will be immediately reported to the State Appropriate Authority

for taking steps. Wherever the complaints are found to be genuine, on making inspections, the complainant will be rewarded and for which the State Government will issue appropriate scheme within three months. The decoy operations will be encouraged and for which the State Government will issue guidelines for both carrying out the decoy operations and for rewarding the participants in the successful decoy operations.

(11) All the Judicial Magistrates/Metropolitan Magistrates will be issued directions by the Registrar General of the Rajasthan High Court that wherever the Special PCPNDT Courts are not established, they can take cognizance, conduct enquiry & trial for all offences of violation of PCPNDT Act and the Rules.

(12) The State Government is requested to continue its efforts to encourage and expand the scope of the schemes for welfare of girl child. The State Government has taken sufficient measures for public awakening, such as 'Badhai Sandesh' on the birth of girl child, involvement of various NGOs and Government Organizations in 'Beti Bachao Beti Padhao' and in developing the 'Asha Software' for timely and seamless online payment under the various schemes to the beneficiary. The fall in the ratio of girl child in the State of 20 Rajasthan, however, requires the State Government to increase and expand the scope of the existing schemes and to initiate more schemes, for public awareness for protection of girl child.

(13) The State Government will also consider to make education of the girl child in the State completely free; to increase the percentage of reservation for women in public employment from 30% to 50%; and to provide measures to limit the expenditure in weddings at all levels.

(14) The State Government, NGOs, Charitable Societies and the Schools both Government and Private must be encouraged and given special grants to organize programmes for development of the girl child and awareness against female feticide and female infanticide.

11. The matter will be listed again on 11th May, 2015. The respondents will submit compliance and progress report on the directions issued by this Court from time to time and the directions issued today and for further monitoring of the matter.

(PRAKASH GUPTA),J. (SUNIL AMBWANI), C.J.

### 5.3. Convictions under the Act

**Case 1: Conviction of Dr. Anil Sabhani, Haryana**

IN THE COURT OF SHRI JAGJIT SINGH, HCS
SUB DIVISIONAL JUDICIAL MAGISTRATE, PALWAL
CASE NO. 295/2 OF 2001
DATE OF INSTT. 5.11.2001/20.7.2004
DATE OF DECISION : 28.3.2006
State through District Appropriate Authority-cum-Civil Surgeon, Faridabad. ... Complainant

VERSUS

1. Dr. Anil Sabhani, Prop. M/s Dr. Anil's Ultrasound Opp. G.H. Palwal, Faridabad
2. Sh. Kartar Singh son of Sh. Lakhi Singh, Technician M/s Dr. Anil Ultrasound, Opp. G.H. Palwal, Faridabad Mesident of V.P.O. Maheshpur, District Faridabad.
3. Ms. Dr. Anil Ultrasound, Opp. G.H. Palwal, Faridabad (H) through Dr. Anil Sabhani)

... Accused.

COMPLAINT UNDER PRE-NATAL DIAGNOSTIC TECHNIQUE (REGULATION AND PREVENTION OF MISUSE) ACT. 1994 AND RULES, 1996

Present: A.P.P. for the State / Complaint
Both accused on bail with Sh. R.A. Gupta, Advocate

JUDGMENT:

The present case was initially field a complaint by the District Appropriate Authority-cum-civil Surgeon Faridabad against accused on the grounds that the complainant has been appointed as the "Appropriate Authority" under 17(2) of the Pre-Nantal Diagnostic Technique (Regulation and Prevention of Misuse) Act, 1994 (hereafter referred as "PNDT Act") vide Haryana Govt. Gazatte notification No. 1/19/88 2HB-11-97 dated 18.9.1997 for the district and is presently posted as Civil Surgeon, District Faridabad, that M/s Dr. Adil Ultrasound Centre. Situated Opp. G.H. Palwal, Faridabad

for conducting PNDT in violation of Section 4(1), 4(2) and 4(3) of the act and also failing to maintain proper records of the ultrasound centre and contravening the provisions of section 29 read with rule 9 and Form 'J' under the PNDT Act Rules and all the offence are punishable under section 23 of the Act. Both the accused are accordingly held guilty and convicted for the above offences. Let the convicts be heard on the point of quantum of sentence on 28.03.2006.

Sd/--

Announced: Sub Divisional Judicial Magistrate

Dt.: 25.03.2006 Palwal: 25.3.2006

JUDGMENT CONTINUED:

Present: APP for the State / Complainant both convicts in person with Sh. R.A. Gupta, Advocate.

ORDER OF ----------

Arguments on the point of quantum of sentence heard. Convict Dr. Anil Sabhani has stated that he is the sole bread earner of the family with an old mother and small children to look after. He is doctor by profession and not a previous convict and a Lenient view be taken against him. Convict Kartar Singh has meanwhile stated that he is not a previous convict and has old parents and small children to look after. He

is the sole bread earner of the family and a Lenient view be taken against him. The learned counsel for the convicts argued that the convicts are not previous offenders and they did not indulge in any criminal act and as such Leniency be shown to them. The learned App. meanwhile argued that stringent punishment be awarded to the convicts, who have indulged in a very serious offence.

2. I have heard the convicts, their counsel as also the learned App. for the State. The convicts have prayed for a Lenient view against them, but in my considered view they do not deserve the Leniency prayed for. As earlier discussed due to the illegal acts of the persons like the convicts the sex ratio is declining day by day in the country and in the State and because of the persons like the convicts the day is not far when there would be no girl child around. In the present case, the convicts orally conveyed the sex of foetus to the patients, but due to the check of such illegal acts the persons like the convicts have worked out their own sex determination code. It was reported in the news paper recently as follows:-

> "If the doctor tells us to come and get the report on Monday, we know it's a boy. Friday means a girl, "says Sarla a proud mother of three strapping boys in Karnal's Chonchda village. Her neighbour's doctor adopted a slightly different modus operandi signature in red ink to indicate a girls and blue for a boy. "no words are exchanged. Its an unspoken thing and one doesn't even have to ask." she says. If the doctor doesn't oblige, some tout does".

3. It is further to be even that Haryana's infamously skewed sex ratio is not just about numbers though they are quite horrific-861 per 1000 males as per the 2001 census – it's also about attitudes. Combined with ultrasound technology that motorable roads, electricity and extensive urbanisation have brought only closer home, this has translated into a dearth of brides. The statistic speak for themselves. 36.24% of men between 15 and 44 years of age (the so-called reproductive of marriageable age) were tabulated as being unmarried in the 1991 census. In some districts like Rohtak, the percentage was as high as 44. Since then, the number has only gone up. Though the state government has claimed success in its efforts to correct the skewed sex ratio through awareness drives and incentives for the girl child, activists who work in the area are sceptical.

4. The convicts together have been indulging in a very serious crime. To kill a person who may have the opportunity to defend himself is a very serious offence, but even more serious is the offence where a person kills some one who is not even in a stage to defend himself. The determination of sex by persons like the convicts lead to the above reality where on determining sex of the foetus as female the same is killed in a cruel manner. The act of the convicts is to be condemned and in my considered view the punishment to be awarded to the convict should act as a deterrent to and other persons, so that no one indulged in such heinous crime. Accordingly. I order both the convicts to undergo simple imprisonment for a period of two years and to pay a fine of Rs. 5,000/- each for the offence mentioned in section 6 (a), 6(b), section 5(1), 5(2), section 4(1), 4(2), 4(3) and section 29 read with Rule 9 of the Act and all the offence are punishable under section 23 of the Act. In default of payment of fine the convicts shall further undergo simple imprisonment for a period of three months Fine paid.

Sd/--
Announced in open Court Sub-divisional Judicial Magistrate

Dated: 28th March 2006 Palwal. 28.3.2006

NOTE: This judgment contains forty nine pages and each page has been signed by me.
Sd/--
Sub-divisional Judicial Magistrate

Palwal. 28.3.2006.

**Case 2. Conviction of Dr. Mrs. Chhaya Tated, Maharashtra**

IN THE BOMBAY SESSIONS COURT AT BOMBAY AT FORT GR. BOMBAY CRIMINAL APPEAL NO. 530 OF 2009
IN
(C.C. No. 10169/MS/2004)
**Dr. Mrs. Chhaya Tated**
aged 42 years, Occ . Doctor
residing at Mahavir Nagar, Pir Bazar
Aurangabad... Appellant/ Original Accused No. 1

Versus

1. The State (at the instance of Shivaji Park P.S.
Dadar (West), Mumbai
2. Municipal Corporation of Greater Mumbai, Mumbai. ...Respondents
(Original Complainant)
Mr. A.H.H. Ponda, Advocate for Appellant.
Mr. D.K.Joshi, APP for State/Respondent No. 1.
Mr. Z.S. Engineer, Advocate for BMC/ Respondent No. 2.

CORAM: HER HONOUR THE ADDL.SESSIONS JUDGE
DR. LAXMI P. RAO
C.R.NO: 34
DATED: 29.09.2011

Oral Judgment

1. The appellant has filed this appeal for challenging the Judgment and Order passed by Learned Metropolitan Magistrate 41st Court, Shindewadi, Dadar, Mumbai on 14.08.2009 in C.C. No. 10169/MS/2004, convicting her along with another accused for the offence punishable under Section 22 (3) for contravening the provisions of Section 22 (1) (2) and for the offence punishable under Section 23 for contravening the provisions of Rules 6 (2), 4 (1) (2), 9 (1) of Pre-natal Diagnostic Techniques Act, 1994

amended as The Preconception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 2003 and sentencing her to suffer Rigorous Imprisonment for three (3) years on each count and to pay fine of Rs. 10,000/- (Rupees Ten Thousand Only) total amount (Rs. 30,000/-) in default, to undergo Rigorous Imprisonment for three (3) months on each count.

2. It is submitted that the appellant/ accused no. 1 was convicted as above for the aforesaid violations and has sought to challenge the impugned Judgment and Order on the following grounds. It is submitted that the Judgment is arbitrary and against the law and equity. The Learned Trial Court has failed to consider that there was miscommunication between the appellant/ accused no. 1 and the persons concerned for publication on the basis of telephonic message. The Trial Court has failed to appreciate that the said Act was to prohibit techniques for determination of sex of the foetus leading to female feoticide and has not considered that there was no such technique for the said determination. The appellant/ accused no. 1 sought to publish the advertisement to facilitate the fertility of women desiring to have a child and was in no way connected with the determination of sex. The entire trial was based on appellant's **"assumed intention"**, which was not correct. Nothing incriminating was found from the panchanama conducted on the spot and no equipment of sex determination were found there. There is total absence of mens-rea. The Learned Trial Court erred in holding that the difference in the two advertisements dated 19.11.2004 and was predetermined and deliberate. The appellant/ accused no. 1 had immediately sent a letter Exhibit P-24 dated in respect of the offending advertisement but the Learned Trial Court failed to appreciate her bonafides. It is therefore prayed

that the appeal be allowed and the impugned Judgment and Order be quashed and set aside.

3. I have heard both the Learned Advocates on behalf of the appellant as well as respondent/ BMC. The appellant/ accused no. 2 was acquitted for the said offence by a separate order dated 18.04.2011 on her appeal No. 527 of 2009. However, the present appeal was not allowed to be decided by the appellant, for the reasons best known to her from the month of March 2011, after hearing of arguments, till this date.

ARGUMENTS

4. It is submitted on behalf of the appellant/ accused no. 1 that under the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994; the power to file the complaint has been given only to the appropriate authority. There has to be a Gazetted Notification for the said purpose. The prosecution has relied upon Exhibit P-8, which is a Gazette Notification of 23.12.2004. However, the complaint was lodged by the Medical Officer, assuming to be the appropriate authority on 13.12.2004. Therefore, it is vehemently argued that the Gazetted Notification dated 23.12.2004 is

after the said visit of the complainant to the hospital on 29.11.2004 to take search of the clinic as well as the complaint dated 13.12.2004. Hence, it is prayed that on this point itself the complaint would not be maintainable.

5. Learned Advocate for the appellant has relied upon the following rulings:-

**Criminal Application No. 4644 of 2004 decided by the Hon'ble Bombay High Court on 23.12.2004 in the case of Dr. Aniruddha Malpani and Anr. V/s. Dr. Jaywant Anant Khandare & Anr.**

**(1995) 5 Supreme Court Cases 302 Full Bench in the case of Anirudhsinhji Karansinhji Jadeja and Anr. V/s. State of Gujarat.**

**(2001) 6 Supreme Court Cases 704 Full Bench in the case of P.K. Pradhan V/s. State of Sikkim**

**(1996) 6 Supreme Court Cases 634 in the case of T.C. Bhadrachalam Paperboards and Anr. V/s. Mandal Revenue Officer, A.P. And others.**

6. It is further submitted that when the inspecting authority visited the hospital in the presence of both the accused on 27.11.2004, there was no sonography machine found. There was no other equipment for sex determination found on the spot, as can be seen from Exhibit P-6, panchanama. The said spot did not show any pathology or general consultation for sex determination or any boards to that effect. Therefore, there is nothing for the inspecting authority to come to a conclusion that this was an unauthorized Center.

7. The third point of argument is that this being a warrant triable case, there was no evidence recorded prior to framing of charge and hence, the procedure has not been followed.

8. At Exhibit P-24 is a letter dated 19.11.2004 sent by the appellant/ accused no. 1 to the Editor informing him that it was a mistake on the part of the person communicating to him about forwarding the advertisement in the magazine, as she desired to put **"Mul Hava?" ("Want a child?"**). There was absolutely no intention of forwarding the advertisement of **"Mulga Hava?" ("Want a male child?"**). Similarly, the appellant/ accused no. 1 had been forwarded an advertisement with the said magazine regarding treatment of hair fall etc. Therefore there is no mens-rea on the part of this appellant/ accused no. 1.

9. Learned Advocate for the appellant/ accused no. 1 has taken me through the evidence of the witnesses and has stressed on the point that the mistake of giving an advertisement as "Mulga Hava?" is admittedly of Mr. Sunil Patni and he has expressed that there was a communication gap. It is therefore prayed that the Trial Court has wrongly arrived at a conclusion of convicting the present appellant (accused no. 1). Hence, it prayed that the appeal be allowed.

10. Learned Advocate for the Corporation has argued that the Trial Court has rightly convicted the present appellant/ accused no. 1. It is a crime against women and hence it should not be taken lightly. The notification ought not to be construed strictly in such offence. However, Learned Advocate has demonstrated that on the date of filing of the complaint i.e. 13.12.2004, the Learned Magistrate was on leave and hence he took the cognizance of the complaint filed, on which is certainly after the Gazette Notification dated

17.12.2004 Therefore, the complainant Dr. Mr. K.S.Banavalikar did have the appropriate authority assigned to her by the said notification.

11. Learned Advocate for the Corporation has relied upon the following rulings.

i .**2009 ALL MR (Cri.) Journal 129 (Gujarat High Court Full Bench) in the case of Suo Motu V/s. State of Gujarat.**

It is held in the same ruling that, **"Court can take cognizance on a complaint made by any officer authorised in that behalf by the Appropriate Authority".**

**ii. High Court of Punjab and Haryana Civil Writ Petition 20635 of 2008 dated 10.02.2010.** It is held in the same ruling that, **"If it is seen to be irregular, judging by the importance of the legislation and the despicable social evil that it seeks to abate, an interpretation shall be so made that a criminal process began in right earnest on a complaint by a person whose authority was initially suspect but whose authority came to be ratified by subsequent conduct is not thwarted"**.

**iii. High Court of Punjab and Haryana, Chandigarh, Civil Writ Petition 18365 of 2009 decided on 03.02.2010 in the case of Dr. Mrs. Sudha Samir V/s. State of Haryana and ors.**

iv. **High Court at Kerala in Criminal Misc. Application No. 4414 of 2008 decided on 01.08.2006**

**v. High Court of Delhi in the case of Dr. Sunil Fakay V/s. Government of NCT of Delhi, Directorate of Family Welfare and Ors. decided on 10.01.2011.**

**vi. High Court of Punjab and Haryana in Civil Writ Petition No. 15152 of 2007 decided on 07.07.2009.**

12. Secondly, it was pointed out that the evidence was recorded before charge, as demonstrated from page 22 from the Record and Proceeding.

13. On merits it is submitted that there is evidence on record to show that the appellant/ accused no. 1 had given an advertisement of "Wanted a male child?" ("Mulga Hava?"). The said fact is corroborated by the testimony of P.W.4. The examining of D.W.2 Dr. Sunil Patni is a frivolous exercise of the defence, as once the matter has been published "Want a male child?", the appellant/ accused no.1 has resorted to a futile exercise of changing her version as the "Mul Hava?" or "Want a child?". In the corrigendum given by the appellant/ accused no. 1, she has not mentioned the name of D.W.2 Mr. Sunil Patni that it was due to his mistake that such an error happened in the advertisement.

14. Exhibit P-30 is a copy of the letter purportedly addressed by this appellant/ accused no. 1 to the Additional Director, Health Services, Pune regarding her said mistake. However, there is nothing to show that she had served this letter upon the said authority on 07.12.2004. There is no stamp of the said office. Therefore the attempt of this appellant/ accused no. 1 to show that there was no mens-rea involved in committing this offence, has failed.

15. The evidence of D.W.2 shows that he was a got up witness. He has said that the appellant/ accused no. 1 purchased the stamp paper in 2008. D.W.2 admits that he did not sign on the register of the notary so also the contents of the notarised documents were supplied by the appellant/ accused no. 1 to the typist. Learned Advocate for the BMC has relied upon the ruling of the **Hon'ble Bombay High Court reported in 2009 (2) Mh.L.J. 855 in the case of H.K.Taneja and Ors. V/s. Bipin Ganatra and Ors.**

16. It is further submitted that the defence of the appellant/accused no. 1 that the mistake in words was committed by miscommunication on telephone has not even been put to P.W.2. It has come in the evidence that the appellant/ accused no. 1 had given the advertisement herself. It is therefore argued that the Learned Trial Court has rightly convicted appellant/ accused no. 1. Hence, it is prayed that the Judgment and Order of the Learned Trial Court be confirmed.

17. Learned Advocate on behalf of the appellant/ accused no. 1 vehemently repeated his argument as argument in re-joinder and has formulated the following four points.

(1) Authority of the complainant is under challenge.

(2) There is no valid notification.

(3) No machine for foetal sex detection was found on the hospital, as can be seen from the panchanama.

(4) Steps were taken by the appellant/ accused no. 1 to rectify the printing mistake. Hence there is no mens-rea.

18. Following points arise for the determination of this Court.

POINTS FINDING

1) Whether the prosecution has proved that the appellant/ accused no. 1 published an advertisement in a weekly magazine 'Lokprabha' of November and December, 2004 about Selection of Sex of foetus, preconception and has contravened 522 of the P.N.D.T. Act of 1994 (amended in 2003) and has thereby committed an offence punishable under section 23 of the **P.N.D.T. Act 2003 ?**

**In the Affirmative.**

2a) Whether the appellant/ accused no. 1 had registered the Nursing Home or Clinic in 'Form A' and by not doing so, she had contravened the provisions of P.N.D.T. Act as per Rules made thereunder vide Rule 4 (1) and 4 (2) of the **P.N.D.T. Act 2003?**

**In the Affirmative.**

2b) Whether the appellant/ accused no. 1 failed to display the duplicate certificate of registration in 'Form B' to conduct Pre-natal Diagnostic Test Procedures and thereby she had contravened the provisions of Rule 6 (2) of the **P.N.D.T. Act?**

**In the Affirmative.**

2c) Whether the prosecution has proved that the appellant/ accused no. 1 failed to maintain a register showing particulars on the basis of which such patients reported for counseling and has thereby contravened the provisions of Rule 9(1) and has thereby committed an offence punishable under Section 23 of the **P.N.D.T. Act, 1994?**

**In the Affirmative.**

3) What Order in appeal? **As per final order.**

**EVIDENCE**

19. The Record and Proceeding shows that the charge was framed against the present appellant/ accused no. 1 and another on 18.02.2008 under Section 22 (3), rules 4 (1) (2), 6 (2) and 9 (1) of the Pre-natal Diagnostic Techniques Act amended as Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 2003. The present accused pleaded not guilty and claimed to be tried. The complainant Dr. Kanchan S. Banavalikar has been examined as P.W.1 by the prosecution. She visited the hospital of accused no. 2 on 27.11.2004 along with her assistant. They inspected the Nursing Home and found there was no board stating that there will be no detection of sex of the child nor they found any registration certificate in the clinic. No register was maintained about the cases in the said premises. She recorded the statement of accused no. 2, which is on record at Exhibit P-5. Panchanama was carried out of the said hospital, which is at Exhibit P-6. Accused no. 1 gave her statement, which is at Article 'B'. She further made inquiry with the publisher and brought a copy of the notification. It is at Article 'C'. The Deputy Officer Health has directed them to take action against this accused, as there was an advertisement published in Lokprabha (weekly) on November, 2000 regarding selection of sex of the foetus.

20. The authorization has been given to her by the Deputy Municipal Commissioner Shri. Doctor and the Executive Health Officer Shri. Thanekar, which is at Exhibit P-7. The Gazette is at Exhibit P-8.

21. The complainant was cross examined on 22.10.2007 by putting one question stating that a false case had been filed against the accused and that she had not committed any offence.

22. After framing of the charge, the complainant P.W.1 was further cross examined on 01.09.2008.

23. P.W.2 is Dr. Dhirubhai Gulabbhai Rathod, who had accompanied P.W.1 to Shree Maternity and Nursing Home, Shivaji Park, Dadar (W) for inspection. P.W.1 prepared the panchanama. It is at Exhibit P-6. The only question put to this witness on behalf of the present appellant/ accused no. 1 is that he was present in the Court Hall when evidence of P.W.1 was recorded.

24. P.W.3 is one Ramkrishnan T.K. Kunhappan Kunnath. He has deposed that he is a Stenographer with the publisher, who published the magazine named 'Lokprabha' in Marathi. His Director has delegated the powers to depose on behalf of the company. The authority letter is at Exhibit P-16. He has produced the original 'Lokprapha' magazine dated 19.11.2004, which is at Exhibit P-17. He has stated the contents

of the advertisement were given in the name of the present appellant (accused no. 1) regarding "Want a male child?". The same advertisement is said to have been released on 03.12.2004 on page 41, which is on record at Exhibit P-18. Thereafter, on 31.12.2004 appellant/ accused no. 1 published one advertisement with a slight change "want a child?". It is at Exhibit P-19.

25. It is deposed further that B.Y.Padhye Publicity Pvt. Ltd. referred all the three advertisements. In his cross examination he has denied that the said agency of Padhye opposed for releasing the said advertisement by showing letter dated 22.11.2004 and yet the publisher released the issue.

26. P.W.4 is one Vijay B. Padhye working as Managing Director for P.Y.Padhye Publishers Pvt. Ltd. He has deposed that the appellant approached him with the request to release the advertisement in various news papers. She is his client since last 15 years. In the first week of October, 2004 the appellant/ accused no. 1 had requested him to release the advertisement in a weekly magazine 'Lokprabha' for November, December and January. She used to provide Desk Top Printing (DTP) material. He sent it to the publisher of 'Lokprabha' magazine. At Exhibit P-18 is the same DTP material by Smt. Chhaya to him, which he referred for publication which was put on 19.11.2004 as well as 03.12.2004. At Exhibit P-20 is the corrigendum published by the 'Lokprabha' Magazine on the basis of DTP material provided by Smt. Chhaya to him which was forwarded to the publisher of 'Lokprabha' magazine. He has received charges for the bills issued to Smt. Chhaya for the advertisement at Exhibit P-18, P-19 and P-20 and she made the payment of Rs. 4,000/- (Rupees Four Thousand Only) on 25.11.2004.

27. In his cross examination this witness has deposed that he received one letter from the appellant on 20.11.2004 in which she is said to have pointed out the mistake in printing. The said letter is at Exhibit P-24. On receiving it, he informed the publisher. The said letter is at Exhibit P-25. Thereafter the advertisement was dropped by the publisher.

28. The statement of the accused came to be recorded under Section 313 of the Criminal Procedure Code. The appellant/ accused no. 1 has admitted question no. 13 that in the evidence of P.W.3 it has come that on 31.12.2004 one advertisement came to be released in 'Lokprabha'. She has answered it as **"true"**. She has also **admitted that she had given the information to P.W.4 for publishing the said material**.

29. The appellant/ accused No. 1 Mrs. Chhaya Rajesh Tated has deposed as D.W.1. It is her evidence that she is a graduate in Homeopathy and was practicing it. She was supplying information of advertisement to one Sunil Patni, who was supplying the script to D.T.P. (Desk Top Publisher) after which it was given to Shri. Padhye (P.W.4). She, herself had not given any type of information to 'Lokprabha' magazine or Sunil Patni to release the advertisement as per Exhibit P-17. She was intending to release the advertisement for providing the treatment on fertility but Sunil Patni released an advertisement as Exhibit P-17("want a male child?"). Upon coming to know about the said advertisement, she informed Shri. Padhye telephonically and afterwards by letter. She also wrote a letter dated 07.12.2004 to Additional Director, Health Department, Pune. It is produced on record at Exhibit P-30. She has said that she is not responsible for releasing the advertisement.

30. She was cross examined on behalf of the complainant. She has admitted having purchased the stamp paper, which came to be used for preparing the affidavit of Sunil Patni. She admits the letter at Exhibit P-30 written by her to the Additional Director, Health Department, Pune does not bear the acknowledgment with his seal. Sunil Patni is said to have made the affidavit on 15.07.2008. The date however, appears on it as 15.07.2006 in the affidavit. She has denied that she was directly providing DTP material to P.W.4.

31. D.W.2 is one Sunil Kumar Anupchand Patni. He claims to know Smt. Chhaya. He is a Cement Merchant residing at Aurangabad. Smt. Chhaya was giving him the work of advertisement whenever he was coming to Mumbai and he was supplying the material to Shri. Padhye. He admits having supplied the script of Exhibit P-17. In his cross examination he has deposed that Smt. Chhaya was giving him 100-200 rupees whenever she told him to give the advertisement. He was getting the DTP work done from Kalyan Typewriting Institute and then handing it over to Padhye Publication. He does not know the long form of DTP nor does he know the process.

32. In his further cross examination he has deposed that he purchased the stamp paper from Aurangabad and used it for his affidavit, which was prepared as per the instructions of Dr. Tated. He did not narrate the contents to the typist. He does not know any notary. He put his signature on the affidavit on the request of Dr. Tated. Dr. Tated paid Rs. 150/- towards notary fees. He has admitted that Dr. Tated herself prepared an affidavit and obtained his signature over it.

**REASONING AS TO POINT NO. 1.**

33. Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) (Regulation and Prevention of Misuse) Amendment Act 2003 will hence forward be referred to as the "said act" for the sake of brevity. Section 22 of the said Act reads as follows:

> **S.22. Prohibition of advertisement relating to Preconception and Pre-natal determination of sex and punishment for contravention -**
>
> **(1) No person**, *organization, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including clinic, laboratory or Centre having ultrasound machine or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus or sex selection* **shall issue, publish, distribute, communicate** *or cause to be issued, published, distributed or communicated* **any advertisement, in any form**, *including Internet,* **regarding facilities of pre-natal determination of sex or sex selection before conception available at such centre**, *laboratory,* **clinic or at any other place.**
>
> **(2) No person** *or organization including Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic* **shall issue, publish, distribute, communicate** *or cause to be issued, published, distributed or communicated* **any advertisement** *in any manner regarding pre-natal determination or* **pre-conception selection of sex by any means whatsoever, scientific or otherwise.**

(3) Any person who contravenes the provisions of subsection (1) or sub-section (2) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees.

Section 23 of the Act reads as follows:

23. Offences and penalties:-

*(1) Any medical geneticist, gynaecologist, 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 this Act or rules** *made thereunder shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.*

Rule 4 (1) and Rule 4 (2) reads as follows:-

4. **Registration of Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic and Imaging Centres** :

*(1) An application for registration shall be made to the Appropriate Authority, in duplicate, in Form A, duly accompanied by an Affidavit containing -*

*(i) an undertaking to the effect that the Genetic Centre/ Laboratory/ Clinic / Ultrasound Clinic/ Imaging Centre/ Combination thereof, as the case may be, shall not conduct any test or procedure, by whatever name called, for selection of sex before or after conception or for detection of sex of foetus except for diseases specified in Section 4 (2) nor shall the sex of foetus be disclosed to any body; and*

*(ii) an undertaking to the effect that the Genetic Centre/ Laboratory/ Clinic/ Combination thereof, as the case may be, shall display prominently a notice that they do not conduct any technique, test or procedure, etc. by whatever name called, for detection of sex of foetus or for selection of sex before or after conception.*

*(iii) The Appropriate Authority, or any person in his office authorized in this behalf, shall acknowledge receipt of the application for registration, in the acknowledgment slip provided at the bottom of Form A, immediately if delivered at the office of the Appropriate Authority, or not later than the next working day if received by post.*

**Rule 6 (2) of the Act reads as follows:**

**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 prenatal diagnostic test or procedures, depending on the availability of place, equipment and qualified employees, and standards maintained by such laboratory or clinic.*

*Rule 9 (1) reads as follows:*

**Maintenance and preservation of records** -

*Every Genetic Counselling Centre, Genetic Laboratory, 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 counseling, 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 counseling, procedure or test.*

34. The prosecution has brought on record unchallenged evidence by way of Exhibit P-17 and P-18 which are in Marathi and part of the advertisement published in the Lokprabha Magazine.

Advertisement dated 19.11.2004 and 03.12.2004:-

In Marathi Translation in English

**Want a male child?**
**Preconception**
Special Treatment! Every 2nd, 4th Sunday
**(Time 12 to 6) Dr. Chhaya Tated (Foreign Returned),**
Shree Nursing Home, Sena Bhavan, Dadar (W), Mumbai
Monday, Tuesday – Pirbazar, 2341180

35. This advertisement appeared on 19.11.2004 and again on 03.12.2004. However, on 31.12.2004 the said advertisement was changed to "want a child?", as per Exhibit P-19.

Advertisement (Exhibit P-19) dated 31.12.2004 :-

English Translation

Corrigendum Want a child? Instead of which it was wrongful printed WANT A MALE CHILD? Hence, those who are not able to conceive or cannot retain foetus for a months, special preconception treatment will be given by Dr.Chhaya Tated (Homeopath ) 2nd and 4th Sunday at Mumbai. Mon- Tues at Aur'bad 2341180.

36. The authority of Dr. Banavalikar has been challenged stating that she was authorized by the order of the DMC Zone II (Exhibit P-7). However, the notification was published in the Gazette of the State Government on 23.12.2004, whereas the complaint was lodged on 13.12.2004 and the inspection of the site was taken on 27.11.2004. The argument advanced on behalf of the appellant is that the authority of the complainant could not have been exercised prior to the publication in the Government Gazette and therefore on this count itself the trial ought to be vitiated for want of authority of the complainant. For this purpose, the Learned Advocate for the appellant has relied upon the ruling of the Hon'ble Bombay High Court in the case of Dr. Aniruddha Malpani that the cognizance could not have been taken without the complainant having proper authority. In the said ruling it is clarified that this decision is not an expression of opinion on the remedy, as may be available to respondent no.1 or any other authorized person after publication of the notification in the official Gazette.

37. Moreover, under the amended act called Pre-Natal Diagnostic Techniques Act of the year 2002 and 2003 (PNDT Act) was originally called The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994 (PC PNDT Act). The purpose of this Act was for;

*"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 thereto."*

38. In view of the aforesaid, the arguments advanced on behalf of the complainant that although the complaint was filed on for whatever reasons, cognizance came to be taken on 10.01.2005 which is after the publication in the Government Gazette on 23.12.2004. The authority was given to the complainant (competent authority) by the Dy. Municipal Commissioner (Exh.7) by virtue of Gazette notification Exh. 8 dated 27-12-2001 and 23-12-2004 issued by the Public Health Department giving power under the said Act to the Municipal Officer of each Municipal Ward office. Hence, Dr. Banavalikar, the complainant is properly authorized under the original Act of 1994. In view of the fact that the authority reposed in the complainant Dr. Banavalikar by G.R. To the Notification in the Government Gazette on 23-12-2004 and the said inspection in Shree Maternity and Nursing Home was carried out on 27-11-2004, I find that action taken by the competent authority pursuant to the notification will have to be accepted pursuant to the authority granted to her by the Dy. Municipal Commissioner (Exh.7) pursuant to the Government notification Published in the Gazette on 27-12-2001. Above all, I find no challenge to the notifications published in the Gazette. In view thereof, the rulings on the point of sanction submitted by and on behalf of the appellant, particularly in respect of section 197- of the Cri. P.c. Would not be applicable to the present case. I therefore, give a finding that the complainant is the competent authority to take action against the said act.

39. It is proved that this Appellant/ accused no. 1 was advertising in a Marathi magazine named **'Lokprabha',** that she was available for consultation at Preconception stage in case anyone was interested in having a male child, on 2nd and 4th Sunday of every month at Shree Maternity and Nursing Home, Dadar.

40. Secondly, the point regarding the publication is provided by Exhibit P-17 and P-19 which are on record. It is admitted by the accused that she was giving six (6) advertisements at a time. Prosecution witnesses 3 has confirmed the said fact that the advertisement "Mulga Hava?" was published. He has denied knowledge that the said advertisement had been objected to by a letter from the advertising agency run by P.W.4. The accused has come out with a defence that she had not approached Padhye Publishers Pvt. Ltd. with an advertisement and that she had telephonically communicated the same through D.W.2 Sunil Patni, who was bringing her advertisement to the agency run by P.W4. However, from the evidence of P.W4 it can be seen that the accused Smt. Chhaya had requested him to release the advertisement for the month of November, December and January, 2004 and after she was providing the DTP material after which, he was sending it to 'Lokprabha' Magazine. It is his evidence that she has paid him Rs. 4,000/- by cash for which he has produced his accounts at Exh. P-23. There is no challenge to the same on behalf of the accused.

41. I therefore find that the accused was herself giving the concerned advertisement to the publicity agent, who in turn handed over the DTP material given by her, to the publishers of the 'Lokprabha' Magazine, wherein it was published.

42. It is to be noted that the accused in her defence has come out with a case that D.W.2 Sunil Patni was handing over the advertisement to the publisher. The evidence of P.W.4 has totally negated the same. Further the evidence of D.W.2 also shows that he is a got up witness in view of the fact that his affidavit was prepared on the instructions given by the present appellant/ accused no. 1 and she had taken him D.W.2 to sign the said affidavit and had obtained his signature. Therefore the evidence of Sunil Patni D.W.2 shows that he was used by the appellant/ accused no. 1 to try to prove that the advertisements were given through him to the publisher and there was miscommunication in respect of the words "Mulga Hava?" ("Want a male child?") and "Mul Hava?" ("Want a child?").

43. Another attempt made by the appellant/ accused no. 1 is vide her letter produced on record to the Health Officer, Pune trying to give her explanation regarding the said advertisement. However, there is nothing to show that the said letter was acknowledged by the authority. Hence, that letter at Exhibit P-30 can be ignored and disbelieved. Appellant has not examined the Health Officer. In any event, the appellant is seen to be trying to give explanation of her innocence, after coming to know that she had been caught in her act of publishing the advertisement of sex selection. All her defence is based on back -tracking from her said act, which cannot be accepted.

44. Last but not the least, from the accused statement of the appellant/ accused before the Trial Court vide question 13 and 14, it can be seen that she has admitted that the said advertisement came to be released in the 'Lokprabha' Magazine on 31.12.2004 upon her instructions given in the month of October, 2004 for releasing said advertisement in November, December and January and that she had given such information, has been admitted by her.

45. I further find that in order to give herself a clean chit, she has apparently concocted the story that there was miscommunication while she telephonically forwarded the advertisement through Sunil Patni and for the reasons aforestated her attempt to shirk her responsibility, which once she has admitted in her accused statement, the exercise has become futile, as there are contradictions in the versions of P.W.3, P.W.4 on one hand and D.W.2 on the other hand in the matter of who was taking the matter to be published, it surfaces that the appellant herself was giving the matter to be published and not through Patni (DW 2) who is proved to be a got-up witness.

46. In view of the aforesaid evidence proved by the prosecution, against this appellant I find that the appellant/ original accused no. 1 has committed an offence by publishing an advertisement regarding facility of Pre-Conception and Pre-Natal choice of male child (Sex Selection) before Conception in such Center or any other place, as defined under Section 22 of the said Act. I find that the appellant/ accused no. 1 has released such advertisement as shown in the box, which is herein above and reproduced here below for the sake of clarity, at the cost of repetition.

**Want a male child?**

**Preconception**

Special Treatment! Every 2nd, 4th Sunday (Time 12 to 6) **Dr. Chhaya Tated (Foreign Returned)**, Shree Nursing Home, Opposite Sena Bhavan, Dadar (W), Mumbai 24464985 Monday, Tuesday - Pirbazar, Aurangabad 2341180.

I therefore find that appellant/ accused no. 1 has contravened the provisions of Section 22 of the said Act and hence she has rendered herself liable for punishment of imprisonment for a term, which may extend to three (3) years and fine which may extend to Rs. 10,000/- **Hence, I answer point no. 1 in the Affirmative.**

REASONING AS TO POINT NO.2(a),(b)(c).

47. As the evidence concerning the points raised is co-related, in order to avoid repetition, I am giving my reasoning to all the points simultaneously and the findings will be given to each point (No.2a, 2b and 2c). The complainant (P.W.1) and another (P.W.2) prepared a panchanama (Exhibit 6) of the spot on 27.11.2004, during the visit for inspection of the Shree Hospital where this Appellant was consulting on 2nd and 4th Sunday of a month (as advertised). There was no sonography machine, Registration Certificate or any register found at the spot, containing the particulars of the persons who attended such genetic counselling or treatment as advertised.

48. It is contended by the prosecution that the appellant/accused no. 1 did not have any certificate of registration granted by the Appropriate Authority, a copy of which ought to have been displayed by the Registrar, Genetic Counselling Centre or Genetic Clinic at a conspicuous place, as contemplated by Rule 6 (2) of the said Act.

49. Rule 4 (1) of the said Act pertains to the concerned person giving undertaking to the Appropriate Authority to the effect that he or she was not conducting any test or procedures by whatever name called, for selection of sex before or after conception or for detection of sex of the foetus. It is provided in Rule 4 (2) that the Appropriate Authority shall acknowledge receipt of the application for said registration.

50. Lastly, Rule 9 (1) provides that such Centre shall maintain a register showing the names and addresses of men or women subjected to Pre-natal Diagnostic Procedures.

51. However, the fact that the appellant/ accused no. 1 published material in the local weekly named 'Lokprabha' in respect of Pre-conception Procedures for obtaining a male child by Homeopathy and Consultation will certainly contravene the Provisions of Section 22 of the said Act and will attract the offence punishable under Section 23 of the said Act, is already held by me in my reasoning as to point no. 1. Thereafter I will scrutinise if this appellant had followed the rules of Regulation and Prevention of Misuse.

52. The appellant had not observed the PCPNDT rules as amended in 2003 under the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994. The notification dated 23-12-2004 is in respect of the same Act. Even if the act and Rules are amended in 2002-03, the legislative intent is the same.

**Rule 4 (1) (ii)** She had not given an undertaking to the appropriate authority that she will display a notice that she does not conduct any technique or procedure for detection of foetal sex or selection of sex before conception.

**Rule 6 (2)** Appellant had not obtained a Certificate of Registration from the Appropriate Authority and had thus not displayed a copy of it on a conspicuous place in the place of business.

**Rule 9 (1)** Appellant had not maintained a Register sharing the names and addresses of the men or women who obtained pre-natal diagnostic tests women who were obtaining counselling as well as the names of the father or spouse and the first date on which they had reported for counseling.

53. From the evidence on record, I find that the appellant/accused no. 1 has not complied with the aforesaid rules 4 (1) (ii), 6 (2) & 9 (1) and has thus committed the offence punishable under the provisions of Section 23 of the **PCPNDT Act 1994** as amended. Hence, **In answer point no. 2a, 2b and 2c in the Affirmative.**

**As to Point No.3:**

54. Upon perusing the impugned Judgment and Order, I find that the point regarding the sanction has been properly considered by the Learned Trial Court. I have given a finding that the "Competent Authority" initiated action before the Ld. Trial Court, pursuant to the Government Notification in the

Gazette dated 27.12.2001 and I have come to a conclusion that the offence punishable under Section 23 of the said Act has been proved by the prosecution. However, the Learned Trial Court has rightly considered the date of publication of the notification of the Government Gazette at Exhibit P-8 and the action taken by the competent authority prior to the notification dated 23.12.2004 will have to be considered in view of the fact as to whether P.W.1 had the authority to carry out the inspection at the premises on 27.11.2004. Therefore I find that the reasoning given by the Learned Trial Court in respect of Section 23 of the said Act and contravention of Rule 6, 4 and 9 of the Act will be sustainable. The impugned Judgment is found to be properly reasoned and hence, will not require any interference. However, maximum sentence of S.I. of 3 years on each count would be appropriate as the offence of providing services for preconception selection of sex in the present modern/advanced times, by contravening the provisions of this special act which is applicable to this whole Nation is to be condemned and should also send a message to the Society at large, as the delay in the system also defeats justice. Deterrence for such offences of giving priority to select a male child at the preconception stage having incidental social repercussions, is the need of the hour.

55. In view of the aforesaid discussion, the Judgment and order will have to be maintained and confirmed. Consequently, the appeal will have to be dismissed. Hence I pass the following order.

**ORDER**

1. Criminal Appeal No. 530 of 2009 is dismissed.
2. The Judgment and Order passed by Learned Metropolitan Magistrate, **41st Court, Shindewadi, Dadar, Mumbai** on 14.08.2009 in **C.C. No. 10169/ *MS/2004** is hereby maintained and confirmed.
3. The Appellant/ (Accused no. 1) Dr. Mrs. Chhaya Tated is convicted for the offence punishable under the following Act and Rules as follows:

   **The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994, The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 (14 of 2003)along with The Pre-conception and Pre-natal Diagnostic Techniques (prohibition of Sex Selection) Rules, 1996 as amended by The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Rules, 2003 (referred as the 'said Act' and 'said rules')**

   i). Appellant / (accused no. 1) is hereby convicted for the offence punishable [under Section 22 (3) for contravening the provisions of Section 22 (1) 2)] and for the offence punishable under Section [23 for contravening the provisions of Rule 4(1) 6 (2), 9(1)] of the said Act.

   ii). Appellant/ (accused no. 1) is hereby sentenced to suffer **Rigorous Imprisonment for three (3) years** for the offence punishable under Section

**22(3) for contravention of Section 22** of the said Act and is further ordered to pay **fine of Rs. 10,000/-** (Rupees Ten Thousand Only) **in default of which, she shall suffer Rigorous Imprisonment for three (3) months.**

iii). Appellant/ (accused no. 1) is hereby sentenced to suffer **Rigorous Imprisonment for three (3) years** for the offence punishable under **Section 23** of the said Act and is ordered to pay **fine of Rs. 10,000/-** (Rupees Ten Thousand Only) **in default of which, she shall suffer Rigorous Imprisonment for three months.**

iv). Appellant/ (accused no. 1) is convicted for the offence punishable under **Section 23 for contravening the provisions of Rule 6 (2) of the said rules,** but no separate sentence passed for the same.

v). Appellant/ (accused no. 1) is hereby sentenced to suffer **Rigorous Imprisonment for three (3) years** for the offence punishable under **Section 23 for contravening the provisions of Rule 9 (1)** of the said Rules is ordered to pay **fine of Rs. 10,000/-** (Rupees Ten Thousand Only) **in default of which, she shall suffer Rigorous Imprisonment for three months.**

**4.** The Bail bond of the appellant/ (accused no. 1) Dr. **Mrs. Chhaya Tated stands cancelled.**

5. Appellant shall surrender before the Trial Court within one week from today for execution of the sentence. The order to pay the fine amount is said to be complied.

6. Issue NBW against the appellant / (accused no. 1) Dr. Chhaya Tated. She be produced before the Learned Trial Court for execution of the sentence.

7. All the miscellaneous applications are disposed off.

8. Record and Proceedings be sent to the Trial Court forthwith, as the appeal has been disposed off.

Dated: 29.09.2011 (Dr. Laxmi P. Rao)
Addl. Sessions Judge For Gr. Mumbai
Dictated on: 09.09.2011
Transcribed on: 20.09.2011
Signed by HHJ on: 30.09.2011

**Case 3: Conviction of Dr. Pradeep Ohri, Punjab**

Punjab-Haryana High Court
Dr. Pradeep Ohri vs State Of Punjab And Anr. on 20 December, 2007
Equivalent citations: AIR 2008 P H 108

Author: S K Mittal
Bench: S K Mittal, K Puri
JUDGMENT Satish Kumar Mittal, J.

1. The petitioner, who had obtained the M.B.B.S. degree in the year 1990 and got himself registered as medical practitioner by the Punjab Medical Council (hereinafter referred to as 'the Medical Council') in the year 1991 and subsequently also obtained the MD degree from Guru Nanak Dev University in the year 1996, has filed this petition challenging the order dated 7-11-2005 (Annexure P-4) passed by the Medical Council removing his name from the State Medical Register for a period of five years under Section 23(2) of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as 'the PNDT Act, 1994') in view of his conviction under Section 23(1) of the said Act. He has also challenged the subsequent order dated 21-8-2006 (Annexure P-5) whereby the Medical Council re-affirmed its earlier decision to remove the name of the petitioner from the State Medical Register.

2. In the present case, the petitioner was running Satyam Diagnostic Centre inside Ohri Nursing Home. On July 9, 2002, an inspection of the said ultrasound centre viz. Satyam Diagnostic Centre was made by the District Medical Authorities. During the inspection, it was found that the petitioner had violated Section 5(a)(b)(c) of the PNDT Act, 1994 and Rules 9(1)(4) and 10 of the Preconception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (hereinafter referred to as 'the Rules'). On a complaint under the aforesaid provisions, he was prosecuted and convicted under Section 23(1) for the offence committed under Section 5(a)(b)(c) of the PNDT Act, 1994 and Rules 9(1)(4) and 10 made there under. But, he was released on probation for a period of one year under Section 4(1) of the Probation of Offenders Act, 1958 vide judgment dated September 24, 2004 delivered by the Chief Judicial Magistrate, Amritsar. Since the petitioner was released on probation and not sentenced to any imprisonment, he was legally advised that it was not necessary for him to file an appeal against the conviction. Subsequently he was advised that he should contest the conviction by way of an appeal and accordingly he filed an appeal before the Sessions Court, Amritsar along with an application under Section 5 of the Limitation Act for condonation of delay in filing the appeal.

3. It is pertinent to mention here that against the order of release of the petitioner on probation, the State filed a revision petition in the High Court seeking enhancement of punishment by way of imposition of a sentence of imprisonment. We have also been informed that the appeal filed by the petitioner before the Sessions Court has now been transferred to this Court and the said appeal as well as the revision are still pending in this Court.

4. After more than a year of his conviction by the trial Court vide the above-said judgment, the petitioner's name was removed from the State Medical Register by the Medical Council under Section 23(2) of the PNDT Act vide order dated 7-11-2005. The petitioner has challenged this order in this petition.

5. Before dealing with the controversy, it will be necessary at this stage to set out the provisions of Section 23 of the PNDT Act, 1994 where under the action has been taken by the Medical Council against the petitioner, which are reproduced below:

23. Offences and penalties.--(1) Any medical geneticist, gynaecologist, 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 this Act or rules made there under shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.

(2) The name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the Court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.

(3) Any person who seeks the aid of any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or Ultrasound Clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging specialist or registered medical practitioner or any other person for sex selection or for conducting pre-natal diagnostic techniques on any pregnant woman for the purposes other than those specified in Sub-section (2) of Section 4 he shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees.

(4) For the removal of doubts, it is hereby provided that the provisions of Sub-section (3) shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection.

6. The petitioner has challenged the aforesaid orders of the Medical Council on the following grounds:

(a) that, completely without prejudice to the grounds (b) to (d) below, the removal of the name of the petitioner from the State Medical Register for a period of five years following his conviction for an offence or offences allegedly committed on 9-7-2002 is squarely hit by the inviolable constitutional prohibition against retrospective or ex post facto action imposed by Article 20(1) of the Constitution. It is submitted that while removing the petitioner's name from the State Medical Register for a period of five years, the Medical Council has purported to act under Section 23(2) of the PNDT Act, 1994 as amended by the PNDT Amendment Act, 2002 (Act No. 14 of 2003) notified w.e.f. 14-2-2003. Prior to such amendment, Section 23(2) reads as under:

The name of the registered medical practitioner who has been convicted by the Court under Sub-section (1) shall be reported by the Appropriate Authority to the respective State Medical Council for taking necessary action including the removal of his name from the register of the Council for a period of two years for the first offence and permanently for the subsequent offence.

Following the PNDT Amendment Act, 2002 notified w.e.f. 14-2-2003, the period of two years for the first offence has been enhanced to five years. It is submitted that even if for the sake of arguments it is presumed that all other conditions for the applicability of Section 23(2) of the PNDT Act, 1994 to the petitioner are satisfied, the infliction of the enhanced penalty of removal for five years instead of two on the petitioner by purporting to apply the amended provisions of Section 23(2) of the PNDT Act (notified w.e.f. 14-2-2003) in respect of an offence or offences allegedly committed on 9-7-2002 is clearly illegal and directly hit by the prohibition under Article 20(1) of the Constitution.

(b) Though the petitioner has been convicted for violation of certain provisions of the PNDT Act, 1994 and the Rules made there under and he could have been punished with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees, but the Chief Judicial Magistrate instead of awarding the sentence, released the petitioner on probation under Section 12 of the Probation of Offenders Act. It is argued that it is settled law (ever since the judgment of the Apex Court in Divisional Personnel Officer, Southern Railway v. T.R. Challappan , which continues to hold the field on this point despite being overrules on another point in Tulsi Ram Patel's case), that release on probation in lieu of sentence does not erase the stigma of conviction, or does not absolve a Government servant/ employee of his liability to departmental punishment for misconduct, but such punishment shall not suffer a disqualification, if any, attaching to a conviction of an offence under such law in view of Section 12 of the Probation of Offenders Act. Equally, it is settled law that Section 12 does apply to a disqualification automatically attaching to a conviction and provided by that very law which prescribes the offence and punishment there for. It is argued that this is precisely the situation in the case of the petitioner. The removal of his name from the State Medical Register on his conviction under Section 23(2) of the PNDT Act, 1994 is directly and automatically flowing from his conviction under the same provisions i.e. Section 23(1) of the PNDT Act, 1994. Therefore, it is argued that the respondent-Medical Council has acted illegally and without jurisdiction while ordering removal of the petitioner's name from the State Medical Register on the ground of his conviction under the PNDT Act which is grossly in violation of Section 12 of the Probation of Offenders Act, which reads as under:

12. Removal of disqualification attaching to conviction.--Notwithstanding anything contained in any other law. a person found guilty of an offence and dealt with under the provisions of Section 3 or Section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law:

Provided that nothing in this section shall apply to a person who, after his release under Section, is subsequently sentenced for the original offence.

In this context, it is further argued that while both the Probation of Offenders Act and the PNDT Act, 1994 are Central laws, there is no provision in the PNDT Act which ousts or excludes the applicability of the Probation of Offenders Act or any provision thereof; and secondly no general non obstante clause under the PNDT Act with reference to any other law. On the other hand, not only Section 12 of the Probation of Offenders Act but both Sections 3 and 4 thereof as well (both of which are referred to in Section 12)

contain a general non obstante clause with reference to any other law. In support of his contention, learned Counsel for the petitioner has relied upon the decision of the Supreme Court in Hart Chander v. Director of School Education, , whereby while upholding the dismissal from service of the appellant, convicted under Section 408 of the I.P.C. but released on probation, the Supreme Court has held as under:

7. In our view, Section 12 of the Probation of Offenders Act would apply only in respect of a disqualification that goes with a conviction under the law which provides for the offence and its punishment. That is the plain meaning of the words "disqualification, if any, attaching to a conviction of an offence under such law" therein. Where the law that provides for an offence and its punishment also stipulates a disqualification, a person convicted of the offence but released on probation does not, by reason of Section 12, suffer the disqualification.

Thus, it is argued that the disqualification contemplated by Section 12 of the Probation of Offenders Act is something attached to the conviction which is flowing automatically from the conviction or which is a consequence or result of the conviction. In that situation, if a person is released on probation under Sections 3 and 4 of the Probation of offenders Act in lieu of the sentence for the said conviction, then he shall not suffer disqualification notwithstanding anything contained in any other law attaching to a conviction for the said offence. Learned Counsel for the petitioner argued that the removal of the doctor's name from the State Medical Register is a necessary and automatic consequence of his conviction under the PNDT Act as is apparent from a bare perusal of Section 23(2) of the said Act. The removal of the petitioner's name from the Medical Register is solely based upon his conviction under Section 23(1), and not on any conduct or misconduct of the petitioner. In view of the law so clearly and comprehensively laid down by the Apex Court as cited hereinabove, the removal of the name of the petitioner from the Medical Register is nothing but a disqualification hit by Section 12 of the Probation of Offenders Act.

(c) Thirdly, it is argued that entirely without prejudice to ground (b) above, the expression "conviction" in Section 23(2) of the PNDT Act necessarily means and implies a conviction that is final and conclusive and not a conviction that is being impeached or still liable to be impeached by way of appeal or revision or other mode known to law. While referring to the decision of the Supreme Court in Dalip Kumar Sharma and Ors. v. State of Madhya Pradesh , learrted counsel for the petitioner argued that a conviction that is defeasible or capable of being, or liable to be voided, annulled or undone by way of appeal or revision or other judicial process known to law, is clearly and wholly outside the purview of the said expression. Thus, the Medical Council acquires no jurisdiction to remove the name of the medical practitioner from the Medical Register of the State Medical Council under Section 23(2) of the PNDT Act, 1994 until the conviction under the PNDT Act becomes final and conclusive whose judgment has already been impeached by the petitioner by filing an appeal which is still pending for consideration in the Court. Hence, the removal of the name of the petitioner from the Medical Register is illegal and void.

(d) That the State Medical Council acquires jurisdiction to act under Section 23(2) of the PNDT Act only if and when a medical practitioner registered with the Medical Council is convicted by a criminal

Court under Section 23(1) of the Act or, alternatively under Sub-section (3) of Section 22 or Section 25 thereof. Unless and until the medical practitioner concerned is convicted under Sub-sections (1) of Section 23, Sub-section (3) of Section 22 or Section 25, no question of the Council acquiring jurisdiction to act against the medical practitioner under Sub-section (2) of Section 23 arises. Chapter VII of the Act comprising Sections 22 to 28 and titled "Offences and Penalties" deals exclusively with offences, conviction and punishment there for under the Act. No other part or provision of the Act provides for offences and conviction or punishment there for. The only offences under the Act are those prescribed in Sub-section (3) of Section 22, Sub-section (1) and (3) of Section 23 and Section 25. Conviction for any or more of such offences is an indispensable sine qua non for action by the State Medical Council under Sub-section (2) of Section 23. In absence of such conviction, any action by the State Medical Council purporting to act under Section 23(2) would be wholly and indubitably coram non judice, without jurisdiction and a nullity for that reason.

Since the petitioner was neither prosecuted nor charged nor convicted for any of the aforesaid offences under the Act, there being no other offence created or prescribed under the PNDT Act, the order dated 7-11-2005 passed by the Medical Council is a complete nullity in law. The provisions of Section 5 and Rules 9 and 10 (under which alone the petitioner was convicted by the trial Court) do not constitute offences in themselves, apart from and independently of Section 23(1) of the PNDT Act.

7. Learned Counsel for the petitioner submitted that in case the contention of the petitioner raised in ground (a) is accepted and it is held that the name of the petitioner cannot be removed from the State Medical Register for a period of more than two years, as the date of occurrence was 9 7-2002, in view of the provisions of Section 23(2) of the PNDT Act, 1994 existing prior to the amendment made by Act No. 14 of 2003, I.e. w.e.f. 14-2-2003, then this Court need not (o con sider and decide the contentions raised in grounds (b) to (d), referred to above, as the petitioner has already undergone two years penalty.

8. On the other hand, Shri B.S. Walia, learned Counsel for the Medical Council argued that the protection provided under Article 20(1) of the Constitution of India would not be available to the petitioner. According to him, the said protection is available only in respect of the criminal offences punishable under Section 23(1) of the PNDT Act, 1994 which provides for punishment by way of imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees etc. Learned Counsel further argued that by the Amending Act no change has been made in Sub-section 23(1) of the PNDT Act nor the petitioner has been imprisoned for his conviction as he was released on probation. He submits that the penalty provided under Sub-section (2) of Section 23 of the said Act is not the punishment for conviction as contemplated under Article 20(1) of the Constitution of India. Therefore, he submits that the amended provisions of Section 23(2) of the PNDT Act which provide for enhancement of period of removal of the name of a medical practitioner from the Medical Register for a period of five years for the first offence and permanently for the subsequent offence is the ensuing civil consequences in distinction to the penal consequences for the conviction under Section 23(1) of the said Act. Therefore, if by the amendment the period of removal has been extended from two years to five years, it makes no

difference and the name of the petitioner has been rightly removed from the Medical Register for a period of five years on the basis of the provisions which were existing on the date of decision. In support of his contention, learned Counsel for respondent Council has relied upon the decision of the Supreme Court in Hathising Manufacturing Co. Ltd. Ahmedabad and Anr. v. Union of India and Anr. . Besides this contention, learned Counsel for the respondent has also controverted the other arguments raised by the learned Counsel for the petitioner.

9. After considering the arguments raised by the learned Counsel for the parties and going through the relevant provisions of the PNDT Act and the Rules made there under, and Article 20(1) of the Constitution of India as also considering the judgments referred during the course of arguments and other relevant judgments, we are of the opinion that the removal of the name of the petitioner from the State Medical Register for a period of five years following his conviction for the offences under the PNDT Act allegedly committed by him on 9-7-2002, is illegal and unconstitutional and the same is squarely hit by the inviolable constitutional prohibition against retrospective or ex post facto action imposed by Article 20(1) of the Constitution or India.

10. Undisputedly, the alleged offence under the PNDT Act and Rules made thereunder was committed on 9-7-2002 for which the petitioner has been convicted under Section 23(1) and released on probation vide judgment dated September 24, 2004, and subsequently a penalty for removal of his name for a period of five years from the Medical Register has been imposed under Section 23(2) of the PNDT Act vide order dated 7-11-2005. It is also not disputed that at the time of commission of the alleged offence, the unamended Section 23(2) of the PNDT Act provides that the name of the registered medical practitioner who has been convicted by the Court under Sub-section (1), could be removed by the State Medical Council for a period of two years for the first offence and permanently for the subsequent offence. The said provision was amended by PNDT Amendment Act, 2002 (Act No. 14 of 2003) notified w.e.f. 14-2-2003. The amended provisions have enhanced the period of penalty for removal of the name of a medical practitioner from two years to five years w.e.f. 14-2-2003. Undisputedly, the said amendment was prospective and not retrospective.

11. In view of these facts, it is to be determined whether removal of the name of the petitioner from the State Medical Register for a period of five years by the Medical Council is in violation of Article 20(1) of the Constitution of India which provides as under:

20. Protection In respect of conviction for offences,--(1) No person shall be convicted of any offence except for violation of a law In force at the time of the commission of the act charged as an offence, nor be sub jected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

12. The argument of the learned Counsel for the petitioner is that Section 23 of the PNDT Act, 1994 provides for the offences and the penalties under the said Act, This Section imposes two types of penalties

for the contravention of any provisions of the PNDT Act and the Rules made thereunder, Sub-section (1) of Section 21 of the said Act provides that If a registered medical practitioner contravenes any provisions of the Act or Rules made thereunder, he shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees, and Sub-section (2) further provides that the name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council on conviction for removal of his name from the Medical Register of the Council for a period of five years for the first offence and permanently for the subsequent offence. Learned Counsel submitted that the removal of the name of the medical practitioner from the Register of the Medical Council on his conviction under the PNDT Act is also a penalty which attracts the rigour of Article 20 of the Constitution of India.

13. On the other hand, it is the contention of the learned Counsel for the respondent-Council that the removal of the name of the medical practitioner on his conviction under Section 23(2) of the PNDT Act and the Rules made thereunder is not a punishment or penalty but it is a civil consequence which a medical practitioner would suffer on his conviction under the Act. Therefore, the protection of Article 20(1) of the Constitution of India will not be available to the petitioner and removal of his name for a period of five years on his conviction under the Act on the basis of the amended provisions is absolutely legal and valid.

14. The aforesaid contention of the learned Counsel for the respondent-Council cannot be accepted. In our opinion, the removal of the name of the medical practitioner under Section 23 (2) of PNDT Act following his conviction for the offences under the said Act and the Rules made thereunder for a particular period is also a penalty provided under the said Act, If various provisions of the PNDT Act are examined, it appears that Chapter VII of the Act deals with offences and penalties under the PNDT Act. The whole of Section 23 is a penal provision, attracting the rigour of Article 20 of the Constitution as is apparent from the title of Section 23itself i.e. Offences and Penalties.

15. It is well settled that the law which imposes additional punishment to that prescribed when a criminal act was committed is ex post facto and a change in law that alters a substantial right can be ex post facto even if the statute takes a seemingly procedural form. It is the duty of the Court to interpret the penal laws in a manner that they do not have ex-post-facto operation. The provision contained in Article 20 of the Constitution also recognises principles laid down under Article 11(2) of the Declaration of Human Rights of the United Nations and Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which lay down as under:

11 (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be Imposed than the one that was applicable at the time the penal offence was committed.

7(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

16. The Supreme Court in People's Union for Civil Liberties v. Union of India has recognised the principle that in view of the fact that India is a member of the United Nations Organisation and is also a signatory to the aforesaid conventions, it is almost an accepted proposition of law that rules of customary international law shall be deemed to be incorporated in the domestic law. It is also well settled that Article 20 of the Constitution is the most precious fundamental right which relates to the personal liberty of a person which should be given liberal interpretation. Under Clause (1) of Article 20 of the Constitution, the protection available is not only against conviction for an act or omission which was not an offence under the law in force when the same was committed, it is also against infliction of a greater penalty than what was provided under the law in force when the offence was committed. Recently a question came up for consideration before the Supreme Court in Transmission Corporation of A.P. v. Ch. Prabhakar and Ors. , whether the constitutional guarantee enshrined in Article 20(1) was confined only to prohibition against conviction for any offence except for violation of law in force at the time of the commission of the act charged as an offence and subjection to a penalty greater than that which might have been inflicted under the law in force at the time of commission of offence or it also prohibited legislation which aggravated the degree of crime or made it possible for the accused to receive greater punishment even though It was also possible for him to receive the same punishment under the new law as could have been Imposed under the prior law or deprived the accused of any substantial right or Immunity possessed at the time of the commission of the offence charged, is a moot point to be debated. The said question of law has been referred to the larger Bench for consideration.

17. As far as it is undisputed that there is no conflict to the proposition that Clause (1) of Article 20 of the Constitution prohibits Imposition of greater penalty for a prohibited act which might have been inflicted under the law in force at the time of commission of offence. In the present case, Section 23 of the PNDT Act provides for the penalties and offences committed under the Act. Sub-section (1) of Section 23 of the said Act provides that whosoever contravenes any of the provisions of this Act and the Rules made thereunder shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees. Sub-section (2) of the said Section provides that the name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for removal of his name from the Register of the Council for a period of five years for the first offence and permanently for the subsequent offence. In our opinion, the removal of the name of a medical practitioner from the Register of the Medical Council for a period of five years (before

the amendment of two years) on his first conviction is in the nature of penalty imposed on him, due to his conviction under the Act. Sub-section (2) of Section 23 does not give any discretion to the medical authorities. Once the factum regarding his conviction is reported to the Medical Council, the removal of the name of the medical practitioner from the Register of the Medical Council for five years (or for two years before Amendment) is mandatory. There is no discretion with the authorities to impose the penalty for a lesser period. Therefore, the removal of his name from the State Medical Register on his conviction under the PNDT Act, 1994 is directly and automatically flowing from his conviction under the same provisions i.e. Section 23(2) of the PNDT Act, because under the said Sub-section the word "shall" has been used and not the word "may". In our opinion, it can be said that the provisions of Sub-sections (2) and (3) of Section 23 are not penal provisions, but are provisions which provide for civil consequences. Since both the sub-sections are part and parcel which provide penalty for the alleged offence, in our opinion, the whole of Section 23 of the PNDT Act is a penal provision which attracts the rigour of Article 20 of the Constitution of India.

18. From the reading of Article 20(1) of the Constitution of India, it is clear that in the said Article the word "penalty" has been used and not the "sentence/imprisonment". Merely because Sub-section (1) of Section 23 of the PNDT Act deals with sentence/imprisonment to be imposed and Sub-section (2) of the said Section deals with the removal of the name of a medical practitioner from the State Medical Register on his conviction, does not make any difference. In both the situations, a penalty is provided which is to be imposed upon a person who has been convicted for the offences under the said Act. For an offence, there can be two penalties, one in the shape of imprisonment and the other in a different shape which in the present case is the removal of the name of a medical practitioner from the State Medical Register on his conviction. In our opinion, both the penalties are subjected to rigour of Article 20 of the Constitution. Therefore, the name of the petitioner could not have been removed from the State Medical Register as a penalty on his conviction under Section 23(2) of the PNDT Act for more than the period which was prescribed in the statute at the time of the alleged commission of the offence.

19. In our opinion, the judgment cited by the learned Counsel for the respondent-Council in Hathising Manufacturing Co. Ltd. Ahmedabad's case AIR 1960 SC 923 (supra) in support of his contention that the removal of the name of a medical practitioner from the State Medical Register on his conviction under the PNDT Act is not a punishment or a penalty, but is only a civil consequence which has flown from his conviction, is not applicable in the facts and circumstances of the present case. In that judgment, the insertion of Section 25-FFF of the Industrial Disputes Act by an amendment was challenged on the ground that it also violates Article 20(1) of the Constitution of India. In that case, it was held that the law which creates a civil liability in respect of a transaction which has taken place before the date on which the Act was enacted, does not violate the mandate of the said Article. The Supreme Court came to the conclusion that the said Section imposes civil liability to pay compensation for closure prior to the Act and non-compliance was not made an offence, therefore, the same does not attract Article 20(1) of the Constitution. In this regard, following observation has been made:

It is true that the Amending Act which has introduced Section 25-FFF was passed in June 1957, and liability to pay compensation arises in respect of all undertakings closed on or after November 28, 1956. But, if liability to pay compensation is not a condition precedent to closure, by failing to discharge the liability to pay compensation and wages in lieu of notice, the employer does not contravene Section 25-FFF (1). If the statute fixes criminal liability for contravention of the prohibition or the command which is made applicable to transactions which have taken place before the date of its enactment the protection of Article 20(1) may be attracted. But Section 25-FFF (1) imposes neither a prohibition nor a command. Undoubtedly for failure to discharge liability to pay compensation, a person may be imprisoned, under the statute providing for recovery of the amount e.g. the Bombay Land Revenue Code, but failure to discharge a civil liability is not, unless the statute expressly so provides, an offence. The protection of Article 20(1) avails only against punishment for an act which is treated as an offence, which when done was not an offence. It is therefore not attracted to Section 25FFF.

20. In our opinion, the aforesaid observations are not applicable in the present case. It has been clearly observed that If the statute fixes criminal liability for contravention of the prohibition or the command which is made applicable to transactions which have taken place before the date of Its enactment, the protection of Article 20(1) of the Constitution may be attracted, but Section 25-FFF (1) neither Imposes a prohibition nor a command. In the instant ease Sub-section (2) of Section 23 of the PNDT Act clearly Imposes a penalty of removal of the name of a medical practitioner from the State Medical Register in case he is convicted for violating the provisions of the PNDT Act. Therefore, it attracts the rigour of Article 20(1) of the Constitution of India. Since we have decided the ground (a) in favour of the petitioner, therefore, in view of the stand taken by the learned Counsel for the petitioner, we are not deciding the other contentions raised by him.

21. In view of the aforesaid discussion, this petition is partly allowed and the impugned order dated 7-11-2005 and the subsequent order passed by the Medical Council is modified and penalty of removal of the name of the petitioner from the State Medical Registrar is reduced to two years from five years.

No order as to costs.

**Case 4: Conviction of Dr. Prashant Navnitlal Gujrathi, Maharashtra**

JUDGMENT
Per Shri S. P. Naik- Nimbalkar,
Judicial Magistrate (F. C.), Parola
(Delivered on 27th July 2010)
Mr. Sambhaji . R. Jadhav, Ld. A. P. P. for complainant.
Mr. U. B. Misar, Ld. Advocate for accused.

1) Accused Dr. Prashant Navnitlal Gujrathi, resident of Parola is charged for the contravention of Rule 9 (4) under The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex

Selection) Rules 1996 (Hereinafter 'Rules 1996' for short) punishable under Section 23 and 25 of The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act 2003 (Hereinafter P. C. P. N. D. T. Act 2003 for short).

2) The summation and summarization of the complainant's case may be stated as under:

Complainant Dr. Sambhaji Patil, Medical Officer, Rural Hospital, Parola was appointed as the appropriate authority under Section 17 of the P. C.P. N. D. T. Act 2003, by the Maharashtra Government.

3) Accused Dr. Prashant Gujrathi runs Shriji Hospital at Parola, which is a sonography clinic. Civil Surgeon, Jalgaon has sanctioned this sonography centre as an ultra sonography centre. Dr. Minal D. Khalane, radiologist, Dhule operates the sonography machine at the aforesaid Shriji Hospital, Parola.

4) On 11-12-2005, complainant Dr. Sambhaji Patil along with Dr. Mrs. Kavita Sontakke, Medical Officer, Civil Hospital, Jalgaon has inspected the sonography centre of the accused. They demanded the requisite record to be maintained under the P. C. P. N. D. T. Act, 2003 to the accused. Accordingly, accused had handed over one register and registration certificate to the complainant. It was revealed during this inspection that the Form F register, consent forms of pregnant women willing to undergo sonography and copy of the P. C. P. N. D. T. Act 2003 was not found at the sonography centre. Accordingly, the complainant had inferred that the accused had contravened the provisions under 'Rules 1996'. Subsequently, the complainant had seized and sealed the ultra sonography machine and a printer by doing a panchanama.

5) Thereafter, the present complaint was filed on 3-1-2006 for contravention of Rule 9 (4) constituting for an offence punishable under Section 23 and 25 of the P. C. P. N. D. T. Act, 2003. As per order on Exh.1 dated 3-1-2006 of my Hon'ble learned pre-decessor the then Judicial Magistrate (F. C.), Parola, process was issued in the form of summons against the accused for contravention of Rule 9 Punishable under Sections 23 and 25 of the P. C. P. N. D. T. Act 2003.

6) The accused has appeared on 10-1-2006 and was released on bail vide order dated 10-1-2006 on Exh.6 i. e. the bail application.

7) As the case is filed as private complaint otherwise than on police report, the evidence before charge came to be recorded. Prosecution has examined as many as three witnesses as follows.

   1) The Appropriate Authority, complainant P. W. No.1 Dr. Sambhaji Rawan Patil at Exh. 22.
   2) Panch witness P. W. No. 2 Baliram Mahadu Walunj Wani at Exh. 25.
   3) Medical Officer, Civil Hospital, Jalgaon, P.W.No.3 Dr. Mrs. Kavita Satish Sontakke at Exh. 26 in capacity of member of the inspecting party.

The accused has cross-examined P. W. No. 2 Baliram and P. W. No. 3 Dr. Mrs. Kavita Sontakke wholly. Whereas, cross-examination of P. W. No. 1 Dr. Sambhaji Patil was partly taken before charge

and in lieu of order below Exh. 38 dated 22-1-2010, P. W. No. 1 Dr. Sambhaji Patil was again cross-examined by the accused.

8) Along with the above mentioned oral evidence, the prosecution has filed the following documentary evidence.

   1) Panchanama dated 11-12-2005 at Exh. 23.

   2) Letter of Additional Director, Family Welfare, Health Services,Mother and Child Development and School Health Department, Pune at Exh. 24.

   3) Learned Additional Public Prosecutor, Jalgaon has filed evidence close pursis vide Exh. 36.

   Prosecution has also placed seized register Article A and copy of registration certificate Article B, on record.

9) Considering the oral and documentary evidence on record, as per order below Exh. 1 dated 15-12-2009, the charge for the contravention of Rule 9 (4) of 'Rules 1996' punishable as an offence under Sections 23 and 25 of the P. C. P. N. D. T. Act, 2003 was framed by me against the accused on 15-12-2009 vide Exh. 33. I have explained the contents of the charge i. e. the particulars of the offence in Marathi, to the accused. The accused understood the same. He has pleaded not guilty to the offence. Hence, the trial ensue.

10) The statement of accused under Section 313 of Code of Criminal Procedure, 1973. (Hereinafter for short Cr. P.C.) was recorded vide Exh. 42 on 23-2-2010. He has denied the entire incriminating evidence against him. The accused has filed the following documents during his statement vide Exh. 42, as follows.

   1) Letter dated 31-12-2005 given by the accused to Civil Surgeon, Jalgaon at Exh. 32A.

   2) The monthly reports filed at Cottage Hospital, Parola of December 2005, November 2005, October 2005, September 2005, August 2005, July 2005, June 2005, May 2005, April 2005 from Exh. 45 to 53 respectively.

   Along with these documents, the accused has also filed the F form registers from Articles 1 to 7 and registers in Format F from Articles 8 to 14.

11) In view of the above rival facts and evidence filed on record by the prosecution as well as the accused, the following points arise for my determination and I have given my findings against each of them for the reasons recorded below.

**Points** **Findings**

1) Whether the prosecution proves that accused Dr. Prashant Navnitlal Gujrathi failed to submit the record which was necessary to be maintained by his sonography clinic in respect of each man or woman subjected to any Prenatal Diagnostic Procedure/Techniques/Test, as specified in Form F,

Compilation and Analysis of Case-laws on Pre-conception and Pre-natal Diagnostics Techniques (Prohibition of Sex Selection) Act, 1994 annexed to the P. C. P. N. D. T. Act, 2003, before the complainant Dr. Sambhaji Patil on 11-12-2005 at Shriji Hospital, Parola, Taluka Parola, District Jalgaon and has contravened the Rule 9 (4), framed under 'Rules 1996' and thereby committed an offence punishable under Sections 23 and 25 of the P. C. P. N. D. T. Act, 2003?.

… Yes

2) What order? … As per final order

**REASONS**

12) As to point No.1:

**Submissions of both Ld. Counsels**:

I have heard the arguments advanced by learned A. P. P. Mr. S. R. Jadhav and learned advocate Mr. U. B. Misar for the accused. Learned A. P. P. Mr. S. R. Jadhav has submitted that P. W. No. 1 Dr. Sambhaji Patil is the appropriate authority with reference to Section 2 (A) and Section 17 of the P. C. P. N. D. T. Act, 2003. The letter in this context of Additional Director, State Government is duly proved. P. W. No. 2 Baliram Walunj Wani has proved the panchanama and seizure of register from the clinic of accused. He has further submitted that the application dated 31-12-2005 vide Exh. 32A of the accused suggest the apprehension in the mind of the accused. The accused has kept mum from the date of inspection i. e. 11-12-2005 till 31-12-2005. This shows that he has manipulated the record, which is filed at Article 1 to 14 at the time of his statement recorded under Section 313, Cr. P. C. The defence of the accused is after thought and is against preponderance of probabilities. Therefore, it cannot be accepted. The prosecution has proved the case beyond all reasonable doubts. Finally, he has submitted that the accused be dealt with as per provisions of law.

13) On the contrary, learned advocate Mr. U.B. Misar for the accused has heavily attacked all submissions of prosecution and has argued at length. He has submitted that the delay of filing the complaint from 11-12- 2005 till 3-1-2006 suggests the concoction of this complaint. He has further submitted that P. W. No. 1 Dr. Sambhaji Patil is not an appropriate authority within the meaning of Section 17 of the P. C. P. N. D. T. Act, 2003. The letter of Additional Director, State Government filed at Exh. 24 is not proved and the same cannot be read in evidence. He has also submitted that police can take cognizance of this complaint. But the complainant has not filed any complaint nor has given information to the police station. He has come down strenuously on the seizure panchanama with the aid of Rule 12 of 'Rules 1996'. As per him, the search and seizure of the documents is not proved. The visit form is not filled by the inspecting party. He further submits that the accused has maintained all the record as contemplated under the P. C. P. N. D. T. Act, 2003 and the same is filed on record vide Articles 1 to 14.

14) Learned advocate Mr. U. B. Misar for the accused has also placed his reliance on:

1) Vijay Bhagwan Shetty Vs. State of Maharashtra and another, 2009 (2) Mh. L. J. (Cri.) 143.
2) Bhalchandra Namdeo Shinde Vs. State of Maharashtra, 2003 Bom. C. R. (Cri.) 133.
3) Naba Kumar Das Vs. State of West Bengal, 1974 Cri. L. J. 512.

I have gone through the above mentioned case laws. It would be proper to elaborate the aforementioned arguments along with the produced authority case laws at the relevant part hereinafter.

15) Non-disputed facts:

At the outset, before proceeding further, it would be proper to lay down the facts which are not disputed by accused on record. This 'non disputed' facts which are gathered from the evidence on record as well as the statement of accused recorded under Section 313, Cr. P. C. vide Exh. 42 may be listed as follows.

1) Accused Dr. Prashant Gujrathi is a registered medical practitioner and runs 'Shriji' Hospital at Parola which is a sonography clinic.
2) P. W. No. 1 Dr. Sambhaji Patil along with other members has inspected 'Shriji' Hospital, Parola on 11-12-2005.
3) Accused Dr. Prashant Gujrathi was present at the time of this inspection.

Except aforementioned facts, all other facts are disputed by the accused.

16) Nature of the offence and burden on prosecution:

At this juncture, it would be proper to lay down the burden which the prosecution is facing in this trial. As mentioned earlier, the offence is filed for the contravention of Rule 9 (4) of the 'Rules 1996' which constitutes for an offence punishable under Sections 23 and 25 of the P. C. P. N. D. T. Act, 2003. Rule 9 (4) of 'Rules 1996'lay down that every genetic clinic to maintain record in respect of each man or woman subjected to any prenatal diagnostic procedure/techniques/test, and shall be maintained as specified in Form F. Form F is annexed along with 'Rules 1996'. Form F starts with reference to proviso to Section 4 (3), Rule 9 (4) and Rule10 (1A). So, before discussing the contents of Form F, it would be proper to discuss this legal provision.

17) Proviso to Section 4 (3) of the P. C. P. N. D. T. Act, 2003 mentions 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 the provisions of Section 5 or Section 6 unless contrary is proved by the person conducting such ultra sonography.

18) Section 5 of the P. C. P. N. D. T. Act, 2003 lays down that written consent of pregnant woman has to be obtained before conducting the prenatal diagnostic procedure and no person including the person conducting prenatal diagnostic procedure shall communicate the sex of the foetus by words,

signs or in any other manner. Section 6 prohibits the determination of the sex of the foetus. So, by virtue of proviso to Section 4 (3) any deficiency or inaccuracy found in the record of genetic clinic would amount to contravention of aforementioned Section 5 and 6. By virtue of Section 5 and 6, maintaining complete record is not a mere formality. But amounts to contravention of Section 5 and 6 of the P. C. P. N. D. T. Act, 2003. Also, it casts legal duty and burden on the concerned genetic clinic.

19) Further Rule 10 (1A) of the 'Rules 1996' creates an obligation on any person conducting ultra sonography/image scanning on a pregnant woman of giving a declaration on each report that she does not want to know the sex of the foetus. Neither it is detected or disclosed to anybody.

20) Form F contains detail 19 entries specifying the details about the genetic clinic, patient, patient's history, duly signed by the Gynaecologist/Radiologist/Director of the clinic. Form F also provides for declaration of pregnant woman with her signature or thumb impression, that she does not want to know the sex of her foetus. It also contains the declaration of Doctor/person conducting ultra sonography/image scanning that he/she have neither detected nor disclosed the sex of foetus to anybody in any manner. Considering the above entries and declaration, Form F appears to be an important part of the prenatal diagnostic transaction.

21) Considering the aforesaid legal provisions, the complaint Exh. 1 and the charge at Exh. 33, the prosecution is burdened in this case to prove that accused Dr. Prashant Gujrathi has failed to submit the complete record of any man/woman subjected to prenatal diagnostic techniques/procedure/test which was obligatory on him to be maintained as specified in Form F, Annexed to 'Rules 1996'. Prosecution has to prove the above fact beyond all reasonable doubts by leading cogent, convincing and clinching evidence. If the prosecution fails to bring home the guilt of accused, as per cardinal principles of criminal trial, the accused is entitled for an acquittal.

22) Prosecution's evidence:

At the cost of repetition, it is necessary to state that in the complaint Exh. 1, Para No. 3, it is particularly mentioned that, P. W. No. 1 Dr. Sambhaji Patil and P. W. No. 3 Dr. Mrs. Kavita Sontakke have demanded the record from the accused. At that time, accused has handed over one register and registration certificate of sonography centre to the complainant. The Form F register, declaration of pregnant woman undergoing ultra sonography were not found at the sonography clinic.

23) P. W. No. 1 Dr. Sambhaji Patil has categorically stated in his chief examination Exh. 22 that accused Dr. Prashant Gujrathi was not having the consent form of patients, declarative form of doctor in F format. Instead of F Form, he was having a simple notebook. P. W. No. 3 Dr. Mrs. Kavita Sontakke has also categorically deposed that the Form F Register at the clinic of Dr. Prashant Gujrathi was not as per the prescribed format. The addresses of pregnant mothers were incompletely written. The entry regarding existing child was not made in the Form F Register. The sonography report was not properly written. The doctors who have done sonography have not signed the sonography report. The declaration of doctor as well as pregnant women was not found.

24) Therefore, the evidence of P. W. No. 1 Dr. Sambhaji Patil and P. W. No. 3 Dr. Mrs. Kavita Sontakke is in tune with the contents of complaint Exh. 1. The fact in the complaint that the Form F Register as prescribed under Rule 9 (4) and Form F were not found at the genetic clinic of the accused, is supported through the evidence of P. W. No. 1 Dr. Sambhaji Patil and P. W. No. 3 Dr. Mrs. Kavita Sontakke.

25) In the searching cross-examinations of both the above witnesses, there is no suggestion given by the accused that he has maintained the Form F Register in the prescribed format as per Form F and was possessing the same at the time of inspection and he was ready and willing to show the same to the inspecting party. A mere suggestion appears in the cross-examination of P. W. No. 1 Dr. Sambhaji Patil (page No. 5, para No. 4, Exh. 22) that 'accused had maintained all the documents as per Rules'. It is denied by P. W. No. 1 Dr. Sambhaji Patil. It is settled position of law that bare denial would not yield anything in favour of accused.

26) No suggestion in the above context is given either to P. W. No. 3 Dr. Mrs. Kavita Sontakke. A mere suggestion appears on page No. 3, para No. 4, Exh. 26 in the cross-examination of P. W. No. 3 Dr. Kavita Sontakke that she has deposed falsely that Form F Register was not maintained in the prescribed format by the accused. This is also denied by the said witness. So, except this evasive denial, there is nothing in the cross-examination of both these witnesses which would shake their testimony on this aspect. But, before accepting this evidence at its face value, as per rules of prudence, evidence and caution, it would be proper to verify these facts with the defence of accused. It is necessary to ascertain whether these facts stands to the test of reliability and admissibility against the defence of accused and objections raised therein.

27) Defence of accused:

Against the above fact, the accused has replied in his statement recorded under Section 313, Cr. P. C. vide Exh. 42 to question Nos. 2 and 3 that P. W. No. 1 Dr. Sambhaji Patil has not introduced him with anybody. The accused had asked about his identity. But P. W. No. 1 Dr. Sambhaji Patil has not shown his identity card to him. In answer to question No. 17, the accused has further replied that he is ready to file all registers with consent form. Accordingly, he has filed Article 1 to 14 on record. So, in the statement of accused also, he has not stated that he had maintained the complete record as per Rule 9 (4) and Form F at his genetic clinic and he was possessing the same on the date of inspection and that he was ready to show it to the inspecting party.

28) On this point, learned advocate Mr. U. B. Misar has argued that P. W. No. 1 Dr. Sambhaji Patil was not having any identity card with him to show that he was the appropriate authority. Further, he has submitted that there was no document regarding the appointment of P. W. No. 1 Dr. Sambhaji Patil as an appropriate authority under the Act. Therefore, it was natural conduct of accused Dr. Prashant Gujrathi of not showing his record. Learned advocate Mr. U. B. Misar has submitted that why should the accused show his record to the person who is a stranger to him. In this connection, he has also pointed out that in the cross-examination P. W. No. 1 Dr. Sambhaji

Patil has admitted at para 3, page 3, Exh. 22 that he was not having the identity card being a competent authority.

29) While dealing with this defence, it is necessary to see the complaint Exh. 1which specifically states that P. W. No. 1 Dr. Sambhaji Patil has visited the clinic of accused on 11-12-2005. P. W. No. 1 Dr. Sambhaji Patil and P. W. No. 3 Dr. Mrs. Kavita Sontakke have also stated that they have visited 'Shriji' hospital and Prashant Nursing Home on 11-12-2005 at or about 5.00 to 5.30 P. M. This fact is not shattered in the cross examinations of both these witnesses. So, the visit is proved.

30) It has further come in the cross-examination at para 4, page 5, Exh. 22, that wife of P. W. No. 1 Dr. Sambhaji Patil has dispensary by name Shri. Sai Hospital at Parola. Shri. Sai Hospital was started in the year 2003-2004. As the medical practice of P. W. No. 1 Dr. Sambhaji Patil was not procuring, he has shifted his clinic in Gajanan Colony. There are several suggestions in Para No. 4, Exh. 22 which suggest the previous acquaintance of P. W. No. 1 Dr. Sambhaji Patil and accused Dr. Prashant Gujrathi. When the accused himself has suggested his acquaintance with P. W. No. 1 Dr. Sambhaji Patil then, whether he would be at liberty to take the defence that P. W. No. 1 Dr. Sambhaji Patil was a stranger to him. The answer is obviously in the negative. Because it has come in the cross-examination of P. W. No. 1 Dr. Sambhaji Patil that accused is practicing from last 30 years at Parola. P. W. No. 1 Dr. Sambhaji Patil has started his clinic from the year 2003-2004. Accused and complainant (as per Exh. 1), both reside at Parola. So, it is not probable that in a small town like Parola the members of medical fraternity are unknown to each other.

31) In the cross-examination, at para 4, the accused has suggested to P. W. No. 1 Sambhaji Patil that he was appointed as a Medical Officer to Cottage Hospital, Parola on temporary basis. This would go to show that accused had knowledge that P. W. No. 1 Dr. Sambhaji Patil was attached to Cottage Hospital, Parola, was known to the accused. Therefore, despite this knowledge, it is difficult to gather why the accused has not shown the record of his genetic clinic to him.

32) Secondly, accused Dr. Prashant Gujrathi was legally bound under Section 29 (2) to show all such record to P. W. No. 1 Dr. Sambhaji Patil. In this connection, it would be proper to lay down Section 29 (2) of the P. C. P. N. D. T. Act, 2003 as follows:

"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". (emphasis supplied).

33) Accused Dr. Prashant Gujrathi was also legally bound to show his record to the inspecting party by virtue of Rule 11 framed under the 'Rules 1996'. It would be proper to lay down Rule 11 as follows.

> "Facilities for inspection.- (1) Every Genetic Counselling centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic, Imaging Centre, nursing home, hospital, institute or any other place where any of the machines or equipments capable of performing any procedure, technique or test capable of pre-natal determination of sex or selection of sex before or after conception is

used, shall afford all reasonable facilities for inspection of the place, equipment and records to the Appropriate Authority or to any other person authorised by the Appropriate Authority in this behalf for registration of such institutions, by whatever name called under the Act, or for detection of misuse of such facilities or advertise- ment therefore or for selection of sex before or after conception or for detection/disclosure of sex of foetus or for detection of cases of violation of the provisions of the Act in any other manner". (emphasis supplied).

34) So, on facts as well as law, the defence of accused that he has not shown the record to P. W. No. 1 Dr. Sambhaji Patil as he was stranger do not gather any force. On the contrary, it suggests that P. W. No. 1 Dr. Sambhaji Patil had inspected the clinic of accused on 11-12-2005 and at that time, the accused has not made available to him the record which was necessary to be maintained by him as specified in Rule 9 (4) and Form F.

35) So, the subsequent question which emerges from the above defence is that whether accused had maintained and possessed the record from Articles 1 to 14 on the date of inspection or not. So, let us consider Articles 1 to 7 first. Articles 1 to 7 is the record in respect of pregnant women. It consist of two parts. First declaration given by pregnant woman and secondly, declaration of Doctor/person conducting utra sonography/ image scanning. Article 1 starts from 7-9-2003 and Article 7 ends on 4-12-2005. The dates on Article 1 are overwritten and scribbled for first 19 forms. There is no counter signature for this overwritting and scribbling. The name of Radiologist/ Gynaecologist along with the stamp (necessary as perform) is not appearing on any of the forms from Articles 1 to 7. Articles 8 to 14 are Form F registers as specified in Form F Annexed to 'Rules 1996'. Article 8 starts with the form on 1-9-2003 and Article 14 ends with the form filled on 4-12-2005.

36) None of the Form F in Articles 8 to 14 contains the name of Radiologist or Gynaecologist/Director of the Clinic who has conducted the ultra sonography on the pregnant woman. There is no reason assigned by the accused as to why the name of Gynaecologist/Radiologist/Director of Clinic and registration number is left blank on all these forms. Through this record, the name of the persons conducting ultra sonography, image scanning or director or owner of the genetic clinic/ultra sound clinic/imaging centre cannot be revealed. The name of the person is necessary in view of the specified Form F with reference to Rule 10 (1A) of the 'Rules 1996'. Because Rule 10 (1A) lays down as under-

"Any person conducting Ultrasonography image scanning on a pregnant woman shall give a declaration on each report on ultrasonography/ image scanning that he/she has neither detected nor disclosed the sex of foetus of the pregnant woman to anybody. The pregnant woman shall before undergoing ultrasonography/ image scanning declare that she does not want to know the sex of her foetus".

37) With reference to the above Rule 10 (1A), the documents at Articles 1 to 14 do not reveal the name of the person giving such declaration and therefore, they are incomplete within the meaning of Rule 10 (1A) read with Form F Annexed with 'Rules 1996'.

38) The accused has adduced these documents in his statement vide Exh. 42. It is needless to say that they were not shown to any of the prosecution witnesses during their cross-examinations. It is not suggested during the lengthy cross-examinations of P. W. No. 1 Dr. Sambhaji Patil and P. W. No. 3 Dr. Mrs. Kavita Sontakke that accused had maintained Articles 1 to 14 at the time of inspection and he has possessed the same at the relevant date, time and place. On the contrary, P. W. No. 1 Dr. Sambhaji Patil and P. W. No. 3 Dr. Mrs. Kavita Sontakke have categorically deposed that they have not found any such documents at the time of search of the sonography clinic of the accused. So, it was for the accused to raise a probable defence that he was having such documents Articles 1 to 14 at the time of inspection. But, the accused has failed to suggest so.

39) The accused has not examined himself to show that Article 1 to 14 were maintained by him or that it is the complete record maintained as per Rule 9 (4) and he has possessed it on the date of inspection. Neither the accused has examined the concerned persons whose signatures are appearing on the forms from Articles 1 to 14. It was necessary because accused has not stated anywhere (in the cross or in his statement Exh. 42) that he has signed the forms in Articles 1 to 14. Accused has not examined any pregnant woman whose consent was obtained on Form F, Articles 1 to 7. It is also pertinent to note that one carbon copy of this form from Articles 1 to 7 is detached from the original form. It is to be given to the pregnant woman. So, if accused had given any such evidence then, it would have shown that the record was genuinely maintained.

40) Let us also view this situation from the point of view of a prudent man. It is difficult to infer as to what had restrained or prohibited the accused from showing Articles 1 to 14 to the inspecting party, if he had maintained them at his sonography clinic. What prejudice at the most would have been caused to the accused if he had shown such important documents to the inspecting party?. But answers to these questions are not given by the accused. So, the fact of not showing the record to the inspecting party goes against the accused.

41) Accused has filed one letter at Exh. 32A. This letter is written to Civil Surgeon, Jalgaon stating that some persons have inspected his sonography clinic. But they have not given any written orders. Therefore, he has not produced any record before them. But he is ready to produce the record to Civil Surgeon. This letter is of 31-12-2005. The inspection is of 11-12-2005. What prevented the accused from filing such record to the Civil Surgeon for 20 days is also not explained by him.

42) Accused has filed the monthly reports sent to Cottage Hospital, Parola from Exh. 45 to 53. But this case is filed for non maintenance of Form F Registers and not for non filing of monthly reports. Therefore, filing of monthly reports and non maintenance of Form F Register are two different facts which cannot be misled with each other.

43) Therefore, considering the entire above discussion summarily, it may be stated that the defence of accused is not probable. Firstly, because it has come on record that P. W. No. 1 Dr. Sambhaji Patil was not a stranger to the accused. Secondly, there is no cross-examination of any of the prosecution witnesses that accused possessed Articles 1 to 14 on the date of inspection. Thirdly, by virtue of

Section 29 (2) and Rule 11 accused was legally bound to show this record (if he was having so) to the inspecting party. Fourthly, by the defence taken, accused himself admits that he has not shown the record to the inspecting party. Fifthly, there is no other evidence put forth by him to show that the record was maintained and possessed by him. Sixthly, the name of concerned Gynaecologist, Radiologist, owner of the sonography clinic is not appearing on any of the forms in Articles 1 to 14. Seventhly, in absence of such names, the record produced itself is incomplete by virtue of Rule 10 (1A) and Form F, Annexed to 'Rules 1996'.

44) Other objections of accused:

a) Complainant is not an appropriate authority:

Learned advocate Mr. U. B. Misar has objected that P. W. No. 1 Dr. Sambhaji Patil is not an appropriate authority under the P. C. P. N. D. T. Act 2003. He has no authority to file this complaint. He has attacked the letter Exh. 24. As per him, Section 17 of the P. C. P. N. D. T. Act 2003 lays down the procedure for appointment of the appropriate authority. As per Section 17 (3) of the P. C. P. N. D. T. Act 2003, the persons who may act as an appropriate authority have been enlisted. P. W. No. 1 Dr. Sambhaji Patil does not fall in such category. Learned A. P. P. Mr. Jadhav has counter submitted that P. W. No. 1 Dr. Sambhaji Patil is the appropriate authority in this context.

45) In view of the above rival contentions, we need to analyse Section 17 (3) of the P. C. P. N. D. T. Act 2003. It states that the officers appointed as appropriate authorities for whole of the State shall be the persons as enlisted in Section 17 (3) (a) of the P. C. P. N. D. T. Act, 2003. But, it is specified in Section 17 (3) (b) that-

"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".

46) On bare perusal of above provision, it can be ascertained that for any part of the State, officer of such other rank can be appointed. Therefore, Section 17 (3) (b) of the P. C. P. N. D. T. Act, 2003 itself is an answer to the objection raised by the accused that Dr. Sambhaji Patil is not the person of the rank as enlisted in Section 17 (3) (a) of the P. C. P. N. D. T. Act, 2003. In view of Section 17 (3) (b) of the P. C. P. N. D. T. Act, 2003, it is for the State Government to determine any other officer of other rank who would be an appropriate authority for any part of the State.

47) Accordingly, letter Exh. 24 is issued by Additional Director Health Services and Family Welfare, Mother and Child Development and School Health Department, Pune. The letter is issued on 21/26th July 2001 to all Civil Surgeons in Maharashtra. This letter is issued for the enforcement of the Prenatal Diagnostic Techniques Act, 1994.The second paragraph of this letter mentions that the Public Health Department, Mantralaya, Mumbai have issued notifications dated 11-9-1997 and 9-12-1997 declaring all the Civil Surgeons to act as an appropriate authority under the P. C. P. N. D. T. Act 2003. On the basis of these notifications, it is further declared that on the Taluka level the

Medical Superintendent of Rural Hospital would be the appropriate authority to act under the P. C. P. N. D. T. Act, 2003. In this context, separate orders are issued.

48) Therefore, on the basis of this letter Ex. 24, it can be ascertained that the appointment of appropriate authority is done on the basis of the notifications dated 11-9-1997 and 9-12-1997 of the State Government. It has remained intact in the evidence of P. W. No. 1 Dr. Sambhaji Patil that he was working as Medical Officer at Parola from 2003 to 31-1-2006. He has admitted in the cross-examination, page No. 5, para No. 4, Exh. 22 that he was appointed on temporary basis. But the letter at Exh. 24 nowhere mentions that the medical officer on temporary basis shall not act in capacity of an appropriate authority at the Taluka level. Therefore, in view of Section 17 (3) (b) of the P. C. P. N. D. T. Act 2003 and letter at Exh. 24, it is ample clear that P. W. No. 1 Dr. Sambhaji Patil can act as an appropriate authority as he was a Medical Officer at Parola at that time.

49) Learned advocate Mr. U. B. Misar for the accused has also attacked on the letter at Exh. 24 on the grounds that the same is not duly proved. Learned A. P. P. has resorted to Sections 78 and 79 of the Evidence Act and has counter submitted that the letter is proved.

50) The letter Exh. 24 is directed to all Civil Surgeons to do the needful in context of program to be initiated under the Prenatal Diagnostic Techniques Act, 1994. In this context, it has been directed to form a Vigilance Committee at Taluka level and the appropriate authority for this Vigilance Committee would be the Medical Officer at Taluka level. Therefore, the recitals of these documents itself bring out that these are certain orders which are given by department of a State Government to its employees working under their superintendence and control. Therefore, Section 78 (1) of the Evidence Act would be certainly attracted in this case. Exh. 24 is proved to be filed from custody of P. W. No. 1 Dr. Sambhaji Patil. P. W. No. 1 Dr. Sambhaji Patil has deposed in capacity of medical officer i. e. employee of the State Government to whom there were directions issued by the Department of the State vide Exh. 24.

51) Hence, the objection of accused that it is a secondary evidence cannot gain ground as the original of this letter i. e. Exh. 24 is filed on record by P. W. No. 1 Dr. Sambhaji Patil. So, this objection of accused is negated with reference to the above discussion.

52) b) Complaint not filed to police or by police:

Learned advocate Mr. U. B. Misar for accused has also objected the complaint on the ground that it was not filed to police. During the arguments, Section 28 of the P. C. P. N. D. T. Act, 2003 was pointed out to him by me. Section 28 of the P. C. P. N. D. T. Act, 2003 lays down that other than an appropriate authority, a person or a social organization, nobody is entitled to file such complaint. Therefore, police have no role to play for enforcing the provisions of P. C. P. N. D. T. Act, 2003. In view of Section 28 of the P. C. P. N. D. T. Act, 2003, the complaint has to be filed to the Court of Metropolitan Magistrate or a Judicial Magistrate First Class having jurisdiction to try such offence.

53) In this context, learned advocate Mr. U. B. Misar for accused has placed his reliance on Vijay Bhagwan Shetty (cited supra). In the said case, Hon'ble Bombay High Court has set aside the order of learned Sessions Judge of approving the order of committal of a case under Electricity Act, 2005 by learned Judicial Magistrate First Class. The reasons for setting aside this order were registration of F. I. R. was illegal, further action taken on the basis of said F. I. R. was erroneous. The Deputy Executive Engineer of the M. S. E. B. was not the authorized officer under Section 151 (a) of the Electricity Act, 2005. (Para 10, Page 147 of the Mh. L. J.).

54) In the present case, it is held earlier that the State Government can appoint officer of any other rank as an appropriate authority. Accordingly, letter Exh. 24 was issued. Also, in view of Section 28 (1) (a) of the P. C. P. N. D. T. Act, 2003 the present complaint may be filed. Hence, due to major variance of facts and above reasons the ratio and reasons recorded by Hon'ble Bombay High Court in Vijay Bhagwan Shetty (cited supra), with great respect and regards, are not applicable to this case. Accordingly, the objection of accused also goes with.

55) c) Non followance of search, seizure and sealing procedure as contemplated in the Act.

The accused has objected the seizure panchanama Exh. 23 on the grounds that the inspecting party has not followed the procedure for seizure as contemplated under Rule 12 of the 'Rules 1996'. It is admitted that panch witness P. W. No. 2 Baliram Walunj Wani and other witness S. D. Chopade were both employees of Cottage Hospital, Parola. It is further admitted that the list of seized documents prepared in duplicate is not placed on record. It has come in the cross-examination of P. W. No. 1 Dr. Sambhaji Patil that one copy of the list was not handed over to the accused or that there is no acknowledgment of the accused on the panchanama Exh. 23 in that regard. There is no signature of panchas on seized document Article A.

56) It is also necessary to state that P. W. No. 1 Dr. Sambhaji Patil has stated in his chief examination that Articles A and B were left at sonography clinic of the accused. Then, he called accused Dr. Prashant Gujrathi in this context and then, the brother of accused Dr. Gujrathi has produced Article A and B before Dr. Sambhaji Patil at Cottage Hospital on the same day at 11.30 P. M. This part is not appearing in the complaint Exh. 1. So, we have to assess the impact of this non followance of procedure on the case of prosecution.

57) It is necessary to state that in the deposition of P. W. No. 1 Dr. Sambhaji Patil, it has come on record that the seized documents were left at the clinic of accused. Therefore, the documents which were produced by brother of accused at 11.30 P. M. were not verified that they were the same seized and left documents or not. Neither there is a separate seizure list of the documents nor the same is done after production of documents by brother of the accused. So, this act of P. W. No. 1 Dr. Sambhaji Patil would not come within the purview of seizure at all. As this would amount to production of the documents Articles A and B by the brother of accused to P. W. No. 1 Dr. Sambhaji Patil.

58) Therefore, as there is no seizure in this case, the document at Article A cannot be looked into. The objections of accused in this regard sustains.

59) But, the case of prosecution is not based on the seized documents Articles A and B. At the cost of repetition, it is necessary to mention again that complaint Exh. 1, para No. 3 mentions that the complete record necessary to be maintained by the accused was not found at the sonography centre. Which means that the accused has failed to submit the complete record as specified in Form F. Therefore, the charge under Exh. 33 is also framed accordingly that the accused has failed to submit the Form F Register and consent forms of pregnant women. Therefore, the fact of seizure or production of Article A and Article B cannot be intermingled with the fact of failure to produce the Form F and consent forms registers of pregnant women by accused Dr. Prashant Gujrathi.

60) Learned advocate for the accused has built his argument on this preconceived notion that non followance of of seizure procedure of Articles A and B would amount to inadmissibility of Articles A and B in evidence which would in the alternative prove that no such seizure has taken place. But the case of prosecution right from the complaint is not that Article A is an incomplete register (Para 3, Exh. 1, complaint). But the case is for the non submission or non production of the record by the accused. Therefore, non production of record and defect in seizure are two entirely different things. The seizure is defective. Its corollary is inadmissibility of seized documents. But what about the act of accused of failure to submit documents at the time of inspection, which is otherwise proved by the prosecution evidence. It would also not show that accused Dr. Prashant Gujrathi has maintained the record at the relevant time and place. The case is for such non maintenance.

61) Therefore, the case laws in this context-

Bhalchandra Namdeo Shinde Vs. State of Maharashtra, 2003 Bom. C. R. (Cri.) 133 and Naba Kumar Das Vs. State of West Bengal, 1974 Cri. L. J. 512 would not be attracted in this case. Because this case is not based only upon the seized documents. Hence, merely by attacking the seizure procedure and by showing that the seizure was faulty, accused would not be entitled for its benefit.

62) d) Delay in filing complaint:

The raid is conducted on 11-12-2005. The complaint is filed on 3-1-2006. There is no explanation for delay appearing on record. We have to see the possibility of concoction or deliberation behind this delay. All such suggestions are otherwise denied by P. W. No. 1 Dr. Sambhaji Patil. There are no concomitant circumstances on record which would raise doubt that the complaint is filed with an ulterior motive to harass the accused deliberately. The complaint is filed by P. W. No. 1 Dr. Sambhaji Patil in capacity of an appropriate authority under the P. C. P. N. D. T. Act, 2003. Therefore, no personal reason for concoction or deliberation is attached with it, neither it has sprang up from his cross-examination. The interest of an appropriate authority to robe an innocent person is not appearing on record. So, the delay would not be fatal to the prosecution in this case.

63) e) Non recording of statements:

As stated earlier, this is a private complaint filed otherwise than on police report. It has to be dealt with the procedure from Section 244 to 247 as contemplated in the Code of Criminal Procedure.

Therefore, the private complainant has not recorded the statements cannot be a major lacuna to doubt with his case.

64) Summary:

The gist of entire above discussion, in the form of summary may be stated as follows:

65) P. W. No. 1 Dr. Sambhaji Patil and P. W. No. 3 Dr. Mrs. Kavita Sontakke have deposed in tune with the complaint Exh. 1. The fact of failure on the part of accused to produce Form F Register and consent forms of pregnant women is established on record by their evidence.

66) The defence of accused was twofold. First, he came with a defence that complainant was a stranger to him. Therefore, he has not produced his record before him. But these defence could not withstand the test of actuality. As from the cross-examination, the previous acquaintance of the accused and complainant was revealed. The legal obligations on the accused casted by Section 29 (2) of the P. C. P. N. D. T. Act 2003 and Rule 11 of the 'Rules 1996' bisected his defence. Then, by filing Articles 1 to 14, accused attempted to show that he has maintained complete record. But due to the irregularities and infirmities as listed (in para 43 above), this defence was also negated. The other objections of accused regarding the appointment of appropriate authority, proof of Exh. 24, non followance of seizure procedure, delay in filing complaint, non recording of statements have not gathered any force to sublimate the crystallized evidence of prosecution.

67) In the result, the evidence of prosecution is inspiring and can be acted upon. The prosecution is successful in proving that the accused has contravened Rule 9 (4) framed under 'Rules 1996' and thereby has committed an offence punishable under Sections 23 and 25 of The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act 2003. Therefore, I answer point No. 1 in the affirmative.

68) As point No. 1 has got its finding in the affirmative, before sentencing the accused to any punishment, I pause here to hear him on the point of sentence.

Date: 27/7/2010 (S. P. Naik-Nimbalkar)

Judicial Magistrate (F.C.) Parola

69) Heard the accused on the point of sentence. He has submitted that he do not accept this punishment. He has submitted to hear advocate Mr. T. K. Patil on his behlf. Learned advocate Mr. T. K. Patil has submitted that accused is not a habitual offender. The theory of reformation be applied while imposing punishment. Chance of reformation be given to the accused. Learned A. P. P. Mr. S. R. Jadhav is absent when called for repeatedly.

70) While fixing the quantum of sentence, the nature of offence is necessary to be looked into. As stated earlier, this case is for non maintenance of Form F Register and consent forms leading to the contravention of Rule 9 (4) of the 'Rules 1996'. At the cost of repetition, it is necessary to mention again that proviso to Section 4 (3) of the P. C. P. N. D. T. Act, 2003 lays down that any

such deficiency or inaccuracy would lead to a further contravention of provisions of Section 5 and 6. Sections 5 and 6 is the prohibition of determination of sex of foetus and communicating it to the pregnant woman or her relatives or any other person in any manner. By virtue of above provisions and the offence proved, the accused has thus contravened Section 5 and 6 of the P. C. P. N. D. T. Act, 2003. The contrary is also not proved by the accused within the meaning of proviso to Section 4 (3) of the P. C. P. N. D. T. Act, 2003. So, the above scenario makes the offence more serious and grave. The case not only remains for non maintenance of record in specified form but also is for contravention of prohibition on determination of sex of foetus.

71) Secondly, the legislative intent behind the enactment of P. C. P. N. D. T. Act, 2003 can be gathered from the statement of object and reasons as follows: " It is proposed to prohibit prenetal 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 woman. A legislation is required to regulate the use of such techniques and to provide deterrent punishment to stop such any inhuman act".

72) So, the legislature itself has emphasized the need for imposing deterrent punishment while dealing with such offenders.

73) Thirdly, the social circumstances relating to such offences are also necessary to be considered. The declining child sex ratio particularly in this taluka is the indicator of such misuse of technological progress.

74) Fourthly, the accused is a doctor by profession. The faith and health of society rest with him. He is educated and a professional. Therefore, more responsibility casts upon him to obey and abide with law.

75) Therefore, considering the nature of offence, the legislative intent, social circumstances and educational qualifications of accused, I am not inclined to prefer a lenient view in this case. Hence, the operative order as under-

**ORDER**

1) Accused Dr. Mr. Prashant Navnitlal Gujrathi, Age- Adult, R/o. Parola, Tal. Parola, Dist. Jalgaon is hereby convicted for the offence under Section 23 and 25 of The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act 2003 for the contravention of Rule 9 (4) framed under The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 and in view of Section 23 (1) of the The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act 2003 read with Section 248 (2) of the Code of Criminal Procedure, 1973, he is sentenced to suffer rigorous imprisonment of one (1) year and to pay a fine of Rs. 5,000/-, in default to pay such fine to suffer further simple imprisonment of two months, in view of Section 30 (1) of the Code of Criminal Procedure, 1973.

2) The existing bail bond of accused stands surrendered.

3) The documents at Articles 1 to 14 as well as muddemal property Article A and B be given to the accused, after the appeal period.

4) Right of appeal is vested with the accused against this Judgment and Order and the same is explained to him in his Mother tongue i. e. Marathi.

5) Copy of this Judgment and Order be given free of cost to the accused forthwith as per Section 363 (1) of the Code of Criminal Procedure, 1973.

6) Copy of this Judgment be given to the Appropriate Authority through Civil Surgeon, Jalgaon for reporting the name of accused to the State Medical Council for taking necessary action against him as per Section 23 (2) of The Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act 2003.

Dictated and pronounced in open Court.
(S. P. Naik-Nimbalkar)
Date: 27/7/2010 Judicial Magistrate (F. C.) Parola

## Case 5: Conviction of Dr. Prabakhar Krishnarao Pawar, Maharashtra

Dr.V.B. Yadav, District Appropriate Authority & Civil Surgeon, Government of Maharashtra

Versus

Dr. Prabhakar Krishnarao Pawar, Jivan Jyoti Hospital, Gondi, Julewadi, Satara Distt

### CASE SUMMARY

This Judgment is unique because in the first place it is written in the local language "Marathi" which is a very difficult task considering the fact that the Act and the Rules framed there under are in English and they contain several technical words and medical terms. Secondly, the Judgment elaborately explains in the language of the locals the object and reasons of the Act, the importance of the Act and why the strict implementation of the provisions of the Act, including implementation of technical and procedural aspects is significant. Thirdly, punishment imposed on the accused in this case is not only exemplary but the Court has also invoked the power of confiscating to the State the sonography machine used for diagnosis.

This Judgment is equally of importance because sensitivity and awareness to the ground reality, which is the hallmark of good judicial decision making process, are found reflected in this Judgment. The Judgment is detailed in analysis of the facts, evidence, application of law, the reasoning and imposition of punishment. It is for the first time in this case that Accused is convicted and punished for violating the code of conduct laid down in Rule 18 which is to be observed by the persons working in Genetic Clinics, Genetic Laboratories, etc.

It is a case of a sting operation. The facts of the case are to the effect that on the reliable information that Accused is conducting activities relating to the pre-natal diagnosis techniques in his clinic, which was not registered under the Act and was disclosing the sex of the foetus to pregnant women, complainant - Appropriate Authority with the support of Advocate Varsha Despande, sent to the clinic of the Accused a six months pregnant lady by name Kavita Lokhande as decoy client with marked currency notes of Rs.2,500/- for conducting diagnostic test. Accused conducted the test with the sonography machine and informed her that foetus in her womb was of a male child and accordingly issued sonography report to her accepting the amount of Rs.2,500/-. On receipt of this information from Advocate Varsha Deshpande and Advocate Shaila Jadhav, Dr. Jayant Deshpande went to the spot, verified the information, recorded statements of Kavita Lokhande, Advocate Shaila Jadhav, etc., seized the marked currency notes and sonography report under Panchnama alongwith other articles. After due investigation, case was filed in the Court against the Accused for the offence punishable u/s. 23 of the Act for contravention of various provisions and rules.

On the basis of evidence of various witnesses referred above, the Court found that the Clinic of Accused was not registered under the Act. He had also not obtained requisite training or experience of running such Clinic and yet he was conducting therein activities relating to pre-natal diagnostic techniques of sex detection and communicating the same to the pregnant lady. It was also proved that Accused had not maintained record, nor obtained consent from the pregnant woman – Kavita Lokhande and further he had also not displayed a board in his premises that disclosure of sex of foetus is prohibited under the Act. Thus for the breach of various provisions of Sections 3, 5 and 29 read with Rules 3, 10, 17 and 18 of the Act, Accused was held liable for conviction u/s. 23.

All the defences taken by Accused from even denying ownership of the Clinic, use of sonography machine, conducting of such activities and even factual details to the extent possible were rejected by the Court with sound reasoning. The case law cited before it was also distinguished on factual aspects. The plea of Accused for leniency was rejected considering that though Accused belonged to the noble profession of medicine, he was indulging into abhorrent practice of sex selection only to satisfy his greed for money. The Court imposed on him deterrent punishment of 3 years Rigorous Imprisonment and fine of Rs.10,000/- on each of the counts and further confiscated to the State his sonography machine, firstly because it was used for commission of offence and secondly on the ground that Accused may misuse it again. (Para 29)

It is the first case in which the accused was held guilty for as many as nine offences and he was punished with full sentence, i.e., to undergo three years imprisonment and fine of RS.10,000/- on each count. This is for the first time that the Court has rightly invoked and applied all the provisions under the Act in proper spirit keeping in mind the object and reasons of the Act, explaining them in the Judgment in the language which public at large can understand. The Judgment is really an eye opener to the entire medical profession and everyone must read it as it is in Marathi language.

## 5.4. Cancellation of registration

### Case 1: Suresh Manjibhai Prajapati v. the State of Gujarat & 1, August 2006

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 17994 of 2006
SURESH MANJIBHAI PRAJAPATI - Petitioner(s)
Versus
THE STATE OF GUJARAT & 1 - Respondent(s)
Appearance :
MR NK MAJMUDAR for Petitioner(s) : 1,
MS MAITHILI MEHTA, Ld. AGP for Respondent(s) : 1 - 2.
CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI
Date : 30/08/2006
ORAL ORDER

1. The petitioner is before this Court seeking the relief as under:

   "7(b) Be pleased to issue a writ of mandamus or any other appropriate writ, order or directions, quashing and setting aside the order passed by the respondents authorities dated 9.4.2006 by which the registration of Genetic Clinic of the petitioner has been suspended."

   It is also prayed in para (c ) as under:

   "Be pleased to issue a writ of mandamus or any other appropriate writ, order or directions, quashing and setting aside the action on the part of the respondents authorities in applying seal to the Sonography machine of the petitioner, in view of the aforesaid peculiar facts and circumstances of the case."

   The petitioner had been before the Appellate Authority by filing appeals, being Appeal Nos. 46 of 2006 and 47 of 2006, which were decided by order dated 5.7.2006, copy of which is at Annexure-'H' to this petition. It has been prayed in para (d) as under:

   "Be pleased to issue a writ of mandamus or any other appropriate writ, order or directions, quashing and setting aside the order passed by the Appellate Authority i.e. respondent No.3 dated 7.7.2006 (5.7.2006) by which it has been ordered to maintain status quo in respect of the seal applied to the Sonography machine of the petitioner."

2. The case of the petitioner is that on 9.4.2006, the petitioner was served with a show cause notice (Annexure-'A') after the place of the petitioner was visited and inspected in presence of two independent witnesses, namely (i) Ishwarji Laxmanji Chavda, aged 48 years, Deputy Mamlatdar, Chitnis Branch and (ii) Shri Gopibhai Dhanabhai Gamar, aged 41 years, Deputy Mamlatdar, Chitnis Branch, Collector Office, Banaskantha, Palanpur alongwith 18 persons of the Health Department of the District Panchayat, Banaskantha. In the notice, various iregularities and breaches of the provisions of The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as "the Act" for brevity), are mentioned.

It is also recorded in the notice that Registration holder Dr. Suresh M. Prajapati, i.e. the petitioner herein, was not present in the hospital and, therefore, in the presence of his representative- case writer Shri Laxmanbhai Karsanbhai Patel and in presence of Shri Jignesh M. Raval, working as a Pharmacist in 'Simant Medical Store', situated in the campus of the hospital, record, register and the hospital was inspected/ examined. Looking to the irregularities and the breaches, including that of change of address, without permission of the authority, 'change of machine', as in the application for registration under PNDT Act dated 7.11.2002, "Wipro GE Logic Alpha 100-M.P." Sonography Machine was mentioned, whereas "LT Medical Altra Sonography' machine was found in the consulting room of the petitioner. This change of machine was not intimated to the appropriate authority.

It is stated in the notice that under Rule 13 of The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Rules, 1996, within three days, appropriate authority is required to be intimated such change. The notice also called upon the petitioner to intimate the authorities as to where the earlier machine is. It is mentioned in the notice that provisions of Rule 17(1), 17(2), 1(1), 9(4), 5(1), 9(8), 13 are noticed to have been breached. The petitioner was granted three days' time to file his explanation.

3. The learned advocate for the petitioner submitted that, on the same day, i.e. 9.4.2006, the appropriate authority under the PNDT Act passed the order and suspended the registration of the petitioner resorting to the provisions of sub-section (3) of Section 20 of the Act.

4. The learned advocate for the petitioner submitted that the notice and the order both are vitiated on account of violation of principle of natural justice.

5. The learned advocate for the petitioner invited attention of this Court to the provisions of Section 20 of the Act. For ready perusal, Section 20 is reproduced:

"Section 20. Cancellation or suspension of registration.-

(1) The Appropriate Authority may suo motu, or on complaint, issue a notice to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic to show cause why its registration should not be suspended or cancelled for the reasons mentioned in the notice.

(2) If, after giving a reasonable opportunity of being heard to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and having regard to the advice of the Advisory Committee, the appropriate Authority is satisfied that there has been a breach of the provisions of this Act or the rules, it may, without prejudice to any criminal action that it may take against such Centre, Laboratory or Clinic, suspend its registration for such period as it may think fit or cancel its registration, as the case may be.

(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)."

The learned advocate for the petitioner submitted that sub-section (3) is in the nature of proviso to sub-Section (1) and (2). By this submission, what exactly is to be conveyed by the learned advocate, he could not and did not make it clear. If at all, the legislature wanted to provide any proviso to sub-sections (1)&(2) it could have so provided. The hard reality is that sub-section (3) is what it is. It is not a proviso to sub-sections (1) & (2). It operates as sub-sections (1) and (2) operate. Not only that sub-section (3) is having an overriding effect as it starts with a 'non obstente clause'.

In the considered opinion of this Court, sub¬section (3) gives wide powers alongwith discretion to the authority. The moment the appropriate authority is of the opinion that it is necessary or expedient, in the public interest, after recording reasons in writing, can suspend the registration without issuing any notice, as is referred to in sub-section (1) of Section 20.

6. In the present case, the authority issued notice on 9.4.2006 and alongwith that issued an order on the same day. The order is of nine pages recording the reasons in detail and then recording a fact that the authority is of the opinion that the registration of the 'Genetic Clinic' of the petitioner-Dr. Suresh M. Prajapati is required to be suspended in the public interest and then the order of suspension is made.

7. The learned advocate for the petitioner relied upon certain orders passed by this Court in Special Civil Application No. 13357 of 2006, Special Civil Application No. 13359 of 2006, Special Civil Application No. 13360 of 2006 and Special Civil Application No. 13433 of 2006.

The orders in first three matters are dated 10.7.2006, while the order in the fourth matter is dated 11.7.2006. The orders were passed on the facts presented by the learned advocate for the petitioner. It is evident from the order itself. For ready perusal, the order is reproduced hereunder:

"Heard Mr.A.D. Oza, the learned advocate for the petitioner. The learned advocate submitted that the clinic of the petitioner-doctor was visited by a team of persons on 24th May 2006. They had drawn Rozkam also, but then as they did not notice anything objectionable, no action was taken. However, on 25th May 2006 again another team visited without giving prior notice, without intimating anything about the so called irregularities or non compliance or non observance of Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994. The authority not only sealed the sonography machines but also cancelled the registration with immediate effect.

2. The learned advocate for the petitioner submitted that the order of cancellation of registration and also sealing of sonography machine are in utter disregard of principles of natural justice, more particularly, the procedure required to be followed under the law.

Rule. To be heard with Special Civil Applications No.11531 of 2006 and 11533 of 2006.

3. The respondents are directed to remove the seal placed on the sonography machine of the petitioner. It is clarified that removal of seal is subject to final orders passed in the matter.

4. The learned advocate for the petitioner submitted that the petitioner has preferred an appeal against the order dated 25th May 2006 before the appellate authority, a committee constituted at the State level for hearing of such appeals. The learned advocate submitted that this Committee enlists only ten matters per month. He submitted that at that speed hearing of the appeal will take place only after a long time. He submitted that the petitioner stands punished for the order passed without issuing show cause notice and without giving an opportunity of hearing. The learned advocate for the petitioner submitted that the authorities have also initiated criminal proceedings against the petitioner. He submitted that the authorities are acting under a drive without complying with the procedure prescribed under the law and principles of natural justice.

Order dated 25th May 2006 is stayed. The respondents are directed to allow the petitioner to continue his practice pursuant to certificate dated 27th August 2001. Direct service is permitted."

The other orders are also more or less on the same lines.

8. In those matters, after the other side appeared, the learned advocate appearing for the respondent authorities invited attention of the Court to sub¬section (3) of Section 20 and also Rule 12 of the Rules, 1996. The learned advocate for the respondents in those matters invited attention to the explanation contained in sub-rule (1) of Rule 12, which reads as under:

"Explanation. In these Rules-

(1) 'Genetic Laboratory/Genetic Clinic/Genetic Counselling Centre' would include an Ultrasound Centre/Imaging Centre/ nursing home/hospital/institute or any other place, by whatever name called, where any of the machines or equipments capable of selection of sex before or after conception or performing any procedure technique or test for pre-natal detection of sex of foetus, is used;

(2) 'material object' would include records, machines and equipments; and

(3) 'seize' and 'seizure' would include 'seal' and 'sealing' respectively."

The learned advocate for the respondents appearing in those matters also invited attention of the Court to the provisions contained in Rule 13 and other similar provisions. He also invited attention to Form No. (B), in which certificate of registration is to be issued, wherein Clause (3) provides Model and make of equipments being used (any change is to be intimated to the Appropriate Authority under rule 13). Those matters are pending for further hearing. During the pendency, the learned advocate for the petitioner filed a Civil Application for amendment and also filed a Civil Application for taking necessary action against opponent Nos. 1 and 2 and other concerned persons for having committed contempt of Court. Those matters were on Board today. Today, the Court has passed the following order in the Civil Applications:

"Mr. B.P. Tanna, learned senior advocate for M/s. Tanna Associates, files affidavit-in-reply, a copy of which is served to the learned advocate for the petitioners. The learned advocate for the petitioners wants time to respond to the same. At his request, the matters are adjourned to 1st September, 2006."

9. In view of the aforesaid state of affairs, the order cited by the learned advocate for the petitioner is not required to be followed unless the Court is convinced that the facts of both the cases are similar.

10. In the present case, the notice was issued on 9.4.2006. The order suspending the registration was passed on 9.4.2006. The petitioner herein has filed his reply to the show cause notice on 12.4.2006 and on the same day, he made a request to the authorities by an application, which is at Annexure-'D' to remove the seal applied to the hospital and to apply the seal to the Sonography machine after allowing the petitioner to place the Sonography machine in a room in a safe condition, so that it is not damaged. It is informed by the petitioner that the authorities have exceeded to that request. The seal applied to the hospital is removed and the machine is now kept in a separate room and continued to be in sealed condition.

11. The petitioner has already preferred appeals, being Appeal Nos. 46 of 2006 and 47 of 2006. Those appeals are also heard and the Appellate Authority has not found any reason to change the order passed by the appropriate authority at the District level.

12. It is at this stage, that the petitioner is before this Court.

13. Having taken into consideration all the relevant facts of the case and the provisions of law, the Court finds no substance in this petition. Hence, the petition is dismissed.

Sd/-
(RAVI R. TRIPATHI, J.)

omkar
To be referred to Reporter.

Sd/-
(RAVI R. TRIPATHI, J.)

**Case 2: Amita R Patel v. State of Gujarat, September 2008**

AMITA R. PATEL & 1 Vs STATE OF GUJARAT & 1 – Respondent(s)
CR.MA/10158/2007 21/21 JUDGMENT
IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
CRIMINAL MISC.APPLICATION No. 10158 of 2007
WITH
CRIMINAL MISC.APPLICATION No. 10160 of 2007

For Approval and Signature:
HONOURABLE MR.JUSTICE M.R. SHAH
AMITA R. PATEL & 1 – Applicant(s)
Versus
STATE OF GUJARAT & 1 – Respondent(s)
Appearance :
MR JV MEHTA for Applicant(s) : 1 – 2.MS KRISHNA B MEHTA for Applicant(s) : 1 – 2.
MR M.R.MENGDEY, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
None for Respondent(s) : 2,
Date : 19/09/2008

**ORAL JUDGMENT**

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, 1950 or any order made thereunder ? No

5 Whether it is to be circulated to the civil judge? No

CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

1. Rule. Mr.M.R.Mengdey, learned APP waives service of rule on behalf of the respondent ? State.

2. Criminal Misc.Application No.10158 of 2007 is filed by the petitioner-Doctor under Section 482 of the Criminal Procedure Code ('Cr.P.C.' for short) to quash and set aside the complaint being Criminal Case No.3251 of 2006 pending in the Court of learned 6th JMFC, Ahmedabad (Rural) for contravention of Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 hereinafter referred to as ('PNDT Act' for short).

3. Criminal Misc.Application No.10160 of 2007 is also filed by the petitioner-Doctor under section 482 of the Criminal Procedure Code to quash and set aside the complaint being criminal case No.845 of 2006 pending in the Court of learned Metropolitan Magistrate, Court No.9, Ahmedabad for contravention of PNDT Act more particularly under Section 4(3), 5(1) of the said Act and Rules 9(4) and 10(1)(A) framed under the said Act.

4. As common question of facts and law arise in both these application, they are being disposed of by this common judgment. Criminal Case No.3251 of 2006 is filed by the Dr.R.R.Vaidya, for and on behalf of the Appropriate Authority under PNDT Act against the petitioner ? Doctor who is having maternity and nursery home at Chandlodiya, Ahmedabad in the Court of learned 6th JMFC, Ahmedabad (Rural) alleging inter-alia that he is functioning as Chief District Health Officer and he is declared Appropriate Authority under the PNDT Act vide Government Notification

dated 07.02.1996 under Section 2(a) of the PNDT Act and Rules framed thereunder. It is further alleged in the said complaint that in discharge of his duty under the PNDT Act he found that accused has failed to observe and comply with the provisions of the Act. It is alleged that on 21.02.2006 primary inspection of the clinic of the accused was undertaken by Dr.Shipla Patel, Block Health Officer, City. The observations and reasons were recorded by her and on 21.02.2006 the infirmity / lapses as observed by the Appropriate Authority was communicated to the accused and said infirmity / lapses are produced at Annexure ? A to the said complaint. As the provisions of the Act were violated, USG machine was sealed. That on 21.06.2006 a show cause notice was issued to the accused as to why the registration of the accused should not be suspended / cancelled. That the accused preferred an appeal No.42 of 2006 before the State Appropriate Authority, Gandhinagar. That by order dated 16.03.2006, Registration of the accused under the PNDT Act was suspended. That the said complaint was filed on the following grounds: ?S1. Form-F is a statutory form and requires to be filled in completely & send before 5th of the next month to the A.A. As per the provisions of the Act/ Rules, sending of the Form F by the 5th of the next month is mandatory.

2. Authenticity of from/s not signed by the accused can never be ascertained by any one & in such cases the entire form is useless. This in turn flouts the requirement of filling up of form for every patient under going USG. Accused &/or patient can disown the contents of the very same from in future to defy probable Medical Termination of Pregnancy ? MTP & may be suggestive of the possibility of the accused maneuvering number of USG done & equal number of forms filled up. The same can not be ruled out.

3. If signature of the doctor is missing on the forms, presumption can be drawn that as the doctor has not been able to comply the declaration, the doctor has not put the signature. Otherwise whenever there is signature put by the doctor, declaration as envisaged by the Act is accepted. In other words non-signing the declaration means non-observance of the same i.e. sex determination & declaration has been carried out & is in total derogation of the statutory provisions of the Act.

4. Indication, date are missing in the forms. Even the register as required under the Act was also not maintained. This clearly indicates the causal approach of the accused towards the statutory provisions of the Act. Also reflect the lack of seriousness with which the Act is being taken up. Resultant effect would obviously be the frustration of the Act which is to curtail female feticide. This in turn, will keep on increasing the difference between the male-female birth numbers. In other words the endeavour to check the increasing ratio of male to female birth, owing to the female child being killed before birth, would not be getting through. In nut shell the Act is set as Naught.

5. The indication for the Pre-Natal Diagnosis as shown by the accused is 'Routine ANC' even routine thing is also with a specific purpose & the same is required to be mentioned otherwise data

collection, analysis of the same & consequent preventive measure to ensure the check of declining number of the female birth cannot be effected.??

5. That it was found that all the aforesaid breach and non-compliance were not at all in the larger public interest. It was further observed in the said complaint that not signing the report may be an attempt to disown such reports if pressed to a corner & with a view to hide / suppress the activity not in consonance with the provisions of the PNDT Act. It was alleged that penal provisions of Section 23 & Section 25 are attracted for contravention of Sections, 4,5 and 6 and corresponding rules. Further it was requested to take cognizance of the offence committed by the accused for non-compliance / breach of the provisions of the Act & Rules and to punish the accused so as to restrict the contravention of the provisions of the PNDT Act/ Rules and ensure the compliance thereof to meet by the noble cause as envisaged by the PNDT Act. In the said complaint, learned trial Court took cognizance and directed to register the complaint and issued summons upon the accused. Being aggrieved and dissatisfied with the same, the petitioners of CRMA No.10158 of 2007 have preferred present application under Section 482 of the Cr.P.C. to quash and set aside the said complaint / criminal case.

6. Similarly one another complaint being Criminal Case No.845 of 2006 is filed by one Dr.P.L.Dave Epidemic Medical Officer, District Panchayat, Ahmedabad on behalf of the Appropriate Authority under the PNDT Act and on behalf of Chief District Health Officer, Ahmedabad in the Court of learned Metropolitan Magistrate Court No.9, Ahmedabad against the petitioner ? accused. It is averred and alleged in the said complaint that complainant has been authorized to act on behalf of Chief District Health Officer who is declared as Appropriate Authority under the PNDT Act by Government Notification dated 09.11.2001. It is further alleged in the said complaint that in the discharge of his duty under the Act, he has found that accused has failed to observe / comply with the provisions of Sections 4(3), 5(1) and Rules 9(4) & 10(1)(A) of the Act framed thereunder. It is alleged that he visited clinic of the accused in presence of two respectable witnesses on 01.03.2006 and on discovering the contraventions of the Act, records, search and seizure procedure was conducted and the Sonography machine of the accused was sealed. Panchnama of the search and seizure was prepared and copy was handed over to the accused and same was produced along with the complaint. It was found that Form 'F' bearing Sr.No. 1 to 25 ranging from 02.12.2005 to 28.02.2006 were not filed up properly and same were seized during the search and seizure procedure. It was found that there was no sign of Doctor in Form 'F' in form numbers 3,4,5,6, 7, 11, 12. It was further found that patient's name was not written in the declaration by the patient section of form F. No indication for sonography is written in para No.11 of Form F in from Number 9,10 and 13. In all ?SF?? form number 14 to 25 the indication for Sonography is shown in para 10 of Form 'F' as ?Sprevious child with congenital anomaly?? along with ?Sto rule out congenital anomaly and for foetal well being??. It is further averred in the said complaint that Section 4(3) of the PNDT Act specifics duty on the registration holder or the Doctor conducting Sonography at the hospital under the Act to record in writing the reason

for conducting the procedure and keep these records up to date in the clinic as per Rule 9(4). It is further averred in the said complaint that as per Rule 10(1)(A) the Doctor and the patient have to give a written declaration to be recorded in Form F; that in no way the procedure being done is for selection or detection of sex of foetus. Section 5 specifies a duty on the registration holder or the Doctor conducting Sonography at the Hospital under the Act to obtain written consent in the language which she understands. That in the said complaint Section 493), 5(1) of the PNDT Act and Rule 9(4) and Rule 10(1A) are re-produced. Therefore, it was requested to take cognizance of the offence committed by the accused for non-compliance of the mandatory provisions of the Act and Rules framed thereunder and thereafter, punish the accused so as to restrict the breach of the provisions of the Act/ Rules and ensure the compliance thereof to meet by the noble cause as envisaged by the PNDT Act. It is further alleged in the said complaint that setting an example will go a long way in refraining the others like the accused from violation of the provisions of the Act/Rules which in turn is required in the interest of maintaining a healthy ratio between the human gender of Male and Female. That in the said complaint after taking cognizance the learned trial Court has issued summons upon the accused for the offence under Sections 4(3), 5(1) of the PNDT Act and Rule 9(4) and 10 (1A) of the Rules framed thereunder. Being aggrieved and dissatisfied with the same, the accused Dr.Ghanshaymsinh Dabhi has preferred present CR.M.A. 10160 of 2007 under Section 482 of the Cr.P.C. to quash the said criminal case.

7. Mr.Mehta, learned Advocate appearing on behalf of the respective petitioners has vehemently submitted that as such there are no breaches whatsoever much less technical one. It is further submitted that all the rules are complied with more particularly the intimation to the patient that one should not try to know sex of the foetus and various other precautions are also taken. It is further submitted that inspite of the fact that respective petitioners have complied with all the provisions of the Act and Rules thereunder with mala-fide intention complaints have been filed by way of random survey and just to show that inspection is done and the officers are carrying on their duties well. Therefore, it is requested to quash and set aside the impugned complaint by submitting that continuous of criminal proceedings against the petitioners would be unnecessary harassment as the petitioners are reputed doctors with good morals and ethics. Mr.Mehta, learned Advocate for the petitioners has submitted that with respect to some other Doctors against whom similar complaints were filed, learned Single Judge of this Court has quashed and set aside such criminal complaints by order dated 07.02.2007. Therefore, it is requested to quash the impugned complaints.

8. Petitions are opposed by Mr.M.R.Mengdey, learned APP appearing on behalf of the respondent-State. It is submitted that on bare reading of the impugned complaints prima-facie case is made out after thorough investigation by the Officers and what is required to be considered at this stage is whether on bare reading of the complaints, prima-facie case is made out for further trial or not. It is submitted that whether the petitioners have in fact committed offence or not is required to be considered at the time of trial on leading appropriate evidence. It is submitted that considering

the lapses found by the Appropriate Authority and the Officers under the PNDT Act and having prima-facie found that petitioners violated the provisions of the PNDT Act and Rules thereunder, impugned complaints have been filed with a view to punish the accused persons. It is submitted that looking to the statement and object of the Act and Rules thereunder prima-facie case is made out, therefore, it is requested not to exercise discretion under Section 482 of the Cr.P.C. and quash and set aside the complaint at this stage. It is submitted that though some mala-fide are alleged, but same are without any basis and are absolutely vague. It is further submitted that even otherwise as held by the Hon'ble Supreme Court and this Court in catena of decisions solely on the ground of mala-fide complaint cannot be quashed under Section 482 of the Cr.P.C. if it prima-facie discloses cognizable offence. Therefore, it is requested to dismiss both the applications.

9. Heard the learned Advocates appearing on behalf of the respective parties.

10. At the outset it is required to be noted that denial to girl of her right to life is one of the heinous violation of the right committed by the society; Gender bias and deep-rooted prejudice and discrimination against the girl child and preference of male child have led to large scale female foeticide in the last decade. Decline of sex ratio of girls and women in India is a major concern for all. In order to check female foeticide, the PNDT Act has been enacted. The PNDT Act provides for (i) prohibition of the misuse of pre-natal diagnostic techniques for determination of sex of foetus, leading to female foeticide; (ii) prohibition of advertisement of pre-natal diagnostic techniques for detection or determination of sex; (iii) permission and regulation of the use of pre-natal 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. Section 3 of the PNDT Act provides Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics. Section 4 of the PNDT Act provides for Regulation of Pre-natal Diagnostic Techniques. Under Section 4 of the PNDT Act certain conditions are cast upon the person conducting Ultrasonography on pregnant women. Section 5 of the PNDT Act provides Written consent of pregnant women and prohibition of communicating the sex of foetus. As per Section 6 of the PNDT Act on commencement of the Act, 1994 there is totally restriction and ban on determination of sex of foetus. As per Section 6 of the PNDT Act, no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of foetus. As per Section 6(b) of the Act, no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of foetus. As per Section 6(c), no person shall by whatever means, cause or allow to be caused selection of sex before or after completion. To see that object and purpose of the PNDT Act is achieved, Rules 1996 are framed. Under Section 32 of the Act, Rule 3 provides for employees, the requirement of equipment etc., for a Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre. Rule 3A provides for sale of

ultrasound machines / imaging machines. Rule 4 provides Registration of Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre. Rule 9 cast duty on every Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre to maintain a register so as to achieve ultimate object of the Act. Rule 10 provides for conditions for conducting pre-natal diagnostic procedures. Section 10(1A) casts mandatory duty that any person conducting ultrasonography / image scanning on a pregnant women shall give a declaration on each report on ultrasonography / image scanning that he / she has neither detected nor disclosed the sex of foetus of the pregnant women to any body and even the pregnant women before undergoing ultrasonography / image scanning declare that she does not want to know the sec of her foetus. Thus maintenance and preservation of records and conditions for conducting pre-natal diagnostic procedures are absolutely mandatory in nature but they are to achieve goal and object of PNDT Act and same is in larger public interest.

11. Now considering above provisions of the PNDT Act, and Rules framed thereunder and object of the PNDT Act, present Criminal Misc.Applications are required to be considered.

12. In the respective complaints / criminal case non-compliance and breach of provisions of the Act and Rules framed thereunder are specifically mentioned and same are on inspection by the Appropriate Authority and/or Officers under the Act. Therefore, prima-facie averments and allegations in the complaint discloses cognizable offence and accused are to be tried. It cannot be said that on bare reading of the impugned complaints, no case is made out for further trial. Whether accused will be punished or not are required to be considered at the time of trial and not at this stage considering Section 482 of the Criminal Procedure Code.

13. As observed by the Hon'ble Supreme Court in the case of Indian Oil Corporation v/s. NEPC India Ltd. and Ors reported in (2006) 6 SCC 736, a criminal complaint in exercise of jurisdiction under Section 482 of the Cr.P.C., a complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused. For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint is warranted while examining prayer for quashing of a complaint. It is further observed and held that the power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution. In the case of State of Orissa and Anr. V/s. Saroj Kumar Sahoo reported in (2005) 13 SCC 540 while considering the nature, scope, purpose and exercise of powers under Section 482 of the Cr.P.C, the Hon'ble Supreme Court has observed that inherent power is to be exercised sparingly and that too in the rarest of rare cases. It is to be exercised ex debito justitiae, to do real and substantial justice and not to stifle legitimate prosecution. It is further observed in the said decision that though no hard and fast rule can be lad down as regards cases where such power can be exercised, but the High Court being the highest court of a State should normally refrain from giving decision in a case

in a case where the entire facts are incomplete and hazy, more so, when the evidence has not been collected and produced before the Court and the issues involved are of magnitude and cannot be seen in their true perspective without sufficient material.

14. In the complaint it is provided to punish the accused so as to restrict the contravention of the provisions of the PNDT Act/ Rules and ensure the compliance thereof to meet the noble cause as envisaged by the PNDT Act. It was sought to be argued on behalf of the petitioners that alleged breaches are technical one. It is true that it might be that alleged breaches may be seen to be technical one but provisions of the Act and Rules which are mandatory are required to be complied with strictly so as to achieve ultimate goal of the Act. As stated hereinabove, certain duties are cast upon the persons conducting ultrasonography / image scanning on a pregnant women so as to check female fotecide.

15. In the facts and circumstances of the case and allegations in the complaint narrated herein above and looking to the object of the Act, no case is made out to exercise extra ordinary jurisdiction under Section 482 of the Criminal Procedure Code to quash the impugned complaints at this stage. Now so far as the decision of the learned Single Judge of this Court relied by the learned Advocate for the petitioners is concerned, it is reported that decision of the learned Single Judge of this Court is referred to Larger Bench and Larger Bench has already heard the matter. Even otherwise on facts, prima facie case is made out against the petitioners and therefore, this Court is of the opinion that considering the averments and allegations in the complaint, no case is made out to exercise powers under Section 482 of the Cr.P.C. and quash the complaint at this stage.

16. For the reasons stated above, both the applications fail, deserve to be dismissed and accordingly they are dismissed. Rule discharged. Before parting with the present judgment, this Court is tempted to observe and this Court is of the opinion that moto of the Government and everybody is ? SSAVE GIRL??. However, it shall not be only 'SAVE GIRL' but it should be 'WELCOME GIRL (BETI VADHAO)' and if this goal is achieved and every man and women starts welcoming girl (Daughter) from the bottom of their heart, then and then only it can be said that the purpose and object for which PNDT Act has been enacted is achieved.

[M.R.Shah,J.]

**Case 3: Dr. K.L. Sehgal v. Office of District Appropriate Authority & Union of India and Others, July 2010**

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 6654/2007
Reserved on: 29th April 2010

Decision on: 5th July 2010

DR. K.L.SEHGAL, Petitioner
Through: Mr. Praveen Khattar, Advocate
versus
OFFICE OF DISTRICT APPROPRIATE AUTHORITY, Respondent
Through: Ms. Zubeda Begum, Addl. Standing
Counsel with Ms. Sana Ansari, Advocates

**W.P.(C) 6826/2007**
DR. SONAL RANDHAWA….. Petitioner
Through: Mr. Ravi P. Mehrotra with Mr. M.L. Mehra andMr. Vibhu Tiwari, Advocates
versus
UNION OF INDIA & ORS …Respondents
Through: Mr. Amiet Andlay, Advocate for R-2 Mr. Maninder Singh, Senior Advocate with Mr. Gaurav Sharma and, Mr. J.P. Karunakaran, Advocates for MCI.

**CORAM: JUSTICE S. MURALIDHAR**

1. Whether reporters of local paper may be allowed to see the judgment? No
2. To be referred to the reporter or not? Yes
3. Whether the judgment should be referred in the digest? Yes

**JUDGMENT**

**05.07.2010**

1. These two writ petitions raise important questions of law concerning interpretation of Section 2(p) of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 [hereafter "the PNDT Act"] which defines "sonologist or imaging specialist".

2. First, the brief facts in each of the writ petitions may be noticed.

**W.P. (C) 6654 of2007 - Dr. K.L. Sehgal**

3. The Petitioner in Writ Petition (C) No. 6654 of 2007 is Dr. K.L. Sehgal who runs the Dr. SehgaTs Polyclinic & Diagnostics Imaging Clinic in New Delhi. He obtained an MBBS degree from the Ranchi University in 1977. He got registered from the Delhi Medical Council (DMC) in 2001. The registration has been renewed from time to time and is currently valid till 4th December 2011. Dr. Sehgal states that he is a registered medical practitioner within the meaning of Section 2(m) of the PNDT Act. Dr. Sehgal claims that he is also a sonologist within the meaning of Section 2(p) of the PNDT Act. He claims that he has undergone a six months training course in Sonography between 14th February 2002 to 2nd September 2002 at the Institute of Ultrasound Training which is a training centre for ultrasound training recognised by the Indian Medical

Association-Academy of Medical Specialties (IMA- AMS) and the Federation of Obstetric & Gynaecological Societies of India (FOGSI). He states that during the course of training he had gained experience of handling more than 100 cases of Ultrasonography under the supervision of Dr. J.S. Randhawa, M.D. (Radiology). The certificate issued by the said Institute has been annexed to the petition.

4. In April 2002, Dr. Sehgal applied for grant of PNDT registration for setting up an ultrasound clinic under the name of 'Dr. Sehgal's Clinic'. He was granted a certificate on 1st May 2002 with registration No. 348. The certificate was valid for a period of five years up to 30th April 2007. By a letter dated 21st February 2007 from Respondent No. 1, i.e., the Office of District Appropriate Authority (hereafter 'the Authority') under the PNDT Act, Dr. Sehgal was asked to submit the necessary documents for renewal of the PNDT registration. In response to the said notice on 28th February 2007 Dr. Sehgal submitted an application for renewal enclosing the certificate of his six months training. He stated that he had been regularly performing sonography tests for the last five years.

5. Dr. Sehgal states that he did not receive any response till the expiry of 90 days thereafter i.e. 29th May 2007. According to him, in terms of Rule 8 (6) of the PNDT Rules, the registration should be deemed to have been renewed on the expiry of 90 days. Rule 8 (6) of the PNDT Rules reads as under:

   "In the event of failure of the Appropriate Authority to renew the certificate of registration or to communicate rejection of application for renewal of registration within a period of ninety days from the date of receipt of application for renewal of registration, the certificate of registration shall be deemed to have been renewed."

6. It is submitted that on 22nd June 2007, Dr. Sehgal received a letter dated 25th May 2007, which according to him was posted on 21st June 2007, by which he was informed that his application for renewal of registration had been rejected on the ground of "non-submission of documents from a qualified Radiologist." Dr. Sehgal protested stating that in terms of Section 3(1) (b) of the PNDT Act, any person who was registered as a medical practitioner and had one year's experience in sonography, was eligible to run an ultrasound clinic.

7. Dr. Sehgal claims to have submitted an application dated 11th July 2007 under the Right to Information Act, 2005 ("RTI Act") seeking the precise reasons for the rejection of his application. By a letter dated 3 August 2007, the Authority provided the following information to him:

   "2. Now, in Feb. 2007, you had submitted application for renewal of PNDT registration. The file had been sent to higher authorities for guidelines (copy of file noting is attached as Annexure I-3). Guidelines were received from the Directorate of Family Welfare in minutes of meeting (attached as Annexure-4). On the above mentioned basis your application for renewal has been rejected.

3. You have also stated that you have been regularly doing ultrasonography from last 5 years (again ref. your letter no. nil dated 28.02.2007). It will be counted towards "Self Experience" & in the PNDT Act & Rules there are no guidelines regarding the registration of registered medical practitioner on the basis of Self Experience: as because any experience without the supervision of any competent authority is not counted, i.e. treats only as "Self Experience"."

8. The rejection of Dr. Sehgal's application is assailed on the following grounds:

(a) that with the rejection not having been communicated to Dr. Sehgal within a period of 90 days from the date of his application, i.e., 28th February 2007, there was a deemed renewal under Rule 8 (6) of the PNDT Rules.

(b) that under Rule 3(1) (b) an ultrasound clinic can be run by a registered medical practitioner having six months training or one year experience in sonography. Since Dr. Sehgal satisfies this requirement, he was eligible to set up an ultrasound clinic. In any event, Dr. Sehgal submitted a certificate from a qualified radiologist that he had undergone training in sonography and therefore, the ground for non-renewal was contrary to the record.

(c) The rejection of the application on the ground that five years' experience by Dr. Sehgal's ultrasound would be a "self-experience" and therefore would not be counted towards the experience under the PNDT Act, was clearly arbitrary. The guidelines of the Directorate of Family Welfare do not indicate that in a similar situation the certificate of registration should not be renewed. It only indicated that the issue was still under consideration and till such time the PNDT Act was to be strictly followed.

9. The response of the Authority under the PNDT Act is that the Institute, in which Dr. Sehgal claims to have undergone training, is not recognised by the Government of India or any competent authority. The Institute was recognised only by private institutions which could be termed as 'NGOs' and the experience gained was no experience because anybody could approach private institutes and get certificates without satisfying the basic criteria of being trained to use the ultrasound apparatus. A radiologist has to be one from an institute recognised by the Government of India. It is submitted that since the PNDT Act and Rules framed thereunder do not specify the institutes and individuals from where the training/experience had to be undergone, the application was placed before an Advisory Committee comprising of technical experts. It is submitted that the grant of registration as sonologist under the PNDT Act is a matter of policy. The absence of clear-cut guidelines is acknowledged. It is stated that a response is awaited to the letter written to the Government of India in this regard on 20th November 2007. It is pointed out that Dr. Sehgal not being a Sonologist or an Imaging Specialist/Radiologist could not be qualified to run an ultrasound clinic. On behalf of Dr. Sehgal, it is pointed out that unless there is a requirement in the PNDT Act or the Rules that the training should be obtained from a recognised institute, the rejection of Dr. Sehgal's application was ultra vires the PNDT Act and Rules.

**W.P. (Civil) 6826/2007 - Dr. Sonal Randhawa**

10. The facts in Writ Petition (C) No. 6826 of 2007 are that the Petitioner, Dr. Sonal Randhawa, holds an MBBS degree from the University of Agra and has been registered under the DMC since 18th September 2006. It is stated that in 2007 she completed American Registry for Diagnostic Medical Sonography (ARDMs) certifying examinations as Specialist in Obstetrics and Gynecology. As far her experience in Sonography is concerned, it is stated that she has worked as a registered Sonologist under PNDT in Rohini (North-West Dist.) for three years. She has training and worked under Dr. J.S. Randhawa MD (Radio diagnosis) who is a qualified and experienced Radiologist and Ultrasonologist from 1998-2001. She claims to have completed a Visiting Fellowship in Diagnostic Ultrasound and Echocardiography from 26th March 2007 in the Department of Radiology, Thomas Jefferson University Hospital and Jefferson Medical College, Philadelphia in USA. It is stated that in February 2003 Dr. Randhawa completed the two year course on ultrasound training under the IMA (AMS) from 4th January 2001 to 10th February 2003. She also worked as a Consultant Ultrasonologist at the government approved Gupta Hospital in Delhi from 16th July 2001 to 31st March 2005.

11. On 5th April 2006 Dr. Randhawa applied for registration as a sonologist under the PNDT Act in the West District of the National Capital Territory of Delhi. Dr. Randhawa had already been recognized and registered as a Sonologist with the Rohini (North-West Zone) and Dwarka (South-West Zone) under the PNDT Act since the last seven years. On 10th July 2006 Dr. Randhawa submitted all necessary documents as directed by the Appropriate Authority in support of her application. Since no reply was forthcoming, Dr. Randhawa filed an application on 14th July 2006 under the RTI Act. On 2nd August 2006 the District Appropriate Authority under the PNDT Act (West District) sent a communication to the Director, Directorate of Family Welfare, GNCTD stating that Dr. Randhawa did not submit documents in support of her application to be registered as an ultrasonologist and therefore her application could not be considered. Dr. Randhawa preferred an appeal on 21st August 2006 with the Director, PNDT, Ministry of Health and Family Welfare with reference to her application dated 14th July 2006 under the RTI Act. In response to this, a letter was written by the Ministry of Health and Family Welfare, PNDT Division on 15th September 2006 stating that the PNDT Act or Rules do not categorically specify the institutions/individuals from where the training or experience has to be acquired. At the meeting of the State Level Multi-Member Appropriate Authority under the PNDT Act held on 6th December 2006 Dr. Randhawa's case was discussed and her request for registration was not acceded to. Dr. Randhawa applied to the Ministry of Health and Family Welfare on 19th December 2006. However, she did not hear any response to the said letter. In the meanwhile she kept pursuing her request for information under the RTI Act. By an order dated 19th June 2007 the Central Information Commission (CIC) directed the Directorate of Family Welfare to provide information to Dr. Randhawa within ten days. The Directorate of Family Welfare sent a letter dated 5th July 2007 to the Petitioner stating that her request for registration as a sonologist could not be acceded by the State Advisory Committee under the PNDT Act and that "training in Ultrasound needs to be examined and recognized by the competent authority."

12. Dr. Randhawa has assailed the refusal of registration on the ground that the reasons therefore were arbitrary and unreasonable. The observation that training in ultrasound needed to be examined and recognized by the competent authority, was a bald one. Even though the PNDT Act and Rules do not provide the procedure for undergoing training/experience or identify persons eligible to provide such registration, there was no justification in simply rejecting the request for registration.

**Stand of the Medical Council of India**

13. In the present cases, the counter affidavit filed by the Respondent is more or less similar. However, in addition to the reply of the Respondent Appropriate Authority, an affidavit has been filed on behalf of Respondent No. 6 Medical Council of India (MCI). Referring to the decisions in **Dr. Preeti Srivastava v. State of MP (1999) 7 SCC 120, State of Punjab v. Dayanand Medical College (2001) 8 SCC 664 and State of Madhya Pradesh v. Gopal D. Tirthani (2003) 7 SCC 83**, it is submitted that the MCI Regulations made under the Indian Medical Council Act, 1956 ('IMC Act') are binding and mandatory. It is stated that a 'recognized medical qualification' as defined under Section 2 (h) of the IMC Act means any of those medical qualifications included in the Schedules to the IMC Act.

14. Under Section 33 read with Section 20 of the IMC Act after obtaining prior approval from the Central Government, the MCI framed the Postgraduate Medical Education Regulations, 2000. As per Regulation 10, the period of training for the award of a degree of Doctor of Medicine (M.D.)/ Master of Surgery (M.S.) shall consist of three completed years including the period of examination. For the award of a postgraduate diploma there shall be two completed years of training including the period of examination. The specialties in which postgraduate degrees/diplomas can be awarded are prescribed in the schedule to the said Regulations. At serial no. 24 under A i.e., qualification for M.D. specializations of the Schedule is Radio Diagnosis and under F i.e., for diplomas at serial nos. 21 to 23 are Radio Diagnosis, Radio Therapy and Radiological Physics. It is submitted that Dr. Randhawa Diagnostics where Dr. Sonal Randhawa is purported to have conducted ultrasounds regularly under the supervision of Dr. J.S. Randhawa is not a recognized medical institute under the IMC Act, and is not included in the Schedule to the IMC Act. The said Institute of ultrasound training is also not included in the list of institutes recognized/permitted by the MCI to conduct any postgraduate courses in Radio-Diagnosis or Ultrasound. The course offered on ultrasound by the said Institute is not a recognized medical qualification for the purposes of the IMC Act.

**Subsequent Developments**

15. After the filing of this petition a meeting was held in the Directorate of Family Welfare on 9th January 2008 in which the following decisions were taken:

"i) Now onwards registration should be allowed to only the persons qualified in Radiology (ii) Specialists may be allowed Ultrasound in their own specialty. For example a Gynecologist with Post Graduate qualification can do level 1 scan for gross anomalies and monitoring of pregnancy. (iii) Registration of existing clinics registered on basis of training/experience from private place

should not be cancelled. At the same time they should be given show cause notice regarding non MCI qualification/experience and a stricture should be written on their registration certificate. (iv) Renewal of such clinics should be allowed till court judgment regarding qualification/experience or any other clarification in this regard from Govt. of India. (v) No new registration should be given on basis of non MCI recognized qualification. (vi) practice of giving training/experience by one Doctor to other fellow Doctor should be stopped. (vii) Directions issued by Hon'ble Court should be followed further in this regard. (viii) A file may be sent to the legal department and legal opinion on this matter be obtained."

16. It is submitted that once the above decisions came to be published, it met with a stiff opposition and an agitation among the fraternity of doctors. The State Advisory Committee which thereafter met on 22nd July 2008 decided to discard the earlier changes. This happened while it considered an appeal of Dr. Rahul Kumar in which it passed the following order:

"Instant appeal has been filed by Dr. Rahul under Section 19(2) of the act against rejection of application for registration vide order dated 13.06.08 passed by the CDMO, North West District. The sole reason for rejection of application is consequent upon the issuance of certain instructions from State Advisory Committee, according to which the kind of training as was being given by private Pos Graduate Doctors was termed as not valid as per Medical Council of India norms and it was considered that practice of giving training/experience by one Doctor to other fellow Doctor should be stopped. Considering the above said the case of the Appellant was rejected for the reason that he had obtained the Post Graduate Diploma in Sonography from the Global Open University which was not listed as recognized Institute for awarding Medical qualification as required. **However, it is informed that in the subsequent meeting of the Advisory Committee dated 22.07.08 it was considered that registration of new Centers under PC & PNDT Act may be resumed on the basis of qualification as prescribed under the provision of Act on the basis of Experience/Training as laid down in the Act as per practice prior to 9.1.08. Since now the previous restrictions as imposed have been done away, as stated above, in the meeting of State Advisory Committee. It is agreed by both the parties that the case of the Appellant may be reconsidered if his case is otherwise found fit on the basis of merits.** The matter is accordingly remanded back to the District Authority for reconsideration in terms of the above." (emphasis supplied)

17. It is pointed out by Dr. Randhawa that pursuant to the above decision Dr. Rahul Kumar was granted registration as was evident in the reply given under the RTI Act on 24th October 2008. Accordingly, it is submitted that Dr. Randhawa has been meted out a differential treatment which is unwarranted.

18. Learned counsel appearing for Dr. Randhawa pointed out to the stand of the MCI in a reply dated 3 March 2008 to an application made under the RTI Act by one Sagar Saxena that "courses like IVF, Laparoscopy, Lasik Surgery, Ultrasound, Bariatric surgery, do not come within the purview of

MCI." In a reply given to one Dr. Diwan Singh on 14th August 2008 in response to a query as to "who is a sonologist as defined in the PNDT Act as per the MCI guidelines," it was stated that the matter is "outside the purview of Medical Council of India."

**Submissions of counsel**

19. This court has heard the submissions of Mr. Ravi P. Mehrotra, the learned counsel for Dr. Sonal Randhawa and Mr. Praveen Khattar learned counsel appearing for Dr. K.L. Sehgal, Ms. Zubeda Begum and Mr. Amiet Andley learned counsel appearing for Respondent No. 2 Appropriate Authority, GNCTD and Mr. Maninder Singh, learned Senior counsel appearing for the MCI.

20. While counsel for Appropriate Authority GNCTD reiterated the submissions noticed hereinbefore, Mr. Maninder Singh learned Senior counsel for the MCI urged that the provisions of the PNDT Act have to be interpreted in such a manner that the word 'or' appearing in Section 2(p) has to be read as 'and'. He relied upon the judgment of the Supreme Court in **Prof. Yashpal v. State of Chhattisgarh AIR 2005 SC 2026**, and in particular para 40 thereof. He pointed out to the growing menace of female foeticide and the apparent failure of the PNDT Act to check the alarming sex ratio which is directly traceable to the indiscriminate use of the pre-natal diagnostic tests and unethical practices of the registered medical practitioners. He submitted that unless the PNDT Act is interpreted to require a sonologist to be a qualified specialist with experience in a recognized institute, the unchecked unethical practices adopted by diagnostic clinics cannot possibly be stopped. He urged this Court to take a proactive approach in the matter and adopt an interpretation that would advance the purpose of the legislation. Reliance is also placed on the decisions in **Dr. A.K. Sabhapathy v. State of Kerala AIR 1992 SC 1310; Gopinder Singh v. Forest Department of Himachal Pradesh 1990 (Supp) SCC 272; and M/s Entertainment Network (India) Ltd. v. M/s Super Cassette Industries Ltd. JT 2008 (7) SC 11.**

**Meaning of 'sonologist ' under Section 2 (p) PNDT Act**

21. The question that arises for consideration is the meaning that should be given to the expression ' sonologist' as defined under Section 2(p) of the PNDT Act. Section 2 (p) reads as under:

"2(p) **"Sonologist or Imaging Specialist"** means a person who possesses any one of the medical qualifications recognized under the Indian Medical Council Act, 1956 or who possesses a post-graduate qualification in ultrasonography or imaging techniques or radiology."

22. The definition of the word 'sonologist' does support the submission of the learned counsel for the Petitioners that as long as the person concerned possesses "one of the medical qualifications recognized under the Indian Medical Council", he could be a sonologist. The word 'or' only makes the possessing of "a post-graduate qualification in ultrasonography or imaging techniques or radiology" an alternative qualification. It appears that prior to the insertion of Section 2(p) in the PNDT Act certain amendments were proposed. The suggested definition of 'sonologist' as proposed reads as under:

"Sonologist/Imaging Specialist" means a person who possesses any one of the medical qualifications recognized under the Indian Medical Council Act 1956, and/or a post graduate qualification in ultrasonography/ imaging technique/radiology and who is certified for performing sonography" (emphasis supplied)

23. Despite the above suggestion, when the amendment was ultimately enacted the word 'and' appears to have been dropped. The present definition requires a post-graduate qualification only in the alternative.

24. How the definition under Section 2(p) has been understood is reflected in Rule 3 of the PNDT Rules which reads as under:

"The qualifications of the employees, the requirement of equipment etc. for a Genetic Counseling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre shall be as under:

xxxxx

(3)(1): Any person having adequate space and being or employing

xxxxx

(b) a Sonologist, Imaging Specialist, Radiologist or Registered Medical Practitioner having Post Graduate degree or diploma or six months training or one year experience in sonography or image scanning,

xxxxx

may set up a genetic clinic/ultrasound clinic/imaging centre."

25. In **Prof. Yashpal v. State of Chhattisgarh**, the Supreme Court, in the context of recognition of institutions for the purposes of affiliation to a university, observed that the word 'or' can sometimes be read as 'and' when the literal meaning of the word would produce "unintelligible or absurd" results. However, the same cannot be said of the present definition. This is because if one were to read the word 'or' as 'and', then the following words which indicate that the person should be possessing any one of the medical qualifications recognized under the IMC Act are rendered redundant. If the submission of the MCI is to be accepted, the definition ought to mean that a sonologist or an imaging specialist could be a person who is

(a) an MBBS or possessing any one of the "other" medical qualifications, for e.g. an Ophthalmologist, an ENT specialist or a Cardiologist who possess qualifications recognized by the IMC Act, together with

(b) a post-graduate qualification in "ultrasonography or imaging techniques or radiology".

The post-graduate qualification in "ultrasonography or imaging techniques or radiology" would also have to be a qualification recognized by the IMC Act. However, that is not how Section 2(p)

reads. To accept the argument of the MCI would be reading too many words into Section 2(p) which is simply not permissible for this Court to do. In this connection a reference may be made to the decision in **Hiradevi v. District Court at Shahjahanpur AIR 1952 SC 362**, where Justice Bhagwati speaking for the Court in the context of the old Section 71 vis-a-vis Section 90 of the U.P. District Boards Act, observed (AIR @ p. 365):

"it was unfortunate that when the Legislature came to amend the old Section 71 of the Act it forgot to amend Section 90 in conformity with the amendment of Section 71. But this lacuna cannot be supplied by any such liberal construction as the High Court sought to put upon the expression 'orders of any authority whose sanction is necessary'. No doubt, it is the duty of the Court to try and harmonise the various provisions of an Act passed by the Legislature. But it is certainly not the duty of the Court to stretch the word used by the Legislature to fill in gaps or omissions in the provisions of an Act."

26. There are other difficulties in reading the definition in Section 2 (p) as suggested by the MCI. The MCI itself has, in a letter dated 4th May 2009 written to the Petitioner in Writ Petition (Civil) No. 6654 of 2007, clarified as under:

"Sir,

With reference to your letter dated nil received on 1.09.2008, I am directed to state that the above mentioned matter was considered by the Executive Committee at its meeting held on 27.04.2009 and it was decided as under:-

The Executive Committee of the Council perused the report of the Sub-Committee and the decision of the Ethics Committee and decided as under:-

"The Ultrasonography can be undertaken by a specialist who possesses postgraduate qualification in the specialty of Radio-Diagnosis. However, specialist doctor in their specialty can also undertake Ultrasonography for the purpose of certification subject to the condition that he/she has undergone orientation training in the Ultrasonography in the department of Radio-Diagnosis in a recognized medical institution under recognized medical teacher for a minimum period of 6 months wherein he has not only observed the procedure of Ultrasonography but also has undergone hands on training to enable him to practice in the field of ultrasonography for the diagnostic purposes pertaining to his/her specialty."

27. The above reply would indicate that a person who is a specialist who either has an MBBS degree or a further specialization qualification would be able to run an ultrasound clinic provided he or she undergoes six months' training in ultrasonography. The MCI is therefore, unclear as to what will satisfy the definition of 'sonologist' under Section 2 (p) of the PNDT Act. It is inconceivable how a request for registration can be refused on the ground of non-compliance with the above requirement when the decision in that regard appears to have been taken only on 27th April 2009 by the MCI.

28. On 11th May 2009 Dr. Sonal Randhawa asked the MCI to provide her with:

"1. List of recognized Medical Colleges which are providing six months training in Diagnostic Ultrasound including hands-on to specialist doctors of subjects other than radio diagnosis in the department of radio diagnosis.

2. Application procedure, eligibility criteria, course curriculum and fee for the same."

29. In reply thereto, on 6th June 2009 the MCI informed her as under:

"With reference to your application dated 11.5.2009, on the subject noted above, the point-wise reply is as under:-

1. No such list of Medical Colleges providing training in Ultrasound is available with Medical Council of India.

2. This is not related to Medical Council of India, you may contact to individual Medical Institutions for the same."

Therefore, it is plain that MCI itself is not aware of medical colleges which provide training in ultrasonography and diagnostic ultrasound.

**Uncertainty in applying the PNDT Act and Rules**

30. At this stage a reference should also be made to the deliberations of State Advisory Committee which considered Dr. Sehgal's application for renewal of registration. The recording of the minutes of the meeting of the Committee held on 27th April 2007 under Agenda Item No. 2 read as under:

"Agenda 2

Qualifications/experience required by Registered Medical Practitioners who are employed by/in a Genetic Clinic.

Details : Grant of Registration/renewal of registration of genetic clinic on the basis of (a) Training with Doctor J.S. Randhawa, Institute of USG Training, D-364, Tagore Garden Extn., N. Delhi-27; and (b) Many centres in 2002 were registered based on (a) above, now requesting renewal on the basis of Self Experience.

In this context, a letter from Govt. of India, dated 15-9-06 was quoted. It was brought to the notice of all present that the issue is under consideration of Central Supervisory Board and there is proposal to accredit only larger Govt. Hospitals and Medical

Council of India recognized, post-graduate Institutes, teaching & Radiology for the purpose of training, to be recognized ultrasonologist as per PC & PNDT Act.

The issue was discussed at large by all members of Advisory Committee and it was concluded that **we may seek guidance from Govt. of India on above agenda. Till such time PC & PNDT Act should be followed, strictly**." (emphasis supplied)

31. The above minutes were enclosed with the reply dated 3 August 2007 given by the District Appropriate Authority to Dr. K.L. Sehgal stating that his application had been rejected on the above basis. What is not clear is the basis for rejection when the Committee was still seeking "guidance" from the Government of India and the matter was still under the consideration of the Central Supervisory Board. The other reason given in the rejection order dated 25th May 2007 in respect of Dr. Sehgal's application is "non-submission of documents of qualified radiologist". No such criterion was earlier prescribed and it is not understood how such a requirement could suddenly be insisted upon.

32. Even in the reply filed by the GNCTD it is stated in para 8 as under:

"That the list of the Hospitals/Institutes recognized by the Govt. of India for the purpose of training/ experience in Ultrasonologist under the PC & PNDT Act is received from the Govt. of India, no private institute or Ultrasound Diagnostic Centre can be accredited by the Govt. of Delhi for the purpose of training/experience in Ultrasonologist under the PC & PNDT Act. The question of the grant of registration as sinologist to the Petitioner under the PC & PNDT Act is policy matter which can be decided after clear-cut guidelines of Govt. of India. A letter dated 20/11/2007 has been written in this regard by the answering respondent and response thereto is awaited."

33. The above letter dated 20th November 2007 by the Director, Family Welfare suggested that a committee of technical experts be constituted to examine the following issues:

"1. What shall Appropriate Authorities do with the Doctors who were provided registration on the basis of 100 cases experience and now applying for renewal?

2. Is the training/experience provided by private Radiologist to MBBS Doctors valid for purpose of registration of under PNDT Act?

3. What is the kind of training/experience valid for registration under PNDT Act?

4. Ultrasounds are used in other specialties also. Can the other Doctors of different specialties use U/s for respective specialties? Do Doctors from different specialties not doing Pre-conception or Pre-natal work require registration under PNDT Act?

5. Are Gynecologist/others specialist/registered Medical Practitioner allowed to perform U/s on their patients?"

34. The above documents reflect an uncertain state of affairs. None of the authorities were clear what should be the minimum criteria regarding training, where the training should be provided, whether the criteria should be made prospective and so on. Also, it is plain that neither the PNDT Act nor the PNDT Rules provided any guidance on these aspects. It is in this background that the plea of the learned Senior counsel for the MCI that the court has to read the requirements of training and special qualification into the definition of 'sonologist' in Section 2 (p) of the PNDT Act has to be examined.

35. In cases such as the present ones, the issues raised involve consideration of technical aspects on which the views of the experts rather than courts are relevant. In determining who should be recognized as being qualified to undertake ultrasound tests, what should be the minimum qualification and experience, the inputs of experienced medical fraternity become critical for. This Court, exercising jurisdiction under Article 226 of the Constitution, lacks the competence to determine such technical issues.

**Rejection of Petitioners' applications unsustainable in law**

36. Nevertheless, it appears to this Court that the reasons for rejection of the Petitioners' applications were not based on rational grounds and on the basis of reasonable criteria made known to each of them in advance. The Petitioners appear to have satisfied the requirements of the PNDT Act and the extant PNDT Rules which do not specify that the training to be undergone has to be in a recognized institute. As already noticed, even the MCI is unclear where such 'recognised' institutes that offer such training and qualification exist. Also, without such criterion being made known in advance, it would be unfair to reject an application for renewal on that basis as was done in the case of Dr. Sehgal and for registration as in the case of Dr. Randhawa. Further, in the case of Dr. Sonal Randhawa there is no convincing explanation forthcoming for the apparent inconsistency in dealing with her applications for registration in the different districts in Delhi. It is not disputed that she has been granted registration under the PNDT Act in two districts but has been refused in the third. Also, if in Dr. Rahul's case, the Advisory Committee on 22nd July 2008 resumed the registering of new centres under the PNDT Act "as per practice prior to 9.1.08" there is no valid explanation for meting out a different treatment to these two petitioners. It was not denied by counsel for the GNCTD that others similarly placed as the Petitioners were not being denied renewal of their registrations/licences to run clinics under the PNDT Act. It was explained that the GNCTD is waiting the decision in these cases before deciding on the future course of action. Clearly therefore, there is no consistency in the GNCTD applying the PNDT Act and the PNDT Rules for the purpose of grant of or renewal of registration. A selective application of an undisclosed criterion is a sure recipe for the decision being rendered arbitrary. Consequently, this Court holds that the rejection of Dr. K.L. Sehgal's application for renewal of registration by the impugned order dated 25th May 2007 and the rejection of Dr. Sonal Randhawa's application for registration as sonologist by the communication dated 5th July 2007 are unsustainable in law.

**Need to plug the loopholes in the PNDTAct**

37. These two petitions reflect a disconcerting state of affairs. As a result of the weak definition of the term 'sonologist' under the PNDT Act, the mushrooming growth of diagnostic clinics is unable to be effectively regulated. The absence of clear rules and guidelines spelling out unambiguously the qualification, training and experience required for operating a diagnostic clinic offering ultrasound tests has resulted in unethical practices being adopted in many such clinics in violation of the PNDT Act going unchecked. These cases underscore the need to amend the PNDT Act to plug the loopholes

and reflect the view of the MCI as indicated in its reply dated 4th May 2009 to one of the Petitioners where it suggested that person seeking to run a diagnostic clinic should either possess a post-graduate degree in Radio Diagnosis or should be a specialist who has undergone orientation training in ultrasonography in a recognized medical institution for a minimum period of six months. To avoid any confusion, the requirements in terms of qualification, training and experience to recognised and registered as a 'sonologist' should be incorporated in the PNDT Act and further explicated under the PNDT Rules. In determining the criteria the best available international practices should be adapted to suit Indian conditions. Secondly, the names of the institutions state-wise which are recognized for that purpose will have to be notified. Thirdly, the changed criteria must be made not only prospective but sufficient time given to enable those seeking registration or renewal to fulfil the changed criteria. Fresh registrations can be postponed to enable the arrangements envisaged by the new criteria to be put in place. These steps will require a comprehensive survey to be undertaken by the Respondents followed by consultations with experts in the medical fraternity and education. The resultant amendment to the definition of 'sonologist' under Section 2(p) of the PNDT Act and the corresponding amendment to the PNDT Rules must be given wide publicity so that there is increased public awareness about the minimum standards one should expect in diagnostic clinics.

**Conclusion**

38. For the aforementioned reasons, the rejection of Dr. K.L. Sehgal's application for renewal of registration by the impugned order dated 25th May 2007 and the rejection of Dr. Sonal Randhawa's application for registration as sonologist by the communication dated 5th July 2007 are held unsustainable in law and are set aside as such. The two writ petitions are allowed in the above terms. The respective applications of both the Petitioners will again be placed before the Appropriate Authority for consideration in accordance with law within a period of two weeks from today. It would be open to the Appropriate Authority to require any further clarification from the Petitioners and if any or both the Petitioners so request, they should be given a personal hearing. The decision on the two applications should be taken by the Appropriate Authority within a period of four weeks thereafter and communicated to each of the Petitioners within a further period of two weeks thereafter.

39. The two writ petitions are disposed of with the above directions.

S. MURALIDHAR, J.
JULY 5, 2010

**Case 4: Dr. Sunil Fakay v. GNCTD, Directorate of Family Welfare and others, January 2011**

IN THE HIGH COURT OF DELHI AT NEW DELHI
W.P.(C) 7736/2010 & CM 22012/2010
DR. SUNIL FAKAY…. Petitioner

Through: Mr. Shivek Trehan, Mr Udit Mendiratta and Mr. Arjun Mahajan, Advocates.

VERSUS

GOVERNMENT OF NCT OF DELHI, DIRECTORATE OF FAMILY WELFARE & ORS,….Respondents

Through: Ms. Anju Bhattacharya, Addl. Standing Counsel with Ms. Shifalika Dalmia, Adv.

CORAM: JUSTICE S. MURALIDHAR

**ORDER**

10.01.2011

1. The prayer in this writ petition is to revoke the effect of order dated 16th July 2010 passed by the Appropriate Authority under the Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 ['PNDT Act'] pursuant to order dated 23rd September 2010 passed by the Appellate Authority whereby the case had been remanded to the District Appropriate Authority.

2. The Petitioner runs a diagnostic centre under the name 'Sunil Fakay Imaging'. On the basis of the complaint of one Shri S. K. Sharma, Secretary, Beti Bachao Samiti, a criminal case was registered against the Petitioner under Section 384 read with Section 34 of the Indian Penal Code, 1860. The allegation against the Petitioner was that it was revealed in a 'sting' operation that he had conducted an ultrasound of the foetus of a pregnant woman (a decoy customer) and disclosed to her the sex of the foetus. An order dated 16th July 2010 was passed by the District Appropriate Authority (Respondent No.2), cancelling the registration of the Petitioner's diagnostic centre. On the very same day, i.e. 16th July 2010, the Sub-Divisional Magistrate, Model Town (Respondent No. 3) passed an order sealing the Petitioner's clinic. The Petitioner then filed an appeal before the Appellate Authority against the cancellation of his registration. On 23rd September 2010, the Appellate Authority passed an order, setting aside the order dated 16th July 2010 of the District Appropriate Authority. The case was remanded to the District Appropriate Authority to follow the due procedure under the PNDT Act and pass a fresh order within one month.

3. Having not received any communication from the District Appropriate Authority for more than a month, the Petitioner filed this petition against the sealing of his clinic and the cancellation of his registration under the PNDT Act.

4. On 2nd December 2010, learned counsel for the Respondents handed over a copy of the minutes of a meeting of the Advisory Committee under the PNDT Act held on 20th October 2010 in the Office of Dy. Commissioner (North- West) Kanjhawla, Delhi. The Advisory Committee recommended that the earlier order of cancellation of the registration under the PNDT Act be substituted with an order of suspension of the Petitioner's licence till the completion of investigation by the police.

5. The Petitioner filed CM No. 22012/10 pointing out that the said minutes of the meeting of the Advisory Committee did not amount to an order by the Respondent No. 2.

6. Learned counsel for the Petitioner submitted that since no order had been passed by the District Appropriate Authority despite the expiry of one month after the date of the order of the Appellate Authority, the due procedure under the PNDT Act was not complied with and, therefore, the Petitioner's clinic should be de-sealed and his registration restored.

7. Learned counsel for the Respondents submits that a formal order of the District Appropriate Authority, on the basis of the recommendation of the Appellate Authority, is likely to be issued in a week's time.

8. The minutes of the meeting of the Advisory Committee dated 20th October 2010 records the fact that the Petitioner appeared before the said Committee and was asked whether he would like to view the CD containing the video of the sting operation in the presence of the Committee. The Petitioner, however, declined the offer. He maintained that the CD was doctored and that he had committed no violation of the PNDT Act. A perusal of the transcript of the CD, which has been placed on record by the Petitioner along with CM 22012 of 2010 shows that the Petitioner did perform the ultrasound on the decoy customer and that he confirmed to her the sex of the foetus. As regards the Petitioner's contention that the CD was doctored, this will have to await the conclusion of the criminal investigation. It is, however, clarified that it will be open to the Petitioner to produce any scientific report in support of his contention that the CD in question has been doctored or manipulated and, on that basis, apply to the District Appropriate Authority to consider lifting the order of suspension of his licence.

9. This Court takes on record the statement of learned counsel for the Respondents that a formal order will be passed by the District Appropriate Authority within one week, on the basis of the recommendation of the Appellate Authority.

10. In the circumstances, this Court finds, prima facie, that the recommendation of the Advisory Committee that the order cancelling the Petitioner's registration passed by the Appropriate Authority on 16th July 2010 should be converted into one of suspension of his licence till the completion of investigation by the police is not unreasonable.

11. The writ petition is disposed of in the above terms. The pending application also stands disposed of.

S. MURALIDHAR, J JANUARY 10, 2011

## Case 5. Dr. (Mrs.) Suhasini Umesh Karanjkar v. Kolhapur Municipal Corporation, June 2011

IN THE HIGH COURT OF JUDICATURE AT BOMBAY CIVIL APPELLATE JURISDICTION WRIT PETITION NO.7896 OF 2010 ALONGWITH CIVIL APPLICATION NO.512 OF 2011

Dr. (Mrs.) Suhasini Umesh Karanjkar,
Aged 36 years, Occupation Medical Profession,
R/o. 741/1, Plot No.14, Shreekrishna Colony, Main road, Sambhaji Nagar, Kolhapur,
Through her Constituted Attorney
Dr. Umesh Murlidhar Karanjkar, Aged 40 years, Occ. Medical Profession, Residing at above address...Petitioner.
Vs.
1. Kolhapur Municipal Corporation through its Health Officer and Appropriate Authorities, Having Office at Municipal Corporation Building, Shivaji Chowk, Kolhapur.
2.The District Collector, Kolhapur having office at Nagala Park, Kolhapur.
...Respondents.
Mr. Sagar A. Mane i/by N.V.Bandiwadekar for the Petitioner.
Mr. S.R.Nargolkar, Additional Government Pleader for Respondent No.2.
Mr. Uday Warunjikar for intervenors in C.A.No.512 of 2011.

CORAM: MOHIT S. SHAH. C. J..
DR. D.Y. CHANDRACHUD. J.
AND D.G. KARNIK. J.
JUDGMENT RESERVED ON 19TH APRIL. 2011
JUDGMENT DECLARED ON 6th JUNE. 2011

**JUDGMENT (Per Chief Justice)**

This reference made by an order dated 23 December, 2010 of a Division Bench of this Court raises the following questions :-

1) Whether the power to search, seize and seal "any other material object" conferred by Section 30 of the Pre¬conception and pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 includes the power to search, seize and seal an ultrasound machine or any other machine or equipment, if the Appropriate Authority or Authorized Officer has reason to believe that it may furnish evidence of the commission of an offence punishable under the Act?

2) Whether the decision of a Division Bench of this Court at Aurangabad Bench in Dadasaheb (Dr.) s/o Popatrao Tarte Vs. State of Maharashtra and others, 2010 (2) Mah. L.J. 110 taking the view that Section 30 does not confer such power in respect of an ultrasound machine lays down the correct law?

2. The brief facts leading to filing of this writ petition are not in dispute. The petitioner is a Gynecologist running a Maternity and Surgical Hospital at Kolhapur with an ultrasound machine. The hospital has been registered as a Genetic clinic/Ultrasound Clinic under the provisions of the Pre-conception and Pre-natal Diagnostic Techniques Act, 1994 "(the Act)" and the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 "(the Rules)". Registration was granted by the competent authority on 3 September 2003 and has been extended from time to time till 31 March 2013. On 22 January 2009, the Appropriate Authority at Kolhapur along with his

officers went to the petitioner's clinic in view of a complaint that the petitioner was using the ultra sound machine for conducting sonography on pregnant women for determination of sex of foetus. The Appropriate Authority seized the record of the hospital and the ultrasound machine and put his seal on the record and the ultrasound machine after drawing a panchanama in presence of the petitioner's husband, who is also a Gynecologist.

On 17 February 2009, the Appropriate Authority issued a notice to the petitioner to show cause why the registration granted in her favour should not be suspended. The petitioner sent a reply dated 5 March 2009. The Appropriate Authority passed order on 7 March 2009 suspending the registration granted to the petitioner under the provisions of the Act and the rules. Aggrieved by the order the petitioner preferred an appeal before the District Collector, Kolhapur under Section 27 of the Act, on 31 August 2009.

3. In the present petition filed on 14 September 2010, the petitioner has challenged the action of the Appropriate Authority seizing and sealing the ultrasound machine on the ground that the Appropriate Authority and the Authorized Officer does not have any power to seize and seal an ultrasound machine. At the time of the preliminary hearing of this petition, counsel for the petitioner placed reliance on the decision of a Division Bench of this Court in **Dadasaheb Vs. State of Maharashtra**, in support of the contention that the Appropriate Authority has no power to seize or seal an ultrasound sonography machine. The following observations are contained in paragraph 12 of the judgment:-

> "On clear reading of the provisions under Section 30 of the Act of 1994 as well as the provisions under Rules of 1996 make it clear that the Appropriate Authority is empowered to seize the documents, record, register, book, pamphlet, advertisement or any other material object found in the Genetic Clinic, Genetic Centre, or the General Laboratory. But on clear and bare reading of the provision under the Act as well as the rules it nowhere provides that the authority is empowered to seize the machinery/the machine used in the Genetic Clinic. If it is so, the authority is not empowered to seize the Ultra Sonography Machine under the provisions of Law. In the premise, the case of the petitioner is covered under the citation as the Rule given by the Principal Bench of this Court in Writ Petition No. 7973/2008 is applicable to the present case. In the premises, we set aside the order of the seizure of the ultra sonography machine and direct to return the seized ultra sonography machine to the petitioner."
>
> (emphasis supplied)

4. While prima facie disagreeing with the above view, the Division Bench making the reference has expressed a tentative opinion that the provisions of Section 30 of the Act and Rule 12 of the Rules are widely worded in order to provide for the power to seize and seal not only registers and documents but also "any other material object" found in a Genetic Counselling Centre, Genetic Laboratory/Genetic clinic or any other place where an offence under the Act has been or is being

committed. Hence, the present reference which involves determination of the questions set out in the opening paragraph of this judgment.

While making this reference, the Division Bench had also directed the District Collector i.e. Appellate Authority to hear and decide the petitioner's appeal expeditiously.

5. The learned counsel for the petitioner placed reliance upon the aforesaid decision of this Court and submitted that Section-30 of the Act does not define "any other material object" and therefore, the definition of "material object" in Explanation (2) to Rule 12 laying down the procedure for search and seizure as "including machines and equipments" cannot empower the Appropriate Authority under Section 30 to seize and seal an ultrasound machine. It was submitted that the substantive power conferred by Section 30 of the Act cannot be enlarged by a definition in the Rules made under the Act.

6. On the other hand, Mr. Nargolkar, learned Additional Government Pleader has submitted that Explanation (2) to Rule 12 expressly defines "material object" as including "machines and equipments" and therefore, there is no scope whatsoever for any controversy. It is further submitted that the Rules of 1996 were framed by the Central Government under the provisions of Section 32 read with Section 30 and were laid before each House of Parliament under Section 34. In absence of any modification made by Parliament in Rule 12, the definition of "material object" as including machines and equipments must be treated as having received legislative acceptance by Parliament. It is further submitted that even otherwise, on an examination of the scheme of the Act and the Rules, the Appropriate Authority and the Authorized Officer do have the power or authority to search, seize and seal ultrasound machines or other equipments used in criminal acts of sex determination for sex selection in contravention of the Act.

7. Before dealing with the rival submissions, it is necessary to refer to the relevant provisions of the Act and the Rules and also to the Statement of Objects & Reasons particularly, for Amendment Act 14 of 2003.

8. The Act and the Rules framed there under came into force on 1 January 1996. The Preamble to the Act provides that it is an Act to provide for the prohibition of sex selection, before or after conception and regulation of the use of pre-natal diagnostic techniques for the purpose of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital mal-formations or sex linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and, for matters connected herewith or incidental thereto.

(emphasis supplied)

9. Section 3 of the Act provides for regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic clinics through the requirement of registration under the Act. Section 4 provides that no such place shall be used for conducting pre-natal diagnostic techniques except for the purposes specified in Clause (2) of the said section and requires a person conducting such techniques such as

ultrasound sonography on pregnant women to keep a complete record in the manner prescribed in the Rules..

Section 6 provides that no pre-natal diagnostic techniques including sonography can be conducted for the purpose of determining the sex of a foetus and that no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultra sonography for the purpose of determining the sex of a foetus.

10. The Act came to be amended by Amendment Act 14 of 2003. The Statement of Objects and Reasons to the Amendment Act, inter alia, read as under:-

> **"Amendment Act 14 of 2003 - Statement of Objects and Reasons.-** The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 seeks to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. During recent years, certain inadequacies and practical difficulties in the administration of the said Act have come to the notice of the Government, which has necessitated amendments in the said Act.
>
> 2. The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders, etc. However, the amniocentesis and sonography are being used on a large scale to detect the sex of the foetus and to terminate the pregnancy of the unborn child, if found to be female. Techniques are also being developed to select the sex or child before conception. These practices and techniques are considered discriminatory to the female sex and not conducive to the dignity of women.
>
> 3. The proliferation of the technologies mentioned above may, in future, precipitate a catastrophe in the form of severe imbalance in male female ratio. The State is also duty bound to intervene in such matters to uphold the welfare of the society, especially of the women and children. It is, therefore, necessary to enact and implement in letter and spirit a legislation to ban the pre conception sex selection techniques and the misuse of pre-natal diagnostic techniques for sex selective abortions and to provide for the regulation of such abortions. Such a law is also needed to uphold medical ethics and initiate the process of regulation of medical technology in the larger interests of the society.
>
> 4. Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to conception as well as the misuse of pre¬natal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended."

(emphasis supplied)

11. Some important amendments made by the said Amendment Act 14 of 2003, have a bearing on the questions under consideration. Having realized that ultra sonography on a pregnant woman with

an ultrasound machine is an very important part of the sex determination test and procedure, which is being misused, Parliament has made a specific reference to sonography and ultrasound machine and other machines in some of the newly inserted sections and also by amendments to existing provisions.

12. The term "genetic clinic" is defined in Section 2(d) as "any clinic or place by whatsoever may be called which is used for conducting pre natal diagnostic procedures". The Explanation thereto provides that genetic clinic even includes a vehicle, where ultrasound machine or imaging machine or scanner or other equipment capable of determining sex of the foetus is used. Genetic laboratory is defined by Section 2 (e) as including a place where facilities are provided for conducting analysis or test samples received from a genetic clinic or pre natal diagnostic tests. Explanation thereto provides that "genetic laboratory" includes a place where an ultrasound machine capable of determining sex of foetus, is used. Both these explanations provide that the definitions would even include a portable equipment with a potential for detection of sex during pregnancy or selection of sex before conception.

    A pre natal diagnostic test is defined in Section 2(k) as "ultrasonography or any test or analysis of amniotic fluid or fluid of pregnant woman or conception or analysis….blood or any other tissue or blood of the pregnant woman or conceptus conducted to detect genetic or sex linked disease".

    Section 2(i) defines "pre-natal diagnostic procedures as "all gynaecological or obstetrical or medical procedures such as ultra sonography, of a woman before or after conception for being sent to genetic laboratory or genetic clinic for conducting any type of analysis or pre natal diagnostic tests for selection of sex before or after conception.

    Section-2) (j) defines "pre-natal diagnostic techniques" as including all pre natal diagnostic procedures and pre natal diagnostic tests.

13. Section 3B provides as follows :

    "3-B- Prohibition on sale of ultrasound machine, etc., to persons, laboratories, clinics, etc., not registered under the Act- No person shall sell any ultrasound machine or imaging machine or scanner or any other equipment capable of detecting sex of foetus to any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other person not registered under the Act".

14. Amended section 4 now specifically provides that the person conducting ultra sonography on a pregnant woman has to maintain the complete record thereof in the manner prescribed in the Rules and any deficiency or inaccuracy found therein amounts to contravention of Section 5 and 6, unless contrary is proved by the person conducting such ultra sonography.

    Section 6 also specifically prohibits 'any genetic clinic.... or any person' from conducting any pre natal diagnostic techniques including ultra sonography for the purpose of detecting sex of foetus.

15. Sub Section (1) of Section 18 prior to amendment by Act 14 of 2003 read as under:-

(1) No person shall open any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic after the commencement of this Act unless such Centre, Laboratory of Clinic is duly registered separately or jointly under this Act.

After amendment in 2003, the provision reads as under :

No person shall open any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including clinic, laboratory or centre having ultrasound or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus and sex selection, or render services to any of them, after the commencement of the Pre-natal Diagnostic Techniques [Regulation and Prevention of Misuse) Amendment Act, 2002 unless such centre, laboratory or clinic is duly registered under the Act.

(emphasis supplied)

16 Section 22 provides for prohibition of advertisement relating pre conception and pre natal determination of sex and punishment for contravention and Section 23 provides that any medical geneticist, gynaecologist, registered medical practitioner or any person who owning a Genetic Centre, etc., or is employed to render his professional or technical services to or at such a centre, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment for a period upto three years and with fine which may extend to ten thousand rupees, which may extend to five years and with fine which may extend to fifty thousand rupees, in case of subsequent conviction.

Sub section (2) of Section 23 even provides that the name of the errant registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action.

17. Section 17(4) of the Act, even prior to the Amendment Act of 2003, provided that the Appropriate Authority shall perform various functions including the following :-

(c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action;" and

(d) any other matter which may be prescribed.

Section 17-A inserted by the Amendment Act, 2003 confers additional powers on the Appropriate Authority including the power in respect of :

(c) issuing search warrant for any place suspected to be indulging in sex selection techniques or prenatal sex determination ; and

(d) any other matter which may be prescribed.

18. Section 29 provides for maintenance of records and preservation of such record for a period of two years till the final disposal of proceeding under the Act. Section 30 of the Act confers power to search and seize records. Prior to its amendment in 2003, Section 30 did not provide for any power to seal, though explanation (3) to Rule 12 of the Rules provides that "seize" would include "seal", Section 30 as amended by Act 14 of 2003 with effect from 14 February 2003 specifically confers power not only to seize but also "to seal" any record, register documents, books, pamphlet, advertisement or "any other material object" found therein at any Genetic Centre etc., in the following words:-

30. Power to search and seize records, etc. -

(1) If the Appropriate Authority has reason to believe that an offence under this Act has been or is being committed at any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or any other place, such Authority or any officer authorised thereof in this behalf may, subject to such rules as may be prescribed, enter and search at all reasonable times with such assistance, if any, as such authority or officer considers necessary, such Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or any other place and examine any record, register, document, book, pamphlet, advertisement or any other material object found therein and seize and seal the same if such Authority or officer has reason to believe that it may furnish evidence of the commission of an office punishable under this Act.

(2)……

(emphasis supplied)

Section 32 confers upon the Central Government powers to make rules for carrying out the provisions of the Act, including;

(xiii) the manner in which the seizure of documents, records, objects, etc., shall be made and the manner in which seized list shall be prepared and delivered to the person from whose custody such documents, records or objects were seized under sub section (1) of Section 30.

19. Section 34 provides that every rule and every regulation made under the Act shall be laid as soon as may be after it is made, before each House of Parliament while it is in session, for a total period of thirty days and if both houses agree in making any modification in the rule or regulation or both Houses agree that the rule and regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be.

20. In exercise of the aforesaid powers under Section 32 read with Section 30 the Central Government has made the Pre conception and Pre- natal Diagnostic Techniques (Prohibition of Sex Selection) Rules 1996.

21. Rule 9 provides for maintenance and preservation of records and sub-rule (6) provides for particulars of the manner in which the records are to be maintained and also provides that all case related

records, forms of consent, laboratory results, microscopic pictures, sonographic plates or slides, recommendations and letters shall be preserved by Genetic Centre etc., for a period of two years from the date of completion of counseling, pre- natal diagnostic procedure or pre-natal diagnostic test, as the case may be. In the event of any legal proceedings, the records etc., shall be preserved till final disposal of the legal proceedings.

Rule 9 (7) further provides that in case the Genetic Clinic etc. maintains records on computer or other electronic equipment, a printed copy of the record shall be taken and preserved after authentication by a person responsible for such record and further that such centre is required to send a complete report in respect of all pre conception or pregnancy related procedures/techniques /tests conducted by them in respect of each month by fifth day of the following month to the concerned Appropriate Authority.

22. Sub rule (1) of Rule 11 provides that Every Genetic Centre, Ultrasound Clinic etc., or any other place where any of the machines or equipments capable or performing any procedure, techniques or test capable of pre- natal determination of sex or selection of sex before or after conception is used, shall afford all reasonable facilities for inspection of the place, equipment and records to the Appropriate Authority or to any other person authorized by the Appropriate Authority.

Sub rule (2) of Section 11 reads as under:

(2) The Appropriate Authority or the officer authorized by it may seal and seize any ultrasound machine, scanner or any other equipment, capable of detecting sex of foetus, used by any organization if the organization has not got itself registered under the Act. These machines of the organizations may be released if such organization pays penalty equal to five times of the registration fee to the Appropriate Authority concerned and gives an understanding that it shall not undertake detection of sex of foetus or election of sex before or after conception.

23. Rule 12 lays down the procedure for search and seizure as under:

12. The Appropriate Authority or any officer authorized in this behalf may enter and search at all reasonable times any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Imaging Centre or Ultrasound Clinic in the presence of two or more independent witnesses, for the purposes of search and examination of any record, register, document, book, pamphlet, advertisement, or any other material object found therein and seal and seize the same if there is reason to believe that it may furnish evidence of commission of an offence punishable under the Act.

Explanation-In these rules-

(1) "Genetic Laboratory/Genetic Clinic/Genetic Counselling Centre" would include an ultrasound centre/imaging centre/nursing home/hospital/institute or any other place, by whatever name called, where any of the machines or equipments capable of selection of sex before or after conception or performing any procedure technique or test for pre-natal detection of sex of foetus, is used:

(2) **"material object" would include records, machines and equipments; and**

(3) "seize" and "seizure" would include "seal" and "sealing" respectively.

(emphasis supplied)

24. A bare perusal of the aforesaid statutory provisions, both in the Act and in the Rules framed thereunder, makes it abundantly clear that an ultra sonography test on a pregnant woman is considered to be an important part of a pre-natal diagnostic test or pre-natal diagnostic procedure, which cannot be conducted except for the purpose of section 4(2). The person conducting ultra sonography on a pregnant woman has to maintain a complete record thereof in the manner prescribed in the Rules and a deficiency or inaccuracy in maintaining such records would amount to an offence, unless the person conducting such sonography is able to show that there was no deficiency or inaccuracy. The fact that section 3-B inserted by Amendment Act 14 of 2003 specifically prohibits even sale of an ultra sound machine or other machines capable of detecting sex of foetus to any genetic clinic or any other place or to any person not registered under the Act, itself should be sufficient to hold that in the scheme of the Act, Parliament has considered an ultrasound machine as a "material object" because it is capable of detecting sex of a foetus.

25. While section 17-A(c) empowers the appropriate authority to issue search warrant for any place suspected to be indulging in pre¬natal sex determination with an ultra sonography test on a pregnant woman, apart from section 30, there is no other section in the Act which confers powers upon the appropriate authority or authorised officer to seize or seal a "material object" like an ultrasound machine at any place suspected to be indulging in pre-natal diagnostic techniques such as an ultra sonography test on a pregnant woman for determination of sex.

26. Now, if the petitioner's contentions were to be accepted, the appropriate authority or the authorised officer will not have any power to seize or seal such an ultra sound machine sold by a person to an unregistered clinic. The Legislature which has condemned misuse of pre-natal diagnostic technique (such as ultra sonography on a pregnant woman) for sex determination of foetus leading to female foeticide, and made it a criminal offence punishable with imprisonment upto three years, could not have intended that while a seller of an ultra sound machine to an unregistered clinic should be prosecuted under section 23 for contravention of section 3-B of the Act, the ultra sound machine should be allowed to be continued to be used by or on behalf of an unregistered purchaser. But for section 30 of the Act, no action can be taken by the appropriate authority or authorised officer in respect of the ultra sound machine being used for sonography on a pregnant woman for the purpose of determination of sex of the foetus, which may ultimately result into termination of pregnancy of unborn child, if found to be female- as stated in so many words in the Statement of Objects and Reasons to the Amendment Act 14 of 2003. That is why Parliament, which had already conferred on the appropriate authority/ authorised officer the power to "search and seize" any material object, also conferred the further power to "seal" such a material object.

27. In our opinion, the above analysis of the provisions of the Act is sufficient to hold that the expression "material object" for which the power to seize and seal is conferred upon the appropriate authority/ authorised officer, includes ultra sound machines, other machines and equipment which are used for pre-natal diagnostic techniques or sex selection techniques.

28. Further, the provisions of Rule 11, particularly sub-rule (2) thereof, conferring power to seal and seize ultra sound machines or other machines or equipments capable of detecting sex of foetus, sold to unregistered purchasers and explanation (2) to Rule 12 (material object would include records, machines and equipments) make it more than clear that the expression "any other material object" in section 30 includes ultrasound machines, other machines and equipment capable of detecting sex of foetus or capable of use for sex selection.

29. It is necessary to note that the Rules made under Section 32 of the Act are required by Section 34 to be laid before each House of Parliament and if no modification is made within a period of 30 days while Parliament is in session, the rules continue to have effect as made. If any modification is made, then the Rules continue to have effect subject to the modification. If both the Houses agree that a rule should not be made, the rule shall be of no effect from the date of annulment.

    It is nobody's case that the Rules have not been laid before Parliament or after having been laid before Parliament, Parliament resolved to delete or modify explanation (2) to Rule 12.

    It must therefore, be held that the Rules have been accepted by Parliament without any modification of explanation (2) to Rule 12.

30. In a catena of decisions (Tata Engineering and Locomotive Company Ltd Vs. Gram Panchayat, Pimpri Waghere , P. Kasilingam Vs. P.S.G. College of Technology, Pali Devi Vs. Chairman, Managing Committee, (para 8), Gujrat Pradesh Panchayat Parishad Vs. State of Gujarat (para 39) the Supreme Court has held that "rules made under a statute are a legitimate aid to construction of the statute as contemporanea expositio.". This is particularly so when Section 34 of the Act requires Rules made under Section 32 of the Act to be laid before each House of Parliament within a period of 30 days while Parliament is in session.

31. We may also refer to the rule of "ejusdem generis" invoked by the learned counsel for the petitioner in support of the contention that "any other material object" in Section 30 must take colour from the preceding words. It is submitted that since all the preceding words pertain to paper such as record, register, document, books, pamphlet and advertisement the words "any other material object" must be construed in light of the preceding words.

32. *In Smt. Leelavati Bai Vs. State of Bombay, 1957 SCR 721 : AIR 1957 SC 521* (Para 11), the Apex Court laid down the following principle:-

    "The rule of ejusdem generis is intended to be applied where general words have been used following particular and specific words of the same nature on the established rule of construction that the

legislature presumed to use the general words in a restricted sense; that is to say, as belonging to the same genus as the particular and specific words. Such a restricted meaning has to be given to words of general import **only** where the context of the whole scheme of legislation requires it. But where the context and the object and mischief of the enactment do not require such restricted meaning to be attached to words of general import, it becomes the duty of the courts to give those words their plain and ordinary meaning".

(emphasis supplied)

33. As already discussed, on analysis of the scheme of the Act, and having regard to the legislative object and the mischief sought to be avoided, as referred to in the preamble to the Act and also in the Statement of Objects and Reasons to the Amendment Act 14 of 2003, we have no manner of doubt in holding that the power under Section 30 to seize and seal "any material object" includes power to seize and seal ultrasound machines and other machines and equipments, capable of selection of sex or capable of performing any procedure, technique or test for pre natal detection of sex of foetus.

34. As regards the decision in *Dadasaheb Vs. State of Maharashtra (supra)*, we note that the Division Bench did not refer to explanation (2) to Rule 12 of the PC and PNDT Rules, 1996, much less to the legislative object and scheme of the Act discussed above . Otherwise also, independently of reference to the said Rules, we are of the view that on an analysis of the provisions of the Act, if any ultrasound machine is used for conducting sonography on a pregnant woman for a sex determination test or sex selection procedure in contravention of the provisions of the Act, the power to seize and seal any other material object, besides the record and documents, would include the power to seize and seal ultrasound machines and other machinery and equipment.

35. We may also refer to the interim order in Writ Petition No. 7973 of 2008 referred to in Paragraph 12 of the judgment in Dadasaheb's case. *(Lata Mangeshkar Medical Foundation Vs. The Dy. Medical Officer of Health Pune Municipal Corporation and others)*. That interim order was passed in an all together different set of facts and circumstances. In that case, 8 ultrasound machines were seized from a charitable hospital with 650 beds and 70 ICU beds and it was in that background that a Division Bench of this Court (without holding that the authority does not have the power to seize or seal ultra sound machines) by an interim order, directed the authorities to return ultrasound machines seized by the authorities on an allegation that "certain formalities were not fulfilled whilst sonography on patients was conducted which raises the suspicion that sonography might have been performed for detecting sex of the foetus."

    An interim order cannot be treated as a precedent while interpreting the provisions of a statue, and that too when the Division Bench did not refer to Section 30 of the Act.

36. In view of the above discussion, our answers to the questions framed for determination are as under:-

(i) The expression "any other material object" in Section 30 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 includes ultrasound machines, other machines and equipment capable of aiding or assisting in selection of sex, or capable of performing any procedure, technique or test for pre natal detection of sex of foetus.

(ii) The decision of the Division Bench of this Court in Dadasaheb Vs. State of Maharashtra 2010 (2) Mah. L.J. 110, taking the contrary view does not lay down the correct law and is hereby overruled.

37. Since the only controversy raised in this petition was about interpretation of the expression "any other material object" in Section 30 of the Act, we may not be treated to have expressed any opinion on the question as regards the circumstances in which the power under Section 30 is to be exercised.

38. As the seizure and sealing of the petitioner's ultrasound machine was challenged only on the ground that the Appropriate Authority or Authorized Officer does not have power or authority to take such action under Section 30 of the Act read with Rule 12 and the petitioner's contention has been repelled, we see no merit in this petition. **The petition is accordingly dismissed.**

39. We place on record our appreciation for the valuable assistance rendered by Mr. Sagar A. Mane, learned counsel for the petitioner, Mr. S.R.Nargolkar, learned Additional Government Pleader for respondent No.2 and Mr.Uday Warunjikar, learned counsel for the intervenors.

40. Before parting with the matter, we may refer to the disturbing figures of the declining National child sex ratio over the last five decades, to which our attention has been invited by the learned

Additional Government Pleader :-

| Year | No. of girls per 1000 boys (in the age group 0-6 years) |
|---|---|
| 1961 | 976 |
| 1971 | 965 |
| 1981 | 962 |
| 1991 | 945 |
| 2001 | 927 |
| 2011 | 914 |

In the State of Maharashtra also, the child sex ratio has gone down from 913 in 2001 to 883 in 2011. It has gone down to as low as 801 in Beed District. In Kolhapur District, where the offence in question is registered, it is 839.

41. We are also distressed by the fact that a number of cases for trial of offences registered under the Act are pending in Courts of the Judicial Magistrate First Class for a long period, sometimes upto 6 years and in a few cases as long as 6 to 8 years. It is, therefore, directed that all cases under the Act shall be taken up on top priority basis and the Metropolitan Magistrates. Mumbai and the J.M.F.Cs. in other Districts shall try and decide such cases with utmost priority and preferably within one year. Criminal Cases instituted in the year 2010 and prior thereto shall be tried and decided by 31 December 2011.

42. A copy of this judgment shall be circulated to the Principal District Judges in all the districts of State of Maharashtra and State of Goa and to the Chief Metropolitan Magistrate, Mumbai, who shall in turn circulate a copy of this judgment to the Metropolitan Magistrates, Mumbai and all the Judicial Magistrates First Class in their respective districts for timely compliance with the above direction.

CHIEF JUSTICE

DR. D.Y. CHANDRACHUD, J.

D.G. KARNIK, J.

**Case 6: Radiological & Imaging Association (State Chapter Jalna) v. Union of India and Others, August 2011**

Imaging Association, having its office at C/o. Shri Sai diagnostic Centre, Post Office Road, Jalna-431 203. (Maharashtra State) ... Petitioner
Versus
1. Union of India Through its Secretary, Ministry of Health and Family Welfare, Having his address at Nirman Bhawan, New Delhi - 110 001.
2. State of Maharashtra Through its Secretary, Ministry of Health and Family Welfare, Having his address at Mantralaya, Mumbai- 400 021.
3. Mr. Laxmikant Deshmukh, Collector & District Magistrate, Having his address at Collectorate, Kolhapur Office, Swarajya Bhavan, Nagala Park, Kolhapur-416 003. ... Respondents

Dr. Jignesh Thakker- Petitioner in person. Mr. Anurag Gokhale for respondent No.1. Mr. V.D. Patil, Government Pleader for respondent No.2-State. Mr.A.A. Kumbhakoni with Mr. Amit Borkar for respondent No.3.

CORAM : MOHIT S. SHAH, C.J. & SMT. R.P.SONDURBALDOTA, J.
Judgment Reserved on : 29 June 2011 Judgment
Pronounced on : 26 August 2011
JUDGMENT (Per Chief Justice)

In this petition under Article 226 of the Constitution, the petitioner- Radiological & Imaging Association (State Chapter- Jalna) (hereafter referred to as "the petitioner" or "the Association") has challenged the circular dated 14 January 2011 of Collector and District Magistrate, Kolhapur (exhibit `F') requiring the Radiologists and Sonologists to submit on-line form F under the Pre-conception and Pre-natal Diagnostic Techniques Rules, 2003. The Association has also challenged the circular dated 10 March 2010 (exhibit `A') issued by the Collector in which reference is made to the workshop of doctors, sonologists and radiologists of Kolhapur held on 8 March 2010 and to the discussion at the said workshop for installation of SIOB (silent observer) for all the sonography machines, as a part of `save the baby' campaign for improving sex ratio in the district.

2. The petitioner-association is a society registered under the Societies Registration Act, 1860, formed for promoting, inter alia, the study and practice of Radio-diagnosis, ultra-sound, CT, MRI and other imaging modalities.

Members of the Association are medical practitioners who are imaging specialists engaged, inter alia, in foetal imaging, generally known as Sonologists/Radiologists and are governed by the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and Rules, 1996 (for brevity, PC&PNDT Act of 1994 and Rules, 1996).

3. According to the petitioner, ultra-sonography is a diagnostic technique which utilizes sound waves and

reflections leading to imaging of diverse muscular or soft tissue organs/ parts of human body for detection of disorders, abnormalities or malfunctioning. It is a non-invasive technique which does not have any side effects or after effects and is, therefore, widely used in India and abroad for diagnostic examination of diverse organs and parts of the human body, including heart, liver, bladder, abdomen, kidneys, intestines, pancreas, prostate etc. Since it is non-invasive and has no radiation hazard, ultra-sonography has proved to be a boon in evaluating the foetus during pregnancy.

## Primary challenge

4. In this petition, the petitioner has challenged the action of Collector and District Magistrate, Kolhapur in issuing Circular dated 10 March 2010 whereby all doctors, sonologists and radiologists practicing in Kolhapur District are called upon to install device `Silent Observer' in their sonography/ultra-sound machines.

According to the petitioner, this machine and its software enables the Collector to directly review at district headquarters at Kolhapur to scan images of the patient which is illegal, against the provisions of the Act and invades privacy of the patients. It is contended that under the Rules, the ultra-sound clinics and other bodies governed by Act and the Rules are given time upto 5th day of the next month for submitting information in the format which is to be signed by the doctor and the patient. However, public notice dated 14 January 2011 (exhibit `F') issued by the Collector and District Magistrate requiring the doctors/ sonologists/radiologists to transmit form -F on-line within 24 hours is without authority of law.

## Defence of Collector and District Magistrate

5. Collector and District Magistrate, Kolhapur has filed affidavit-in-reply dated 28 February 2011 submitting, interalia, as under:¬

5.1 Vide notifications issued under Section 17 of the Act, the Collectors and District Magistrates as well as Civil Surgeons or Deans of Medical Colleges (where Civil surgeons are not available) at every district level, are appointed as appropriate authorities. Reference is made to the power conferred by the Act and the Rules on the appropriate authority for enforcement of the provisions of the Act and the Rules.

5.2 (a) The Collector and Civil Surgeon found that Kolhapur district is having the worst sex ratio 839 females per 1000 males. After understanding the magnitude of the problem and illegal use of sonography centres for sex selection test resulting in female foeticide, the Collector organized the workshop of doctors/radiologists/sonologists.

(b) Kolhapur has 250 sonography centres as on 1 January, 2011 and each month more than 12000 sonography tests are being conducted on pregnant women in the district i.e. 1,50,000 tests per annum in the district. Sonography centre has to maintain, as per Section 4 and Rule 9, record of each test on the pregnant woman in form `F'. It is mandatory for the sonography centres

to submit form `F' to the office of the Civil Surgeon (District Appropriate Authority) by fifth of next month. The district and sub- district appropriate authorities are required to inspect each centre once in three months to check whether the sonography centre has maintained the record properly or not. It requires a lot of manpower to monitor the submission of `F' form from all centres and its analysis for necessary action under the Act and the Rules. The overburdened district and sub-district authorities also entrusted with other public duties, find it almost impossible to carry out 100% inspection and to study and scrutinize `F' forms being received in such large numbers every month.

5.3. The district administration came across two blatant violations of the Act viz. under-reporting and false reporting of sonography tests.

(a) Under-reporting is not filling `F' form even though sonography test is conducted on a pregnant woman, for the sole purpose of sex determination resulting in female foeticide.

(b) False reporting is wrong mentioning of age of the foetus and incorrect and wrong particulars in the other relevant columns. It was noticed that even when the health, growth and other indicators of foetus is normal, many doctors/radiologists submit incorrect report of pre-natal diagnostic procedure and recommend Medical Termination of Pregnancy.

Checking of `F' form after considerable long time lag was not yielding desirable result as the appropriate authority was unable to detect the sex selection abortion being carried out.

(c) Study on doctors perspective on PC&PNDT Act shows that 55.9% of the doctors stated that the information submitted was absolutely false and 41.2% stated that they were not sure. Almost all, 97% of the doctors confirmed that there is demand for gender determination of foetus by patients (exhibit `M').

Several studies have shown that almost 70% of form `F' are incomplete whether deliberate or not.

6. In order to overcome these problems, the District administration evolved the impugned methods:

6.1 The on-line `F' form facilitates to fill in all 19 columns of form correctly and upload on daily basis. It also helps the district authority, namely, Civil Surgeon to analyse the monthly data expeditiously because on-line record in form `F' is readily available on computers for the analysis and, action if needed, and for corrective course for proper enforcement of the Act. This new scientific innovation of on-line `F' form is an added tool in the hands of district appropriate authorities for analysis of huge data (more than 12000 `F' forms on average per month) to take needful action.

6.2 Otherwise also, the information submitted in `F' form in hard copy was required to be scrutinized and analysed by the District administration and as indicated above, the number of `F' forms being received every year in Kolhapur district alone being 1.5 lakh, it was not

possible for the administration to analyse the information submitted in `F' forms in such a large number. With on-line submission of `F' forms, it is possible for the appropriate authority to analyse the data by referring to a few parameters like age of the foetus, number of children the pregnant woman already has etc.

6.3 On-line submission of `F' form is in consonance with the spirit and object of Section 4 and Rule 9.. which already require the sonography centre to submit submission of forms `F' every month. All sonography centres, in addition to on-line submission, still keep `form `F' manually in printed form where they sign and obtain signature of the patient undergoing sonography test.

6.4. After installation of silent observer on the ultra-sound machines in the sonography centres in Kolhapur district, reporting of sonography tests of pregnant women has increased to 34%. At the hearing also, Mr. Kumbhakoni, learned counsel for the Collector and District Magistrate, Kolhapur has placed before us the statement giving details of the number of `F' forms submitted in October 2009 and in May 2011 as under:¬

| Month | Kolhapur Rural | Kolhapur City | Kolhapur District |
|---|---|---|---|
| October 2009 | 4,932 | 4,970 | 9,902 |
| June 2010 | 6,618 | 5,290 | 11,908 |
| May 2011 | 8,909 | 6,688 | 15,597 |

7. It is the specific case in the reply affidavit that the information contained in `F' form submitted on-line is not accessible to anyone except the Collector and District Magistrate.

8. The second solution found out by the District Collector and District Magistrate, Kolhapur and Civil Surgeon is installation of silent observer (SIOB). Together with on-line submission of `F' forms, the silent observer addresses both the problems of under-reporting or false-reporting. As soon as doctor/radiologist opens the sonography machine, the silent observer captures and stores the video output of each sonography test which shows the age of foetus and abnormality if any. Thus, each sonography test is counted and can be cross-checked with the `F' form submitted on-line In case of suspected medical termination of pregnancy, the district administration can check the `F' form and verify the truthfulness by comparing video of sonography test. For instance, in order to show that the MTP is for medical purpose and not as a result of sex selection, the age of aborted foetus is normally shown as below 12 weeks, in which case the sex is not necessary to be mentioned in the report. In order to escape from the provisions of the Act, many doctors/radiologists indulge in false reporting in form `F' in this fashion. By cross-checking, the information submitted in `F' form on-line with the data stored in the silent observer, it is possible for the appropriate authority to detect false reporting in form `F' and then to track down MTP for the purpose other than the medical purpose.

9. Rule 9(6) of the PC&PNDT Rules provides that all case-related records, forms of consent, laboratory results, microscopic pictures, sonographic plates or slides, recommendations and letters shall be preserved for two years. With few exceptions, no sonography centres preserve such records except `F' form. What the silent observer or SIOB does is, facilitate storage of video record of each sonography test. The silent observer is embedded on the ultra-sound machine which remains in the concerned sonography centre. The information stored in the said silent observer is not transmitted on-line to any authority but it remains stored in the device installed on the ultra-sound machine. It is accessed by the appropriate authority only when required in case of suspected MTP after sex selection.

10. In paras 10 and 31 of the affidavit-in-reply, the Collector and District Magistrate, Kolhapur (respondent No.3) has specifically stated as under:¬

"…….Respondent No.3 submits that petitioner has stated without ascertaining the facts and functions of SIOB that it enables the Respondent No.3 to directly review at his district level (Kolhapur District) the scanned images of a patient is not correct. The device SIOB stores the video of sonography tests of pregnant women carried out at the sonography centre and not transmitted to district server for viewing by the Collector. The SIOB is sealed in presence of the concerned doctor/Radiologist with his signature. The Appropriate Authority, whenever it deems fit, request the concerned doctor/Radiologist and his authorized person go to the centre and access the selected data on pen drive and it is being viewed by a member of Radiologist Association of Kolhapur and they offer us their observation.

Hereto annexed and marked as Exh. `C' is the protocol made for use of "silent Observer"."

> 31 Silent Observer is not connected to any district server, no internet is connected to Silent Observer. The appropriate authority with the help of silent observer can check for suspected centres and suspected cases like pregnant females with one or more previous girls, pregnant females with age of 35 and above. The solution also provides various medical data of the entire district that can be used for various decision making."

11. It is further stated in the affidavit-in-reply that the Collector and District Magistrate, Kolhapur alongwith Civil Surgeon, Chairperson of Federation of Obstetric and Gynecological Societies of India and Chairperson of Radiologist Association organized a one day workshop at Kolhapur on 8 March 2010 and demonstrated the new device i.e. SIOB or popularly called the "silent observer"- to all the doctors/radiologists and sonologists present at the workshop and the object of installation of silent observer. It was also explained that this device will help the administration in solving the problem of under- reporting and false-reporting. It will protect the practitioners doing ethical and legal practice and will act as a deterrent against sex selection practice resulting in female foeticide. All the doctors/radiologists present at the workshop agreed and resolved unanimously to install the silent observer (SIOB) at their own cost as concerned citizen of India to curb the illegal practice female foeticide and improving the sex ratio and it was, thereafter that the Collector and District

Magistrate, Kolhapur issued letter dated 10 March 2010 (exhibit `A') appealing to all the doctors and radiologists in the district to install the silent observer at the earliest. All 250 sonography centres in Kolhapur district have installed the silent observer at their own cost and there is not a single complaint to any higher authority.

Concernig Central Government stand

12. At the hearing of this writ petition, Mr.Anurag Gokhale, learned counsel for Union of India has placed on record office memorandum dated 16 June 2011 issued by the Director, Ministry of Health & Family Welfare (PNDT Division) to the learned Additional Government Advocate on the subject matter of the present petition, which reads as under:¬

"The undersigned is directed to refer to your letter dated 4961/LIT/2011 dated 24.5.2011 on the subject cited above and to convey that the declining child sex ratio and the reducing number of girl children in many states as per 2011 Census is a matter of great concern.

1. Tracking of pregnancy tests and detection of unreported termination of pregnancies have been a challenge for Appropriate Authorities in monitoring the activities of clinics offering diagnostic services. Clearly, it is the mandate of the Appropriate Authorities to effectively implement the PC & PNDT Act, 1994, as provided under Sub-section 4 of Section 17 of the Act. District Appropriate Authorities thus have the discretion to facilitate the mechanisms to check illegal sex determination tests, including innovative strategies like the `Silent Observer' among others.
2. This issues with the approval of competent authority."

Sd/¬

Director (PNDT Division) Rival Submissions

13. At the hearing of the petition, the learned advocate as well as the learned counsel for the petitioner sought discharge, as the Coordinator of the petitioner-association himself desired to argue the case. Accordingly, Dr. Jignesh G. Thakker, Coordinator of the petitioner-association made the following submissions:¬

(i) The impugned letter/circular of the Collector and District Magistrate, Kolhapur requiring the doctors/ radiologists /sonologists to submit form `F' is without authority of law and not supported by any provision of the Act or the Rules.

(ii) The patient gives consent for sonography test to be conducted by the concerned doctor/ radiologist/sonologist and gives no consent for giving access to the information contained in the sonography test to any other person. Hence, there is invasion into the patient's right to privacy.

(iii) The sonography test is undertaken by a pregnant woman in view of faith and trust on the radiologist/sonologist/doctor that all the information relating to the test will remain

confidential and private. However, the impugned actions of the Collector and District Magistrate, Kolhapur result into breach of confidentiality and privacy and therefore, constitute an offence punishable under section 72 of the Information Technology Act, 2000.

14. On the other hand, Mr. Kumbhakoni, learned counsel for the Collector and District Magistrate, Kolhapur, Mr. V.D. Patil, learned Government Pleader for the State of Maharashtra and Mr. Anurag Gokhale, learned counsel for respondent No.1 Union of India have opposed the petition and made the following submissions:¬

(i) The appropriate authorities under the Act are required to supervise and implement the provisions of the Act and the Rules and to take appropriate legal action against the use of any sex selection technique by any person at any place suo motu or otherwise and also to undertake independent investigation. The appropriate authorities also have the powers to summon any person who is in possession of any information relating to violation of possession of any Act or the Rules and to produce any document or material object relating thereto. The appropriate authorities have also power to issue search warrant for any place suspected to be indulging in sex selection techniques or prenatal sex determination.

(ii) Section 4 and Rule 9 also require the ultra-sound clinic to preserve the records and documents for a period of two years and to afford all reasonable facilities for inspection of the place, equipment and records to the appropriate authority or to any other person authorized by the appropriate authority. Rule 9(8) also requires the ultra-sound clinic to submit the information in form `F' by fifth day of the next month. Hence, requiring the ultra-sound clinics to submit `F' forms on-line is only requiring the ultra-sound clinics to submit information in electronic form which is otherwise also required to be submitted by the ultra-sound clinics in physical form.

Referring to the averments made in the affidavit- in-reply as to how on-line submission of `F' forms will help the authorities in making proper analysis of the data submitted in large numbers (almost more than 1,50,000 forms of ultra-sound test done on pregnant women in one district alone in a year, it would not be possible to make proper analysis and to enforce the Act and the Rules, if such information is not received by the appropriate authority in electronic form.

(iii) Only the appropriate authority has access to this information and only the appropriate authority can assign the work of analysis to the officer authorized by the appropriate authority. Since the existing provisions of the Act and the Rules themselves require the ultra¬sound clinics to give access to the information to the appropriate authorities and to the officers authorized by the appropriate authority, and the on-line information is not available on public domain, there is no question of breach of privacy right of the patient

(iv) It is only on account of introduction of on-line submission of `F' form that the authorities have been able to overcome the problem of under-reporting of `F' forms as per the data given. The

statement placed on record by the Collector and District Magistrate shows the number of `F' forms in 250 ultra-sound centres in Kolhapur district has gone up from 9,902 in October 2009 to 15,597 in May 2011.

(v) As regards the silent observer, it is submitted after referring to the relevant averments in the reply affidavit that silent observer does not transmit the information stored in the device embedded on the ultra-sound machine to the office of the Collector through any district server or any other server but it very much remains within the premises of the registered ultra- sound centre. Otherwise also, the registered ultra¬

sound centre is required to store all its records, registers, sonography slides etc. for a period of two years. The silent observer stores images generated during the ultra sonography test, so that when the appropriate authority desires, or the officer authorized by the appropriate authority is required, to cross-check the information supplied in the `F' form on-line, the appropriate authority or authorized officer will go to the ultra-sound centre and obtain the information stored in the silent observer in the presence of the concerned radiologist/sonologist and in the presence of another radiologist/sonologist of the District.

(vi) It is submitted that there are sufficient safeguards for ensuring that there is no breach of privacy rights of the patient and that the Collector and District Magistrate welcomes any further suggestions or any other safeguards which may be made or suggested by the petitioner-Association or others.

(vii) Mr. Kumbhakoni has lastly submitted that the impact of innovative measures introduced by the Collector and District Magistrate, Kolhapur is so significant that the sex ratio, which was 839 girls as to 1000 boys in the district in May 2010, has gone upto 876 girls as to 1000 boys in January 2011. It is submitted that the innovative initiatives taken by the Collector and District Magistrate, Kolhapur may not be interfered with.

15. Having heard the coordinator of the petitioner- Association and the learned counsel for the respondents, we have given our anxious consideration to the rival submissions.

## Statutory Provisions

16. Before dealing with the submissions, we may refer to the relevant provisions of the Act and the Rules. The scheme of the PC&PNDT Act and Rules thereunder has very recently been examined by a Full Bench of this Court in Judgment dated 6 June 2011 in Writ Petition No.7869 of 2010.

17. The preamble to the Act which was initially enacted in 1994 and which underwent substantial amendments in 2003 indicates that it is an Act to provide for the prohibition of sex selection, before or after conception, and for regulations of pre-natal diagnostic techniques and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto.

18. The Act came to be amended by Amendment Act 14 of 2003. The Statement of Objects and Reasons to the Amendment Act, inter alia, read as under :

"Amendment Act 14 of 2003 - Statement of Objects and Reasons.- The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 seeks to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. During recent years, certain inadequacies and practical difficulties in the administration of the said Act have come to the notice of the Government, which has necessitated amendments in the said Act.

2. The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders, etc. However, the amniocentesis and sonography are being used on a large scale to detect the sex of the foetus and to terminate the pregnancy of the unborn child, if found to be female. Techniques are also being developed to select the sex or child before conception. These practices and techniques are considered discriminatory to the female sex and not conducive to the dignity of women.

3. The proliferation of the technologies mentioned above may, in future, precipitate a catastrophe in the form of severe imbalance in male female ratio. The State is also duty bound to intervene in such matters to uphold the welfare of the society, especially of the women and children. It is, therefore, necessary to enact and implement in letter and spirit a legislation to ban the pre conception sex selection techniques and the misuse of pre-natal diagnostic techniques for sex selective abortions and to provide for the regulation of such abortions. Such a law is also needed to uphold medical ethics and initiate the process of regulation of medical technology in the larger interests of the society.

4. Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to conception as well as the misuse of pre-natal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended."

(emphasis supplied)

19. Having realized that ultra sonography on a pregnant woman with an ultrasound machine is an very important part of the sex determination test and procedure, which is being misused, Parliament has made a specific reference to sonography and ultrasound machine and other machines in some of the newly inserted sections and also by amendments to existing provisions.

Sub-section (1) of amended section 4 now specifically provides that the person conducting ultra sonography on a pregnant woman has to maintain the complete record thereof in the manner prescribed in the Rules and any deficiency or inaccuracy found therein amounts to contravention of Section 5 and 6, unless contrary is proved by the person conducting such ultra sonography.

Sub-section (2) of amended section 4 mentions the purpose/s for which, and for which alone, the pre-natal diagnostic test or procedure can be conducted.

Section 6 also specifically prohibits 'any genetic clinic....

or any person' from conducting any pre natal diagnostic techniques including ultra sonography for the purpose of detecting sex of foetus.

20. Section 23 provides that any medical geneticist, gynecologist, registered medical practitioner or any person who owning a Genetic Centre, etc., or is employed to render his professional or technical services to or at such a centre, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment for a period upto three years and with fine which may extend to ten thousand rupees, which may extend to five years and with fine which may extend to fifty thousand rupees, in case of subsequent conviction.

Sub-section (2) of section 23 even provides that the name of the errant registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action.

21. Section 17(4) of the Act, even prior to the Amendment Act of 2003, provided that the Appropriate Authority shall perform various functions including the following :¬

(c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action;" and

(d) any other matter which may be prescribed.

Section 17-A inserted by the Amendment Act, 2003 confers additional powers on the Appropriate Authority including the power in respect of :

(c) issuing search warrant for any place suspected to be indulging in sex selection techniques or prenatal sex determination ; and

(d) any other matter which may be prescribed.

1. Section 29 provides for maintenance of records and preservation of such record for a period of two years till the final disposal of proceeding under the Act. Section 30 of the Act read with Rule 12 confers power to search, seize and seal records and ultra- sound machine.

2. Section 32 confers upon the Central Government powers to make rules for carrying out the provisions of the Act, ;

(xiii) the manner in which the seizure of documents, records, objects, etc., shall be made and the manner in which seized list shall be prepared and delivered to the person from whose custody such documents, records or objects were seized under sub section (1) of Section 30.

In exercise of the aforesaid powers under Section 32 read with Section 30 the Central Government has made the Pre conception and Pre- natal Diagnostic Techniques (Prohibition of Sex Selection) Rules 1996.

24. Rule 9 provides for maintenance and preservation of records and sub-rule (6) provides for particulars of the manner in which the records are to be maintained and also provides that all case related records, forms of consent, laboratory results, microscopic pictures, sonographic plates or slides, recommendations and letters shall be preserved by Genetic Centre etc., for a period of two years from the date of completion of counseling, pre- natal diagnostic procedure or pre-natal diagnostic test, as the case may be. In the event of any legal proceedings, the records etc., shall be preserved till final disposal of the legal proceedings.

Rule 9 (7) further provides that in case the Genetic Clinic etc. maintains records on computer or other electronic equipment, a printed copy of the record shall be taken and preserved after authentication by a person responsible for such record and further that such centre is required to send a complete report in respect of all pre conception or pregnancy related procedures/techniques /tests conducted by them in respect of each month by fifth day of the following month to the concerned Appropriate Authority.

Sub rule (1) of Rule 11 provides that Every Genetic Centre, Ultrasound Clinic etc., or any other place where any of the machines or equipments capable or performing any procedure, techniques or test capable of pre- natal determination of sex or selection of sex before or after conception is used, shall afford all reasonable facilities for inspection of the place, equipment and records to the Appropriate Authority or to any other person authorized by the Appropriate Authority.

Rule 12 lays down the procedure for search and seizure as under:

"12. The Appropriate Authority or any officer authorized in this behalf may enter and search at all reasonable times any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Imaging Centre or Ultrasound Clinic in the presence of two or more independent witnesses, for the purposes of search and examination of any record, register, document, book, pamphlet, advertisement, or any other material object found therein and seal and seize the same if there is reason to believe that it may furnish evidence of commission of an offence punishable under the Act.

Explanation-In these rules¬

(1) "Genetic Laboratory/Genetic Clinic/ Genetic Counselling Centre" would include an ultrasound centre/imaging centre/nursing home/hospital/institute or any other place, by whatever name called, where any of the machines or equipments capable of selection of sex before or after conception or performing any procedure technique or test for pre-natal detection of sex of foetus, is used;

(2) "material object" would include records, machines and equipments; and (3) "seize" and "seizure" would include "seal" and "sealing" respectively. (emphasis supplied) Discussion

25. A bare perusal of the aforesaid statutory provisions, both in the Act and in the Rules framed thereunder, makes it abundantly clear that an ultra sonography test on a pregnant woman is considered to be an important part of a pre-natal diagnostic test or pre-natal diagnostic procedure, which cannot be conducted except for the purpose of section 4(2). The person conducting ultra sonography on a

pregnant woman has to maintain a complete record thereof in the manner prescribed in the Rules and a deficiency or inaccuracy in maintaining such records would amount to an offence, unless the person conducting such sonography is able to show that there was no deficiency or inaccuracy.

26. In our opinion, the aforesaid provisions of the Act and the Rules make it amply clear that the persons running the sonography clinic/sonography centre etc. are required to store, maintain and preserve the complete records including the sonography plates or slides for a period of two years from the date of pre-natal diagnostic techniques procedure/test and that in the event of legal proceedings, such records, letter etc. have to be preserved in light of the legal proceedings. The sonography clinic is also required to send a complete report in respect of a pre-conception of pregnancy related procedure for technical procedure or test conducted by them in respect of each month for the perusal of the concerned appropriate authority.

    As per Rule 11(1) the Clinic is also duty bound to afford all reasonable facilities for inspection of equipments and records to the appropriate authority or any other person authorized by the appropriate authority and such authority/authorized officer has also been vested with the power to search, seal and seize such equipments/records. All these provisions are required to be read with the express power conferred by section 17(4) of the Act which empowers the appropriate authority to take immediate action in case of breach of the provisions of the Act or the Rules.

27. We find considerable substance in the submission of Mr. Kumbhakoni, learned counsel for the Collector and District Magistrate, Kolhapur that if the number of `F' forms giving particulars about sonography test conducted on pregnant women in Kolhapur district alone runs into almost 1,50,000 `F' forms per year or 15,000 forms per month, and if they are not submitted on-line, it will be impossible for any appropriate authority or officer authorized by the appropriate authority to make any meaningful scrutiny and analysis of `F' forms being received in such large numbers. The on-line submission of `F' forms in such large numbers has four distinct advantages.

    In the first place, the sonography centres sending such forms in physical form very often take the plea in the prosecution under the Act that some columns in the form were not filled in inadvertently, but there was no mens rea and, therefore, the appropriate authority should not take a harsh view by prosecuting the radiologist/sonologist merely for incomplete information submitted in `F' form. The advantage of the on-line submission of `F' form will be that if any column in the form is left blank, the form will not be accepted on-line Hence, the person filling in the form is immediately alerted that some column/s in the form/s is/are incomplete. Hence, all the columns in form `F' will have to be filled in.

    The second advantage will be that since `F' form is to be submitted on-line within 24 hours, the concerned persons required to submit the information in `F' form will have to complete their work on day-to-day basis and, therefore, will have no excuse to plead that the information cannot be submitted after lapse of one month. In fact, having gone through the contents of `F' form, we find that it would be possible for the person assisting the radiologist/sonologist to fill in the form immediately after the sonography test is undertaken.

The third advantage is to the district administration. On account of a large number of such `F' forms being received on-line (15,000 per month in one district), it will be possible for the appropriate authority and the officer authorized by it to make a meaningful scrutiny and analysis of the `F' forms by searching the relevant data such as age of the foetus, the number of children of the pregnant woman as on the date of the sonography test, etc. This will help the Appropriate Authority to zero in on cases where MTP was resorted to after sex selection.

The fourth advantage will be that Section 17(4) requires the Appropriate Authority to "take immediate action" in case of complaints of breach of provisions of the Act and the Rules, but it would not be possible to take immediate action if the authority had to wait for submission, hard copy of the "F" form till the 5th day of the next month. In every field electronic filing is to be followed by submitting paper documents. Hence the instructions to submit "F" form on-line within 24 hours are in keeping with the letter and spirit of Section 17(4).

1. Coming to the "silent observer", the entire petition is based on the premise that the information stored in the silent observer which contains the images of ultra sonography on all patients will be transmitted on-line and will be available in public domain and thereby would violate the privacy rights of the patients undergoing ultrasonography. The entire premise and the apprehension based thereon is without any basis. The affidavit of the Collector and District Magistrate, Kolhapur states in terms that the silent observer is embedded on the ultra-sound machine, that the images stored therein are not at all transmitted on-line to any server, and that it is only for the purpose of cross-checking the information supplied in the `F' forms submitted on-line, that as and when any violation of the Act and the Rules is suspected, the appropriate authority will obtain the images stored in the silent observer for the purpose of cross-checking the information submitted in the `F' form on-line. Since the appropriate authorities have been invested specifically with the power to take appropriate legal action against the use of any sex selection or sex determination technique by any person at any place even suo motu as provided in section 17(4)(e), and section 17-A also specifically empowers the appropriate authority to summon any person who is in possession of the information relating to violation of the provisions of any Act or the Rules and to obtain production of any document or any material object relating to violation of the provisions of the Act and also to issue search warrant for any place suspected to the indulging in sex selection techniques or pre-natal sex determination and proviso to section 4(3) specifically provides that the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic and Rule 9 also provides that all case-related records, microscopic pictures, sonographic plates or slides etc. are required to be preserved in the sonography centre for a period of two years and Rule 9(8) also requires the Ultra-sound Clinic to send a complete report in respect of all pre-conception or pregnancy related procedures/techniques/tests conducted by them to the concerned appropriate authority, in our view, the instructions sent by the Collector and District Magistrate, Kolhapur requiring the sonologists/persons incharge of ultra-sound machines to install SIOB (popularly known as

silent observer) are within the letter and spirit of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act and Rules made thereunder.

2. In State of Maharashtra v. Praful B. Desai,1 and in Sakshi v. Union of India and others,2 the Supreme Court has held that the principles of interpreting an ongoing statute have been specifically set out by the leading jurist Francis Bennion in his commentaries titled Statutory Interpretation:¬

"It is presumed Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

1 (2003)4 SCC 601 2 (2004)5 SCC 518 In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters....

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials."

(emphasis supplied)

30. The Supreme Court then noted that the above principle of updating construction has been approved in a number of decisions. "Handwriting" in Section 45 of the Evidence Act is construed to include "typewriting"; "notice in writing" construed to include a notice by fax"; "telegraph" to include "telephone"; "banker's books" to include "microfilm"; "to take note" to include the "use of tape recorder", and "documents" to include "computer databases".

31. In Sakshi v. Union of India and other (supra), the Court has also held that there is a major difference between the substantive provisions defining the crimes and providing punishment for the same on the one hand and procedural enactments on the other hand. Rules of procedure are handmaiden of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the Court to expand or enlarge the meanings of such provisions to elicit the truth and do justice to the parties.

32. The Parliament has taken notice of the socio-cultural mindset of the people as regards the circumstances in which they resort to female foeticide after ascertaining sex of the foetus. When the number of `F' forms being received by the appropriate authority in a district runs into a large

number like 15,000 forms of pregnant women undergoing ultra-sonography test in a single district in a month and more than 1,50,000 sonography tests on pregnant women in a single district in a year, the object of the Act requiring the ultrasound clinics to submit information in `F' form and giving the Appropriate Authority power to inspect the place, equipments and records for the purpose of investigating violations of the PC&PNDT Act and the Rules can be fulfilled if, and only if, the `F' forms are submitted on-line and such information can be cross-checked with the sonography slides in the silent observer.

33. Hence the requirement of sub-section (1) of Section 4 of the Act to maintain the complete record of ultra sonography on pregnant women and the mandate of Section 17(4) of the Act requiring the Appropriate Authority to take immediate action on investigation of complaints of breach of provisions of the Act and the Rules would include the power to require the ultrasound clinic to submit the on-line information in form `F' within 24 hours, and to keep the ultra sonography slides stored in the silent observer embedded on the ultrasound machine.

34. As regards reliance placed by the petitioner on the provisions of Section 72 and 72A of the Information Technology Act, 2000, we find no merit in this contention. Section 72 refers to a person having got access to the electronic record in pursuance to any powers conferred by Information Technology Act, 2000 or the Rules and Regulations made thereunder. Obviously, the information received by the appropriate authority through `F' forms on-line are not received in exercise of any powers under the Information Technology Act,2000 nor under the Rules and regulations thereunder. Moreover, Section 72 as well as 72-A both specifically provide that those provisions are subject to any other law for the time being in force. The provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and the Rules thereunder, therefore, definitely prevail over the provisions of sections 72 and 72 A of the Information Technology Act, 2000.

35. As regards the allegation of invasion of privacy rights, it is amply clear from the affidavit of the Collector and District Magistrate, that the images stored in the silent observer are not transmitted on-line to any server and thus they remain very much part of the ultra-sound machine on which the silent observer is embedded and that the silent observer is to be opened only in the presence of the concerned radiologist/sonologist/doctor incharge of the Ultra-sound Clinic.

Silent observer is an electronic device which is attached to Sonography machine. In the event of the appropriate authority needing to check the sonographies which have taken place through a particular machine, the appropriate authority i.e. the Collector/the civil surgeon may himself or his authorized officer will have to actually go to the site of the ultra-sound machine and it is only on the authorization of Collector that the silent observer can be removed from a particular ultra-sound machine and only on putting the user name and password under the control of Collector that the officer can actually see the sonographies done with the ultra-sound machine on a Computer. Moreover, mere seeing of these sonographies by lay person would be of no help and hence as per the protocol made by appropriate authority under the Act, whenever the silent observer is to be

opened, presence of the concerned doctor at the sonography center as well as a third expert doctor would be necessary. The protocol made by the appropriate authority for seeing the results of the silent observer is annexed to the reply affidavit at exhibit `C'.

36. n view of the above factual backdrop, the submission that there will be violation of privacy rights is without any substance. Even so, we may refer to the decisions of the Apex Court having some bearing on the subject.

37. In R. Rajagopal alias R.R.Gopal and another v. State of T.N. and others1 the Supreme Court considered the right of privacy vis-a-vis a right of the press laid down under Article 19 of the Constitution and laid down, interalia, the following principles:¬

"(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article

21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

38. In Sharda v. Dharmpal2 a three Judge Bench of the Supreme Court explained the interplay between the right to privacy on the one hand and public interest on the other hand in the following terms:¬

"56. With the expansive interpretation of the phrase "personal liberty", this right has been read into Article 21 of the Indian Constitution. (See R. Rajagopal v. State of T.N.1 and 1 (1994)6 SCC 632 2 (2003)4 SCC 493 People's Union for Civil Liberties v. Union of India3 . In some cases the right has been held to be amalgam of various rights.

57. But the right to privacy in terms of Article 21 of the Constitution is not an absolute right.

58. In Gobind v. State of M.P4. it was held :

"Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest."

59. If there were a conflict between fundamental rights of two parties, that right which advances public morality would prevail. (See 'X' v. Hospital 'Z' 5, and `X' v. Hospital `Z' 6. In R. Rajagopal v. State of T.N., , this Court upon formulating six principles, however, hastened to add that they are only broad principles and neither exhaustive nor all-comprehending and indeed no such enunciation is possible or advisable.

60. In Gobind v. State of M.P.,4 it was held :

"28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."

(emphasis supplied)

39. In Mr. 'X' v. Hospital 'Z' 5 after referring to the principles laid down in R. Rajagopal v. State of T.N. (Supra), the Apex Court referred to Article 8 of the European Convention on Human Rights and then laid down the following principle:¬

"26. As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action 3 (1997) 1 SCC 301 4 (1975)2 SCCP.157, para 31 5 (1998)8 SCC 296 6 (2003)1 SCC 500 as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.

In that case, the appellant was suffering from HIV positive. The doctor in the respondent-hospital disclosed this fact to the persons related to the girl to whom the appellant intended to marry. The Court held that the girl had a right to know about the HIV positive status of the appellant.

40. Having regard to the aforesaid principles and considering the matter in the factual backdrop already highlighted hereinabove that the information contained in `F' form submitted on-line is submitted only to the Collector and District Magistrate and that except the authorized officer no third party can have access to it and that the information contained in the silent observer remains embedded on the ultrasound machine and that after analysis of the information contained in `F' form submitted on-line, the appropriate authority or the officer authorised by the authority has to access the information contained in the silent observer including the visual images, we are of the considered opinion that there is no violation of the doctor's duty of confidentiality or the patient's right to privacy. The contours of the right to privacy must be circumscribed by the compelling public interest flowing through each and every provision of the PC&PNDT Act, when read in the background of the following figures of declining sex ratio in the last five decades:

Year No. of girls per 1000 boys (in the age group 0-6 years) National Average Maharashtra

While the Court cannot close its eyes to these depressing figures, the assertion of Collector and District Magistrate, Kolhapur that after introduction of the impugned innovative measures, the sex ratio in the district has gone up from 839 in May 2010 to 876 in January 2011- is certainly a heart warming eye opener.

41. In the above view of the matter, it is not necessary to consider the further submission on behalf of the respondents that the right of the unborn child to be born would also be a fundamental right, and therefore, when there is a conflict of fundamental rights of two parties, that right which advances public morality will prevail.

42. Accordingly, we find no merit in the challenge to the instructions of the Collector and District Magistrate, Kolhapur requiring the ultra sound clinics to submit the information in `F' form on-line within 24 hours and to instal the "silent observer" on the ultrasound machine.

43. Before parting with the matter, in order to allay any apprehension that any person, other than the appropriate authority or a medical person may have access to such information, we make it clear that the appropriate authority shall not allow access to such data stored in a silent observer to a non-medical officer except himself and senior officers not below the rank of Deputy Collector and that no access shall be given to such images in silent observer to any lower officer of the Revenue Department or to any officer in the Police Department below the rank of Deputy Superintendent of Police, except when such information is required in connection with or, for the purpose of registration of an offence. As regards medical personnel, only medical officers of the rank of Civil Surgeon or Deans of medical college or officers-incharge of the Primary Health Centre shall be given access to the images in the silent observer.

    In our view, it will be open to the radiologist/sonologist/doctor incharge of ultra-sound clinic to require that such images in a silent observer may be accessed by such a medical officer in the presence of the appropriate authority or an officer authorised by the appropriate authority.

44. Subject to the above observations, we find no merit in this petition. The petition is accordingly, dismissed.

CHIEF JUSTICE

SMT. R.P. SONDURBALDOTA, J.

**Case 7: Prem Niketan Hospital v. State (Medical and Health) & Ors, July 2012**

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR
DB Civil Writ Petition No.96/2012
Prem Niketan Hospital Vs. State of Raj. & Ors.
Date:23/07/2012

HON'BLE THE CHIEF JUSTICE MR. ARUN MISHRA
HON'BLE MR. JUSTICE NARENDRA KUMAR JAIN-I
Mr. S.K. Singh, for petitioner.
Mr. Mohd. Rahil Katam, for respondent State.

In the instant petition, petitioner has challenged vires of amendment made in Rule 11(2) of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (hereinafter referred to as the Rules of 1996) on the ground that the Rule does not deal with renewal of already registered machine. It is also submitted that Rule is against the provisions of natural justice and the Rule is applicable to the sonography machines of the organizations which are not registered at all and not in the cases where they are registered but it has not been renewed.

Stand of the respondents is that registration certificate of the petitioner had expired on 18.1.2009 and petitioner has applied for renewal on 7.6.2011 after more than a period of two years from the date of expiry. Application for renewal filed by the petitioner has been rejected. The Magistrate while passing order dated 1.7.2011 has imposed a condition that petitioner shall not open the seal and shall not undertake sonography of any patient without registration. The machine was being used without any valid registration certificate. Rule-11(2) of the Rules of 1996 has been substituted vide amendment dated 31.5.2011. Amendment has rightly been made in the Rules. It cannot be said to be ultra vires.

We have heard learned counsel for the parties.

Shri S.K. Singh learned counsel appearing on behalf of the petitioner has submitted that provisions of Rule-11(2) cannot be made applicable where registration was there but there was non-renewal of registration; as such, the order of confiscation is bad in law. He has also submitted that provision is not applicable with respect to the machines which were held by the organization and were registered once upon a time.

Amended Rule-11(2) of the Rules of 1996 is quoted below:-

11(2). The Appropriate Authority or the officer authorised by it may seal and seize any ultrasound machine, scanner or any other equipment, capable of detecting sex of foetus, used by any organization if the organization has not got itself registered under the Act. These machines of such organizations shall be confiscated and further action shall be taken as per the provisions of the Section 23 of the Act.

A bare reading of the Rule makes it clear that the organization has to be registered otherwise, action has to be taken as per provisions of Section 23 of the PCPNDT Act, 1994. We find that Rule cannot be said to be ultra vires on the basis of submissions made. They are in realm of interpretation of Rules not pertaining to its vires. Rule is quite clear. It cannot be said to be illegal or arbitrary. Thus, we do not find any substance in the submission that the Rule is ultra vires. Validity of the order of confiscation is to be seen independently. It is open for the petitioner to question validity of the order independently in accordance with law. We find no ground so as to declare the Rule 11(2) of the Rules to be ultra vires.

Resultantly, the writ petition is dismissed.

(NARENDRA KUMAR JAIN-I)J. (ARUN MISHRA) CJ.

GS

All corrections made in the judgment/order have been incorporated in the judgment/order being emailed.

**Case 8. Dr. Sujit Govind Dange v. State of Maharashtra and others, August 2012**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
WRIT PETITION NO.11059 OF 2011
Dr.Sujit Govind Dange
Age : 38 years, having his hospital at 26, First Floor, Ambika Shopping Complex Sector 8, Nerul (W), Navi Mumbai 400706 ….Petitioner

V/s.

1.State of Maharashtrathrough its Department of Public Health & Family Welfare, Mantralaya, Bombay.
2. The Additional Director Health Service Family Welfare Bhavan, Pune.
3. Medical Officer of Health, Navi Mumbai Municipal Corporation, Navi Mumbai.
4. The State Appellate Authority having office at Arogya Bhavan, St. Georges' Hospital Compound Near GPO, Mumbai—400 001.
5. Union of India Through its Ministry of Health & Family Welfare, having office at Nirman Bhavan, New Delhi—110 011. Respondents

WITH
CIVIL APPLICATION NO.251 OF 2012
In
WRIT PETITION NO.11059 OF 2011

Varsha Laxmanrao Deshpande : Applicant

V/s.

Dr.Sujit Govind Dange & Ors. : Respondents

Mr.V.M.Thorat i/b. Ms P.V.Thorat for the petitioner.
Mr.S.N.Patil, Asstt. Govt. Pleader for respondent nos. 1&2
Mr.S.V.Marne for respondent no. 3
Mr.A.M.Sethna with Mr.A.S.Kulkarni i/b. J.S.Deo for respondent no.5
Mr.U.P.Warunjikar for the applicant in C.A. No. 251 of 2012.

CORAM : D.D. SINHA AND
SMT.V.K.TAHILRAMANI, JJ.
Date of Reserving the Judgement. : 22.06.2012.
Date of Pronouncing the Judgement. : 16.08.2012.

JUDGEMENT (Per D.D.Sinha, J.)

Heard the learned counsel for the petitioner and the learned counsel appearing for the respective respondents.

2. The petitioner is challenging the legality and propriety to notice/order dated 21.6.2011 passed by the respondent no.3 and order dated 9.11.2011 passed by the respondent no.4. Similarly, a direction is sought against the respondent nos.2 and 3 to release and/or return to the petitioner sonography machine seized vide order dated 21.06.2011.

SUBMISSIONS OF THE PETITIONER:

3. Mr. Thorat, the learned counsel for the petitioner, has submitted that the action of the respondent-authorities is wholly illegal, incorrect and, therefore, cannot be sustained in law. It is contended that the provisions of the proviso to sub-section (3) of section 4 of the Act require the Doctor to keep a record in the clinic as prescribed under the Rules, failing which it can be presumed that the provisions of sections 5 and 6 are contravened by such Doctor. It is submitted that before drawing presumption of contravention of section 5 or 6, opportunity must be given to the Doctor to disprove the said presumption as per the scheme of sub- section (3) of section 4 of the Act. The scheme of the Act, therefore, provides that before the said presumption is drawn, the Doctor conducting sonography on a pregnant woman is required to be given a chance to put forth his defence regarding maintenance of the record and it is only thereafter the authorities are entitled to consider whether there is a violation of section 5 or 6 of the Act. It is contended that if the appropriate authority is satisfied by the explanation of the Doctor, it may not be necessary to proceed against such Doctor by initiating criminal proceedings or take action of suspension of licence.

4. Mr.Thorat has contended that section 20 of the Act provides for cancellation or suspension of licence. Sub-section (1) of section 20 specially provides that the appropriate authority may suo motu or on complaint, issue a notice to the Genetic Clinic to show cause why its registration should not be suspended or cancelled. Sub-section (2) of section 20 further provides that after giving reasonable opportunity of being heard to the Genetic Clinic and having regard to the advice of the Advisory Committee, if the appropriate authority is satisfied that there has been a breach of the provisions of the Act or the Rules, it may, without prejudice to any criminal action that it may take against such Centre, Clinic or Laboratory suspend its registration for such period as it may think fit or cancel its registration, as the case may be. Mr.Thorat, therefore, contended that sub-sections (1) and (2) of section 20 substantiates the contention canvassed by the petitioner that as per the scheme of the Act, it is necessary to first afford a reasonable opportunity of being heard to the Doctor and it is only thereafter action, if any, either of suspension or cancellation of licence can be taken.

5. The counsel for the petitioner has submitted that sub-section (3)of section 20 is an exception to the rule of giving reasonable opportunity of hearing to the Genetic Centre/Doctor provided as per sub-sections (1)and (2) of section 20. However, though the appropriate authority is vested with the emergency powers stipulated in sub-section (3) and can suspend the licence if it is necessary or expedient to do so in public interest, it must record reasons in writing and it is only thereafter, it is entitled to suspend the registration of any Genetic Counselling Centre,etc., without issuing such notice.

6. It is submitted that in the hand-book prepared and published by Union of India which is in the form of guidelines, it is stipulated that though the appropriate authority has a right to suspend the registration of Genetic Laboratory, Clinic or Centre, without issuing a notice, however, such power should be exercised as an exception rather than a rule and only when it is essential in the public interest to do so. In the instant case, the appropriate authority has not given or recorded any reason before suspending the licence or obtained advice of the Advisory Committee.

7. Mr. Thorat further submitted that the provisions of section 20 though empower the appropriate authority to suspend the registration, such suspension can only be for the specific period. Even otherwise, the term "suspension" denotes that the validity of the registration is put in abeyance for a temporary period and not for an indefinite period. In the instant case, the appropriate authority suspended the licence for an indefinite period which amounts to cancellation of the same which is not permissible in law.

8. Mr.Thorat has submitted that the scheme envisaged under the Act and the Rules made thereunder suggests two different actions and two different punishments. It prescribes strict compliance by the Doctor conducting ultrasound sonography on a pregnant woman to keep the record strictly as per the format provided. However, while maintaining the record, if some mistake is committed due to inadvertence which is not of a serious nature, it may not attract punishment of cancellation of licence and, therefore, under the provisions of the Act, lesser punishment of suspension of licence for a limited period for minor and/or clerical mistakes is provided. Similarly, for serious lapses committed by the Doctor in this regard, harsh punishment like cancellation of licence is also provided under the Act. It is contended that in many cases of similar type, the authority has suspended the licence for a limited period of one month or so in case of minor violations of the provisions of the Act. The counsel for the petitioner has contended that the appropriate authority in Navi Mumbai which has taken action against the petitioner has used different yardstick while taking action in respect of other Doctors who had committed similar lapses. It is contended that the appropriate authority in the case of Dr.Parulekar' Hospital situated at Airoli, Navi Mumbai, where similar allegations were made regarding not filling `F' form properly issued show cause notice dated 26.7.2011 to the said hospital asking it to show cause as to why action of suspension should not be taken. It is, therefore, submitted that the normal rule as per the scheme of the Act is to issue show cause notice before taking action of suspension and it is only in exceptional situation show cause notice contemplated under sub-sections of section 20 of the Act can be dispensed with and that too after recording reasons in

writing. It is contended that in the instant case, the appropriate authority has not complied with the mandatory requirement prescribed under sub-section (3) of section 20 of the Act and, therefore, the impugned order is not sustainable in law. Even otherwise, the order of suspension which was issued by the appropriate authority for an indefinite period amounts to cancellation and the said action which is impermissible and, therefore, the same deserves to be quashed and set aside. In order to substantiate this contention, reliance is placed on the decision of a single Judge of this Court sitting at Aurangabad Bench in Writ Petition No.9573 of 2011 (Tirupati Diagnostic Centre v. The District Appropriate Authority @ Civil Surgeon, General Hospital Jalna) rendered on 22.3.2012.

9. Mr. Thorat further submitted that without prejudice to the above referred contention advanced by him, even if it is assumed that there was a breach of rule on the part of the petitioner and there is a power to suspend the licence under section 23 of the Act. In the instant case, the suspension of licence has taken place in June 2011 and is being continued for a more than one year. Since the appropriate authority does not have power of suspending the licence for an indefinite period, such action, therefore, is not sustainable in law and liable to be quashed and set aside. Similarly, since the licence can be suspended only for a limited period, ultrasound machine, therefore, can only be seized by the appropriate authority for a specific period only. It is submitted that if the order of suspension is unsustainable in law and is liable to be quashed and set aside, necessary consequence is that the appropriate authority must return ultrasound machine to the petitioner. It is submitted that when the ultrasound machine was attached and sealed, no indication was given to the petitioner that the appropriate authority was about to file a criminal case against the petitioner and, therefore, seizure of machine cannot be considered as a part of muddemal property and is required to be released.

10. It is contended that ultrasound machine is used only by two specialists i.e. Gynaecologist or Radiologist. Both these specialists are very busy in their respective professions and, therefore, they are required to rely upon their subordinate staff for up-keep of the clinic, laboratory, etc., including maintenance of record required as per the provisions of the Act. It is submitted that there is no nexus between the provisions of the Act and the object to be achieved by the Act. The object is to see that no professional should conduct sex determination test for the purpose of female foeticide and, therefore, harsh punishment like suspension, cancellation of licence and/or conviction is provided, whereas for committing minor violation or error in filling up the form and/or maintaining the record, awarding of such punishment is unreasonable, arbitrary and, therefore, violative of Article 14 of the Constitution of India.

11. Mr. Thorat has submitted that without prejudice to the legal submissions made by him, even on merit of the matter, it will be seen that there is no irregularity committed by the petitioner. At no point of time, the petitioner has admitted his guilt and solitary sentence in the Appeal Memo cannot be read in isolation to treat the same as admission of the petitioner of not keeping the record as per the Rules. It is submitted that rule 9 is the only rule which deals with maintenance and preservation of the record and it is nowhere stipulated in the said rule that it casts a duty of maintaining `F'

register. It does not stipulate the manner in which the said register is required to be maintained by the Doctor. It is contended that for the mistake committed by the Doctor who has referred the patient, the blame cannot be put on the Radiologist and/or Gynaecologist. Mr.Thorat, therefore, contended that the action of the appropriate authority is wholly unwarranted, misconceived and liable to be quashed and set aside.

## SUBMISSIONS OF THE RESPONDENT NO.3:

12. Mr. Marne, the learned counsel for the respondent no.3, has contended that the appropriate authority on noticing discrepancies as mentioned in the order of suspension thought it fit in larger public interest to exercise power under section 20(3) of the Act for ordering immediate suspension of registration. In the instant case, it is pertinent to note that there is no prejudice as such caused to the petitioner because of non issuance of the show cause notice or for not granting hearing to the petitioner by the appropriate authority, since in the appeal filed by the petitioner before the appropriate authority, the petitioner has admitted the existence of discrepancies/irregularities mentioned in the suspension order. It is, therefore, contended that even if show cause notices would have been issued to the petitioner, beyond contending that the discrepancies are of minor nature committed by the petitioner by mistake, there was nothing that the petitioner could have stated in his defence.

13. Mr.Marne has contended that the Act nowhere makes it mandatory for the appropriate authority to obtain advice of the Advisory Committee. Under section 17(4)(a), the appropriate authority has wide powers to suspend or cancel without obtaining any advice. Under section 17(4)(i), the recommendations of the Advisory Committee are to be considered only if action is taken on the basis of the complaint. In the present case, the action is taken by the appropriate authority *suo motu* and not on any complaint and, therefore, it was not required to obtain advice of the Advisory Committee.

14. The learned counsel for the respondent no.3 has submitted that the contention canvassed by the petitioner that the appropriate authority has not recorded reasons is also not correct. In the order of suspension, the appropriate authority has recorded the reasons why it was suspending the registration. The petitioner has admitted the existence of the said discrepancies as mentioned in the order of suspension. Since the petitioner has admitted the existence of discrepancies mentioned in the order of suspension, the authorities were justified in exercising the power under section 20(3) of the Act. It is submitted that the petitioner having admitted the existence of the discrepancy, it is not open for the petitioner to state that reasons were not sufficient to take action of suspension of registration/licence. The learned counsel for the respondent no.3 further contended that the contention canvassed by the counsel for the petitioner that the order of suspension is for an indefinite period and, therefore, bad in law is also incorrect. The order of suspension of registration of the petitioner would continue till final decision of the criminal case/s lodged against the petitioner is taken by the competent criminal Court.

15. The counsel for the respondent no.3 has further submitted that the Act and or the Rules made thereunder nowhere stipulates two types of violations, major and minor ones. On the contrary, the proviso to subsection (3) of section 4 raises an automatic presumption of contravention of the provisions of section 5 or section 6 of the Act in case of any deficiency or inaccuracy in keeping complete record as prescribed in the Rules. It is mandatory under rule 9 to maintain and preserve various records. Maintenance of record in Form `F' is a vital condition before subjecting a pregnant woman to ultrasonography test. In Form `F', it is mandatory for a pregnant woman to declare that she does not want to know the sex of her foetus. It is also mandatory for the Doctor to declare that while conducting ultrasonography/image scanning, he did not disclose sex of foetus in any manner. In the present case, there is an admitted violation of this condition and, therefore, by no stretch of imagination, it can be treated as a minor irregularity. It is submitted that if non-maintenance of record in Form `F' is permitted, it would open a door for Doctors to determine and disclose sex of foetus as there would be no record of tests performed on pregnant woman. In any case, it is for the criminal Court to consider and decide the nature of violation of the provisions of the Act and the Rules on the basis of evidence adduced by the parties. In the instant case, since the discrepancy about not maintaining complete record is admitted by the petitioner, the action of suspension is sustainable in law and it is open for the petitioner to prove that the petitioner did not determine the sex of the foetus nor disclosed about it to anyone. It is, therefore, contended that the action taken by the appropriate authority is sustainable in law and the petition is liable to be dismissed.

## SUBMISSIONS OF THE RESPONDENT NO.5:

16. Mr.Sethna, the learned counsel for the respondent no.5, has contended that the petitioner seeks to challenge the impugned action taken by the appropriate authority, including that of suspension of its centre's licence mainly on three grounds which, according to the petitioner, is contrary to the mandate under section 20 of the Act which are as under:-

    (i) no opportunity to show cause or being heard was given to the petitioner;

    (i) no approval of the Advisory Committee was obtained; and

    (ii) the suspension of licence was in complete violation of the principles of natural justice and, hence, contrary to section 20.

17. It is submitted that there is no v iolation whatsoever of any of the statutory provisions by the respondents as alleged. Section 20(3) is a non obstante provision. Therefore, independent and *de hors* to what is stated in sub-clauses (1) and (2) of section 20, the appropriate authority is duly and statutorily empowered to take appropriate action without issuing any notice referred to in section 20(1) provided such action of suspension of the Centre's registration is in public interest.

18. It is contended that in the present case, as provided under section 21, the appropriate authority has *suo motu* initiated the action of sealing the sonography machines and suspending the Centre's licence. The reasons for taking such actions have been duly recorded in the impugned order dated

21.6.2011. Those relate to the discrepancies and irregularities in maintenance of Form `F' which is a form statutorily required to be filled and maintained at all times by the Centre, inter alia, under rule 9 of the Rules of 1996. The irregularities and discrepancies have been enumerated in the impugned order. The learned counsel for the respondent no.5 has submitted that the petitioner himself has admitted the existence of irregularities and discrepancies as recorded in the order. The Appellate Authority has also in its order dated 9.11.2011 considered the seriousness of the violation which included non-filing of declaration in Form `F'.

19. The counsel for the respondent no.5 has further contended that section 17 of the Act sets out the functions of the appropriate authority and section 17(4)(a) includes the power to suspend/cancel registration of a Genetic Clinic. It is contended that section 9 of the Act clearly mandates that record shall be maintained and preserved for a period of two years or such period as may be prescribed and shall be made available at all times for inspection of the appropriate authority. Rule 9 also provides in detail the manner in which the records are to be maintained, including all details as specified in Form `F'. Rule 18 of the Rules prescribes code of conduct to be observed by persons working at genetic centres which, inter alia, include to ensure that no provisions of the Act and the Rules are violated in any manner.

20. The learned counsel for the respondent no.5 has submitted that maintenance of Form `F' is a statutory requirement under the provisions of the Act and the Rules, any breach thereof will, therefore, lead to contravention of the provisions of sections 5 and 6 of the Act as provided under section 4 of the Act. There is no mention either in the provisions of the Act or the Rules distinguishing between minor and/or major offences. Hence, the contention of the petitioner of not maintaining Form `F' is a minor irregularity which is totally misconceived and contrary to the statutory scheme of the Act.

21. The counsel for the respondent no.5, in order to substantiate the contention canvassed by him, placed reliance on the decision of a Division Bench of this Court in Imaging Association v. Union of India and Ors. in Writ Petition No.797 of 2011 decided on 26.8.2011. Reliance is also placed by the learned counsel on the decision of a Full Bench of this Court in Dr.(Mrs.) Suhasini Umesh Karanjikar v. Kolhapur Municipal Corporation (2011 (4) All M.R. 804). The learned counsel further placed reliance on the decision of a Division Bench of this Court in Radiological & Imaging Association (State Chapter), through Dr.Jignesh Gokuldas Thakker v. Union of India & Ors. (Writ Petition (L) No.1939 of 2011) decided on 17.11.2011.

22. In this Writ Petition, a Civil Application, being Civil Application No.251 of 2012, has been filed by the applicant for intervention. Heard Mr.Warunjikar, the learned counsel for the applicant in the Civil Application. Civil Application No.251 of 2012 for intervention is allowed.

23. Mr.Warunjikar, the learned counsel for the applicant in Civil Application No.251 of 2012 for intervention, has submitted that the applicant adopts the contentions canvassed by the respondents and prays that the Writ Petition be dismissed.

## CONSIDERATION AND CONCLUSIONS:

24. Considered the contentions canvassed by the learned respective counsel for the petitioner as well as the respondents, perused the relevant provisions of the Act and the Rules as well as the decisions cited by the parties. The petitioner, in this petition, inter alia, challenged the order dated 21.6.2011 passed by the appropriate authority-cum-Medical Officer of Navi Mumbai Municipal Corporation as well as the order dated 9.11.2011 passed by the appellate authority.

25. The petitioner has challenged the action of sealing of sonography machine/s and suspension of licence of the petitioner's centre on the following grounds:-

(i) The order of suspension of registration is passed by the appropriate authority without following the procedure laid down under section 20(1) and (2) of the Act.

(ii) That the powers conferred under section 20(3) of the Act is an extraordinary power required to be exercised in an exceptional circumstance and that too after recording reasons. The impugned action is in violation of the provisions of section 20(3) of the Act.

(iii) It was mandatory to obtain advice of the Advisory Committee before taking action of suspension of registration under section 20 of the Act.

(iv) Suspension of licence cannot be for an indefinite period.

(v) The irregularities and discrepancies being of a minor nature do not warrant suspension of registration and seizure of ultrasonography machine.

26. Before we consider the issues raised by the petitioner, in the light of the provisions of the Act, it will be expedient to take into consideration the objectives of the Act. The Legislature enacted the Act 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. The intention of the Legislature is to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide since abuse of such techniques is discriminatory against the female sex and affects the dignity and status of women. The intention behind the legislation is to regulate the use of such techniques and to provide deterrent punishment to stop such inhuman act. Clause (2) of the Statement of Objects and Reasons of the Act reads thus:-

"(2) The Bill, *inter alia*, provides for:--

(i) prohibition of the misuse of pre-natal diagnostic techniques for determination of sex of foetus, leading to female foeticide;

(ii) prohibition of advertisement of pre-natal diagnostic techniques for detection or determination of sex;

(iii) permission and regulation of the use of pre-natal 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."

27. It will be appropriate to consider section 4 of the Act in the light of the Statement of Objects and Reasons of the Act. Section 4 provides regulation of pre-natal diagnostic techniques. Sub-section (1) contemplates that 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 pre-natal diagnostic techniques except for the purposes specified in sub-section (2) and after satisfying any of the conditions specified in sub-section (3).

28. Sub-section (2) of section 4 contemplates that no pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely:--

"(i) chromosomal abnormalities;

(ii) genetic metabolic diseases;

(iii) heamoglobinopathies;

(iv) sex-linked genetic diseases;

(v) congenital anomalies;

(vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board."

Whereas sub-section (3) of section 4 mandates that 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) ge of the pregnant woman is above thirty-five years;

(ii) the pregnant woman has undergone 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 Board."

29. Proviso to sub-section (3) further stipulates 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. The scheme of section 4 clearly demonstrates that the person qualified (Doctor) can conduct pre-natal diagnostic techniques except for the purposes specified in sub-section (2) of section 4 provided he/she is satisfied for the reasons to be recorded in writing that any of the conditions mentioned in sub-section (3) of section 4 are fulfilled. The proviso to sub-section (3) makes it mandatory for the Doctor conducting ultrasonography on a pregnant woman to keep complete record thereof in the clinic in such manner as prescribed under the provisions of the Act and the Rules particularly as provided under rule 9 of the Rules of 1996 which provides the procedure and manner pertaining to the maintenance and preservation of records of Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centres, etc. 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 ultrasonography 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 ultrasonography. The safeguards provided in section 4 of the Act are with the object to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide and, therefore, the person (Doctor) conducting ultrasonography on a pregnant woman is required to scrupulously follow every aspect of sub-sectio ns (1), (2) and (3) of section 4 as well as rule 9 of the Rules.

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 ultrasonography on a pregnant woman. In the instant case, it is not in dispute that the petitioner has admitted the existence of deficiency or inaccuracy in maintaining and preserving the complete record which includes Form `F' and, therefore, as per the scheme of section 4 of the Act, it amounts to an offence since the same is in contravention of the provisions of sections 5 and 6 of the Act unless contrary is proved by the petitioner who has conducted ultrasonography. 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 condition prescribed under the Act. The contentions canvassed by the petitioner, in this regard, therefore, are devoid of substance and are rejected.

31. Section 20 of the Act deals with the power of the appropriate authority to cancel or suspend the registration of the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and procedure

to be followed by the appropriate authority in this regard. It is no doubt true that sub-section (1) of section 20 requires the appropriate authority to issue a notice to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, etc., to show cause why its registration should not be suspended or cancelled for the reasons mentioned in the notice. Similarly, sub-section (2) of section 20 contemplates giving of reasonable opportunity of hearing to the Genetic Counselling Centre, etc., and having regard to the advice of the Advisory Committee and if the appropriate authority is satisfied that there is a breach of the provisions of the Act or the Rules, it is legally entitled, without prejudice to take any criminal action for such period as it may think fit, or cancel its registration, as the case may be. Whereas sub-section (3) of section 20 starts with the non obstante clause and contemplates that if the appropriate authority is of the opinion that it is necessary or expedient in the larger public interest, it can suspend the registration of the Genetic Counselling Centre without issuing any notice referred to in sub-section (1), after recording reasons in writing for invoking this extraordinary power. Sub-section (3) gives extraordinary power to the appropriate authority in the larger public interest to be used in exceptional circumstances when the appropriate authority is of the opinion that it is necessary or expedient to do so and that too after recording reasons. In the instant case, the impugned order dated 21.6.2011 passed by the respondent no.3 in exercise of power under section 23 of the Act whereby the licence of the diagnostic centre of the petitioner came to be suspended mentions reasons. Those are as follows:-

"During the inspection the following discrepancies/irregularities were observed:

1. "F" form register is not kept in prescribed form and not updated.
2. No signature of Radiologist and patients on few F forms.
3. Monthly reports available without "F" forms check list.
4. In month of June, 2011, total 37 F forms are available, but in F Form register only 23 patients' details were updated.
5. Referral slips are available but not in proper form (no letter head and no. reg. no. of referring doctor)."

32 It is, therefore, clear that in the instant case, the appropriate authority, in fact, has given reasons for exercising extraordinary power under sub-section (3) of section 20 of the Act for suspending the licence of the diagnostic centre of the petitioner and, therefore, the contentions canvassed by the counsel for the petitioner, in this regard, are also unfounded.

33. It is no doubt true that in the normal circumstances, as contended by the counsel for the petitioner, the appropriate authority is expected to issue show cause notice to the Genetic Counselling centre, etc., and is also expected to give reasonable opportunity of hearing to the Genetic Counselling Centre, Laboratory, etc., before taking action of suspending or cancellation of registration of Genetic Counselling Centre, etc., having regard to the advice of the Advisory Committee. However, the exercise of power under sub-section (3) of section 20 of the Act by the appropriate authority is

warranted in exceptional situation and that too in order to protect the larger public interest and after recording reasons and is not guided by the procedure stipulated in sub-sections (1) and (2) of section 20 of the Act as per the scheme of sub-section (3) of section 20 of the Act, hence, the contention canvassed by the learned counsel for the petitioner that the impugned action is bad in law being violative of the principles of natural justice is misconceived for the reasons recorded hereinabove.

34. Another contention canvassed by the counsel for the petitioner that the impugned action suspending the licence of the diagnostic clinic of the petitioner for an indefinite period is impermissible which virtually amounts to cancellation of the licence of the Genetic Centre of the petitioner is also misconceived since the suspension of licence of the petitioner is only till decision in the criminal case is taken by the Criminal Court.

35. We want to reiterate the scheme of the relevant provisions of the Act which are attracted in the present case. Section 4 deals with regulation of pre-natal diagnostic techniques whereas section 17(4) deals with the functions to be performed by the Appropriate Authority. Clause (a) of sub-section (4) of section 17 demonstrates that one of the functions required to be performed by the Appropriate Authority is to grant, suspend or cancel registration of a Genetic Counselling Centre, Genetic Laboratory and Genetic Clinic. Sub-sections (1), (2) and (3) of section 20 deal with the procedure to be followed by the Appropriate Authority while cancelling or suspending the registration of Genetic Counselling Centre, Laboratory or Clinic. In the normal course, the Appropriate Authority is requited to follow the procedure stipulated under subsections (1) and (2) of section 20 of the Act before cancelling or suspending the registration whereas sub-section (3) of section 20 clothes the Appropriate Authority with extraordinary powers to be used in an exceptional situation when the Appropriate Authority is of the opinion that it is expedient in public interest to suspend the registration of the Genetic Centre after recording reasons therefor, without issuing any notice referred to in sub-section (1). Similarly, rule 9 of the Rules of 1996 deals with the manner in which the record Genetic Counselling Centre is required to be maintained and preserved. The proviso to subsection (3) of section 4 provides that the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic in the manner prescribed under rule 9 of the Rules and any deficiency or inaccuracy found in this regard shall amount to contravention of the provisions of section 5 or section 6 and would amount to an offence unless contrary is proved by the person conducting such ultrasonography.

36. The relevant observations made by the Full Bench of this Court in Dr.(Mrs.) Suhasini Umesh Karanjkar, through her Constituted Attorney Dr. Umesh Murlidhar Karanjkar (supra) read thus:-

"24. A bare perusal of the aforesaid statutory provisions, both in the Act and in the Rules framed thereunder, makes it abundantly clear that an ultra sonography test on a pregnant woman is considered to be an important part of a pre-natal diagnostic test or pre-natal diagnostic procedure, which cannot be conducted except for the purpose of Section 4(2).

The person conducting ultra sonography on a pregnant woman has to maintain a complete record thereof in the manner prescribed in the Rules and a deficiency or inaccuracy in maintaining such records would amount to an offence, unless the person conducting such sonography is able to show that there was no deficiency or inaccuracy.…....."

The above observations made by the Full Bench clearly demonstrate that the ultrasonography test on a pregnant woman is an important part of prenatal diagnostic test which cannot be conducted except for the purpose of section 4(2) of the Act and the person conducting such ultrasonography test has to maintain complete record thereof in the manner prescribed in the Rules and any deficiency or inaccuracy in maintaining such records would amount to an offence unless the person conducting such ultrasonography is able to show that there was no deficiency or inaccuracy. The law declared by the Full Bench is squarely applicable in the present case and the issue involved stands covered by the said decision. However, the decision of the learned single Judge of this Court sitting at Aurangabad Bench rendered on 3.5.2012 in Criminal Application No.757 of 2012 in view of the decision of the Full Bench, in our view, does not further the case of the petitioner. Similarly, the decision cited by the counsel for the petitioner dated 22.3.2012 rendered in Writ Petition No.9573 of 2011 by the learned single Judge of this Court sitting at Aurangabad Bench also does not help the petitioner.

37. The observations made by the Division Bench in Radiological & Imaging Association (State Chapter-Nalna), through Dr.Jignesh Gokuldas Thakker v. Union of India & Ors. (Writ Petition No.797 of 201) in paragraphs 25 and 26 read thus:-

"25. A bare perusal of the aforesaid statutory provisions, both in the Act and in the Rules framed thereunder, makes it abundantly clear that an ultra sonography test on a pregnant woman is considered to be an important part of a pre-natal diagnostic test or pre-natal diagnostic procedure, which cannot be conducted except for the purpose of section 4(2). The person conducting ultra sonography on a pregnant woman has to maintain a complete record thereof in the manner prescribed in the Rules and a deficiency or inaccuracy in maintaining such records would amount to an offence, unless the person conducting such sonography is able to shows that there was no deficiency or inaccuracy.

26. In our opinion, the aforesaid provisions of the Act and the Rules make it amply clear that the persons running the sonography clinic/sonography centre etc. are required to store, maintain and preserve the complete records including the sonography plates or slides for a period of two years from the date of pre-natal diagnostic techniques procedure/test and that in the event of legal proceedings, such records, letter etc. have to be preserved in light of the legal proceedings. The sonography clinic is also required to send a complete report in respect of a pre-conception of pregnancy related procedure for technical procedure or test conducted by them in respect of each month for the perusal of the concerned appropriate authority. As per Rule 11(1) the Clinic is also duty bound to afford all reasonable facilities for inspection of equipments and records to the appropriate authority or any other person authorized by the appropriate authority and such authority/authorized officer has also been vested with the power to search, seal and seize such equipments/records. All these provisions are required to be read with the express power conferred

by section 17(4) of the Act which empowers the appropriate authority to take immediate action in case of breach of the provisions of the Act or the Rules."

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 pre-natal 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.

39. The observations made by the Full Bench as well as the Division Benches of this Court referred to hereinabove conclude all the challenges raised by the petitioner in the present petition. The observations made by the Division Bench in Malpani Infertility Clinic Pvt. Ltd. & others (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. Similarly, in the instant case also, the prosecution has been launched against the petitioner, though at a subsequent stage, which is pending before the competent criminal

    Court. The contentions canvassed by the learned counsel for the petitioner, in this regard, therefore, suffer from lack of merit and, therefore, the same are rejected.

40. In view of the above settled legal position, the impugned orders passed by the Appropriate Authorities are neither arbitrary nor violative of Article 14 of the Constitution and are sustainable in law and it is for the petitioner to prove before the criminal Court that there was no deficiency or inaccuracy in maintaining and preserving the complete record of the clinic. The petition suffers from lack of merit and the same is dismissed.

(D. D. SINHA, J.)
(SMT.V.K.TAHILRAMANI,J.)

**Case 9. Prakash Patel v. State Appropriate Authority, February 2013**

C/SCA/15096/2011
CAV JUDGEMNT
IN
THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION NO. 15096 of 2011

FOR APPROVAL AND SIGNATURE:
HONOURABLE MR.JUSTICE Z.K.SAIYED

Whether Reporters of Local Papers may be allowed to see the judgment?

To be referred to the Reporter or not?

Whether their Lordships wish to see the fair copy of the judgment?

Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

Whether it is to be circulated to the civil judge?

PRAKASH PATEL....Petitioner(s)
Versus
STATE APPROPRIATE AUTHORITY PC AND PNDT ACT,1994 & 2....Respondent(s)
Appearance:
MR MR MR NIKHILESH J SHAH, ADVOCATE for the Respondent(s) No. 2 RULE

CORAM:
HONOURABLE MR.JUSTICE Z.K.SAIYED
Date : 18/02/2013 CAV JUDGEMNT

By way of present petition under Article 226 of the Constitution of India the petitioner challenges the order passed by the respondent No.1 in Appeal No.9 of 2011 filed by the petitioner vide communication dated 12.8.2011. The petitioner also challenges the order dated 23.5.2011 passed by the respondent No.2 whereby the registration of the clinic of the petitioner has been cancelled permanently. The petitioner has challenged both the above orders on the ground that the same are absolutely, unjust, improper, incorrect, malafide, prejudicial and not in consonance with the provisions of the Act and Pre-natal Diagnostic Techniques (Prohibition of Sex Section) Rules, 1996.

The case of the petitioner in brief is that the petitioner is possessing the qualification of MD/DGO and is practicing in the field of gynaecology and obstetrics since 1982. The hospital of the petitioner is duly registered under the PNDT Act and was given registration certificate bearing Registration No.GJ-13-0078-AAA-2007. On 02.04.2011 the petitioner addressed a complaint to DCB, Surat alleging that several persons in the name of NGO are involved in blackmailing the doctors. On 16.04.2011, the officer of the

respondent No.2 visited the premises of the petitioner but could not find any material object/record with regard to sex determination of the foetus. However, the said authority seized office copies of Form-F for the period from 15.07.2009 to 03.02.2010 only with a view to find fault with the petitioner. On 18.4.2011, show cause notice came to be issued to the petitioner which was duly replied on 29.4.2011. On 23.5.2011, the respondent No.2 authority in defiance of the principles of natural justice and in violation of the mandatory provisions of PC & PNDT Act especially Section 20(2) cancelled the registration of the petitioner. Being aggrieved with the said decision the petitioner preferred appeal before the respondent No.1 Appropriate Authority. Against the said decision dated 23.5.2011 the petitioner preferred an Appeal before the respondent No.1. The respondent No.1 authority dismissed the appeal of the petitioner vide order dated 12.8.2011. Being aggrieved with the said the petitioner has preferred the present petition.

Heard Mr.A.D.Oza, learned advocate for the petitioner, Mr.Bharat Vyas, learned AGP for respondent State and Mr.N.J.Shah, learned advocate for the respondent No.2.

Mr.A.D.Oza, learned advocate for the petitioner submitted that the petitioner is a medical practitioner in the field of gynaecology and obstetrics and is possessing qualification of MD/DGO. On 02.04.2011 the petitioner addressed a complaint to DCB, Surat alleging that several persons in the name of NGO are involved in blackmailing the doctors and are extorting money from them by doing video shooting and by creating false patients for sex determination.

On 16.04.2011, the officer of the respondent No.2 visited the premises of the petitioner but could not find any material object/record with regard to sex determination of the foetus. However, the said authority seized office copies of Form-F for the period from 15.07.2009 to 03.02.2010 only with a view to find fault with the petitioner. It is pertinent to note that as per the provisions of Rule 9(8) of the Rules, the doctors are required to send duly filled in Form-F of each month by 5th day of the following month to the respondent No.2 authority. Such Forms-F were sent to the said authority as per the rules at the relevant point of time and no notice with regard to any alleged deficiencies was received by the petitioner till the date of visit of the premises caused by the respondent No.2 authority on 16.4.2011. It is only after the petitioner made complaint to DCB, Surat, the authority visited premises of the petitioner and with a view to book the petitioner, found some alleged deficiencies in office copy of the Forms which were sent to the authority prior to one and a half year of the date of visit.

The petitioner addressed a detailed complaint to the respondent No.2 naming the persons who are involved in blackmailing the doctors and extorting money. The petitioner at the same time also addressed a representation to the Health and Family Welfare Department for restoring the registration of the petitioner.

On 18.4.2011, show cause notice came to be issued to the petitioner which was duly replied on 29.4.2011. On 23.5.2011, the respondent No.2 authority in defiance of the principles of natural justice and in violation of the mandatory provisions of PC & PNDT Act especially Section 20(2) cancelled the registration of the petitioner. It is pertinent to note that the petitioner is also having another hospital at Majura Gate and

there also the petitioner is having Sonography machine, which is duly registered with the authority. The petitioner is conducting sonography at the said place without there being any complaint. Against the said decision dated 23.5.2011 the petitioner preferred an Appeal before the respondent No.1.

The respondent No.1 authority dismissed the appeal of the petitioner by a non-speaking order dated 12.8.2011 without taking into consideration the relevant facts and without taking into consideration the submissions made by the petitioner.

He has submitted that the impugned orders are bad in law and the respondent No.2 has cancelled the registration of the petitioner without following the mandatory provisions of Section 20(2) of the Act which provides for giving reasonable opportunity of being heard.

He has submitted that the alleged deficiency which forms the basis of passing the order of cancellation is no deficiency in the eye of law and the said deficiencies were found in the office copy of Form-F maintained by the petitioner and not in the original Form-F which were sent to the respondent No.2 as per the provisions of the Rule for which no notice was issued to the petitioner in the original Form-F. He has submitted that the original Forms-F were sent to the authority at the relevant point of time as per Rules and endorsement with regard to receipt of such Form is taken from the authority. He has submitted that the period of alleged deficiencies found in the office copy of Form-F is relevant and the said period is from 15.7.2009 to 03.02.2010. Prior to this period and after this period no alleged deficiencies were found in any of the Form-F. The authority is acting malafide manner and against the interest of the petitioner as well as the patients who at large are the sufferers.

He has submitted that the other doctors who were issued show cause notice have been given a clean chit and no action is taken against them. The Advisory Committee of respondent No.2 is blowing hot and cold at the same time as for the very nature of deficiencies no action is taken against certain doctors and petitioner is punished only as he made the complaint dated 02.04.2011 to the DCB, Surat.

He has submitted that the petitioner is having another clinic at Majura Gate where he is having different registration and he is also using sonography machine. He has submitted that in the show cause notice neither details with regard to defects are mentioned nor the copies of the defective Forms were provided with the notice for the purpose of asking explanation with regard to so called defects. Thereby the respondent authority has not provided proper reasonable opportunity as contemplated in Section 20(2) of the Act. The action of the respondent No.2 in cancelling the registration is bad in law, unjust, improper and incorrect and is in violation of Articles 14 and 19 of the Constitution of India.

He has submitted that the respondent No.2 authority has tried to mislead this Court by producing irrelevant documents, terming the same to be notice issued to the petitioner (page Nos.163-164 and 193-194). If the outward number and contents of the notice are perused, it is amply clear that by producing such documents the respondent No.2 authority has tried to mislead this Court with a view to cause prejudice to the petitioner.

He has submitted that even it is not the case of the respondent authority that the petitioner has indulged in disclosing or determining the sex/foetus and what is alleged is some deficiency in the office copy of the Form-F which is no deficiency in the eye of law. The respondent No.2 authority has acted high-handedly and after issuance of notice in the petition and after taking time for filing reply, sealed the sonography machine of the petitioner on 14.11.2011 for extraneous reasons and considerations. This amounts to interference in the pending proceedings before the Court. He has submitted that the impugned orders are bad in law and the same deserves to be quashed and set-aside and the petition deserves to be allowed by granting the relief as prayed for in the petition.

Mr.N.J.Shah, learned advocate appearing for Appropriate Authority has submitted that the allegations against the petitioner are very serious and relate to determination of sex and foetus with the help of sonography. Both the authorities below have concurrently held that there were serious lapses on the part of the petitioner in operating the machine and in maintaining the records of sonography of pregnant women.

He has submitted that the petitioner has not come out with the clean hands before the Court. It is submitted that though the petitioner has referred to Form-F and the deficiencies therein the said Form-F have not been produced by the petitioner on record. It is also not the case of the petitioner that the copy of the said forms were not available with him prior to filing of this petition. It is submitted that the petitioner had asked for copies of the Form-F which were seized from the petitioner s clinic and the same were supplied to the petitioner on 7.9.2011.

It is submitted that the case of the petitioner was placed before the District Advisory Committee. It is also required to be noted that the reply as well as show cause notice were placed before the Advisory Committee before taking the decision and the District Advisory Committee after careful consideration thereof came to the conclusion that the action was required to be initiated and accordingly action was taken by the respondent to cancel the registration. It is submitted that no statutory provisions requiring the examination of Form-F by the respondent within specific period has been pointed out by the petitioner.

It is the case of the petitioner that the petitioner has lodged a complaint to the Police Inspector, DCB, Surat, regarding blackmailing and conspiracy of certain persons in the name of NGO and after that complaint the respondent authorities have visited the premises of the petitioner and taken action that such action of the respondent authority was in furtherance of or at the instance of some interested persons, who were blackmailing the petitioner in the name of NGO. In this connection, it is submitted by the respondent that it was for the petitioner to establish such allegation and he has not produced any document in support of his such submission.

It is submitted that the case of the petitioner was placed before the District Advisory Committee respondent No.2 and the District Advisory Committee after careful consideration of the show cause notice and reply filed to the same dismissed the case of the petitioner. Against the said decision of the respondent No.2 the petitioner preferred an appeal before the respondent No.1 Appropriate Authority who also dismissed the said appeal.

Mr.Shah referred page Nos.79 and 80 and submitted that the petition is filed on 28.9.2011 i.e. after the petitioner was in possession of xerox copy of 66 Forms-F seized by the Appropriate Authority and yet the petitioner has not produced the same alongwith the petition. This is suppression or withholding the material from the Court and hence no relief should be granted.

The so called unnoticed deficiencies in Form-F in the custody of the respondent do not make out a ground for contending estoppal of taking action on the basis of deficiency as they remained deficiency and the same does not absolve the petitioner.

In support of this contention the respondent No.2 has relied upon the decision of the Full Bench in the case of Suo Motu vs. State of Gujarat, reported in 2009 Cri.L.J. 721, herein the Full Bench of this Court was considering the question as to whether any deficiency of inaccuracy in filling Form-F as required under the statutory provisions is merely a procedural lapse. In the said decision the Full Bench has observed as under:-

The Full Bench of this Court answered the question as under:-

7. As seen earlier, the Act and the Rules made thereunder provide for an elaborate scheme to ensure proper implementation of the relevant legal provisions and the possible loop-holes in strict and full compliance are sought to be plugged by detailed provisions for maintenance and preservation of records. In order to fully operationalise the restrictions and injunctions contained in the Act in general and in sections 4, 5 and 6 in particular, to regulate the use of pre-natal diagnostic technique, to make the pregnant woman and the person conducting the pre-natal diagnostic tests and procedures aware of the legal and other consequences and to prohibit determination of sex, the Rules prescribe the detailed forms in which records have to be maintained. Thus the Rules are made and forms are prescribed in aid of the Act and they are so important for implementation of the Act and for prosecution of the offenders, that any improper maintenance of such record is itself made equivalent to violation of the provisions of sections 5 and 6, by virtue of the proviso to sub- section (3) of section 4 of the Act. It must, however, be noted that the proviso would apply only in cases of ultrasonography conducted on a pregnant woman. And any deficiency or inaccuracy in the prescribed record would amount to contravention of the provisions of sections 5 and 6 unless and until contrary is proved by the person conducting such ultrasonography. The deeming provision is restricted to the cases of ultrasonography on pregnant women and the person conducting ultrasonography is, during the course of trial or other proceeding, entitled to prove that the provisions of sections 5 and 6 were, in fact, not violated.

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. Thus the burden shifts on to the person accused of not maintaining the prescribed record, after any inaccuracy or deficiency is established, and he gets the opportunity to prove that the provisions of sections 5 and 6 were not contravened in any respect. Although it is apparently a heavy burden, it is legal, proper and justified in view of the importance of the Rules regarding maintenance of record in the prescribed forms and the likely failure of the Act and its purpose if procedural requirements were flouted...

I have heard the learned advocates for the respective parties at length and have gone through the averments made in the petition and documents produced on record. From the record it appears that during the inspection of the clinic following deficiencies were noticed by the Authority.

(1) Addresses of two clinics had been mentioned in the form;

(2) Declaration of pregnant women on form F as prescribed under the provisions of Pre-Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as the PNDT Act for the sake of brevity) were printed in English language whereas the same should be printed in vernacular languages.

The Radiologist who had carried out the sonography had not signed the declaration of the Doctor conducting the ultrasound in 16 forms as required according to the PNDT Act.

(4) Signatures of four pregnant women were not taken in the form F which is mandatory according to the PNDT Act.

On the basis of the same, show cause notice dated 18.4.2011 was issued to the petitioner and served upon him by the respondent No.2. After considering the explanation of the petitioner the respondent authority found explanation of the petitioner as unsatisfactory and thus cancelled registration No.GJ-13-0078-AAA-2007 under Section 20(2) of the PC-PNDT Act vide order dated 23.5.2011. The sonography machine of the petitioner was sealed with a direction to him that the same shall not be used and be kept in a store-room. Against the said decision the petitioner preferred an Appeal before the State Appropriate Authority (PC-PNDT), Gandhinagar, Health and Family Welfare Department. The Appellate Authority after considering the submissions of the petitioner and relevant aspects of the matter dismissed the Appeal of the petitioner thereby confirming the order of the District Appellate Authority i.e. respondent No.2.

The allegations against the petitioner pertains to the provisions of PC-PNDT Act. The tests which are available as on today and can incidentally result in determination of the sex of the child are prohibited.

The statement of objects and reasons makes this clear. The statement reads as under:-

The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders.

The para 4 reads thus :

Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to conception as well as the misuse of pre-natal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended.

From the above statement it becomes clear that the Act proposes to control and ban to use all these selection techniques both prior to conception as well as its misuse after conception and the same does not totally ban these procedures or tests. Both the authorities below have concurrently held that deficiency or inaccuracy in filling Form-F prescribed under Rule-9 of the Rules made under the PNDT Act were noticed. Perusal of the order of the Appellate Authority makes it clear that the petitioner conceded that there were some lapses and he also assured the authority that he would be careful in future.

As regards the deficiency or inaccuracy in filling Form-F decision of the Full Bench as referred above in the case of Suo Motu vs. State of Gujarat, reported in 2009 Cri.L.J. 721 may be profitably referred here. In the said case the Full Bench was considering the question as to whether any deficiency or inaccuracy in filling Form-F as required under the statutory provisions was merely a procedural lapse. On analysis and appreciation of the scheme and provisions of the Act and the Rules made thereunder the Full Bench answered the questions in the following words : ¬

(iv) Deficiency or inaccuracy in filling Form F prescribed under Rule 9 of the Rules made under the PNDT 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 PNDT 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.

From the above it becomes clear that deficiency or inaccuracy in filling Form-F prescribed under Rule-9 of the Rules made under the PNDT Act being a deficiency or inaccuracy in keeping the records 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 PNDT Act and it has to be treated and tried accordingly.

In view of foregoing discussion and observations this Court does not find any illegality committed by the respondent authorities and therefore, the impugned orders deserve no interference in this petition and the petition is, therefore, dismissed. Rule is discharged.

(Z.K.SAIYED, J.) KKS

**Case 10: Dr. Radhakrishna v. the State of Maharashtra, May 2014**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH AT AURANGABAD
CRIMINAL WRIT PETITION NO.26 OF 2013

1. Dr. Radhakrishna s/o Namdeo Zalwar,
Age-62 years, Occu:Medical Practitioner,
Zalwar Hospital and Sonography Centre,
R/o-Main Market, Sillod,
Tq-Sillod, Dist-Aurangabad.

2. Dr. Birendra s/o Radhakrishna Zalwar,
Age-34 years, Occu: Gynecologist,
Zalwar Hospital and Sonography Centre,
Main Market, Sillod, Tq-Sillod, Dist-Aurangabad....PETITIONERS

VERSUS

1. The State of Maharashtra,
Through it's Secretary,
Drugs and Medical Education Department, Mantralaya, Mumbai-32,

2. Deputy Director of Health Services, Aurangabad.

3. The Tahsildar, Sillod, Dist-Aurangabad.

4. Medical Superintendent,
Sub District Hospital, Sillod,
Tq-Sillod, Dist-Aurangabad
and the appropriate authority. ...RESPONDENTS

Shri B.R. Warma Advocate with Shri C.V.
Thombre Advocate for Petitioners.
Shri S.V. Kurundkar, Public Prosecutor with
Shri V.D. Godbharle and Mrs. S.G. Chincholkar,
A.P.P. for Respondent Nos.1 to 4.

CORAM: A.I.S. CHEEMA, J.
DATE OF RESERVING JUDGMENT: 8TH APRIL,2014.
DATE OF PRONOUNCING JUDGMENT: 9TH MAY, 2014.

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 Pre-natal 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 Petitioners claim that on 9th May, 2012, Respondent No.2 and Dr.Madhuri Thorat and Dr. Madhav Munde, Residential Medical Officer, District Civil Hospital, Aurangabad and Divisional Vigilance Cell visited the hospital and noticed certain lacunae, for which notice was issued on 9th May, 2012 and reply was given by the Petitioners on 12th May, 2012 explaining the lacunae pointed out. The Petitioners claim that they denied the allegations made in the notice about Form F. On 29th November, 2012 Deputy Director of Health Services, informed that lacunae have been noticed and there was violation of the Act and Rules. Respondent No.4 filed S.C.C. No.863 of 2012 before Judicial Magistrate, First Class, Sillod, Dist-Aurangabad for violation of provisions under the Act, referring to Section 23 and 29 of the Act. Petitioners claim that the criminal proceeding is manifest with mala fides and there is no offence made out as claimed.

   Petitioners want the S.C.C. No.863 of 2012 to be quashed and set aside.

4. On behalf of the Respondents, affidavit in reply has been filed by the Medical Superintendent, denying averments in the Petition and claiming that provisions of the Act and Rules have been violated and the Petition deserves to be rejected. Copies of documents have been filed in support.

5. Petitioner No.1 has filed Rejoinder to the Affidavit-in-reply.

6. I have heard learned counsel for the Petitioners as well as learned Public Prosecutor for the Respondents.

7. Learned counsel for the Petitioners referred to copy of the complaint where 5 deficiencies and inaccuracies have been enlisted.

   It was argued that defect No.1 pointed out is claimed to be with reference to Form F that the Form being used was not as per the Act. It was argued that this was only regarding missing of words "Non invasive" of the format. Counsel submitted that the defect No.2 pointed out was of not taking steps

to get entry made in the certificate of registration, of portable ALOKA sonography machine kept in the store. With this regard, counsel submitted that the Petitioner No.1 had informed regarding the portable machine to the Authorities before the incident and subsequent to the incident entry regarding the said machine has been taken in the certificate of registration.

It was further argued that Defect No.3 pointed out in the complaint is that time is not specified regarding sonologist in the certificate.

It was argued that no rule requires specifying of such time. The counsel further argued that Defect No.4 pointed out in the complaint claims that signatures of Dr. Zalwar in the forms are different. According to the learned counsel in reply dated 12th May, 2012 the Petitioner No.1 had informed that it appeared to be so due to poor print of carbon copy.

It was argued for the Petitioners that Defect No.5 relates to non mentioning of reasons for abortion in the records. The argument is that this does not relate to the present Act and it would be matter under the Medical Termination of Pregnancy Act, which is different.

Learned counsel for Petitioners further argued that in the present matter, both the Petitioners have been made accused, which is not correct and that the registration of the Clinic was standing only in the name of Petitioner No.1 and so Petitioner No.2 could not be proceeded against.

8. 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 cwp26.13 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.

9. Learned Public Prosecutor pointed out to the copies of documents filed with the affidavit- in-reply to show that the concerned records were not kept properly and there are various defects.

The Public Prosecutor submitted that Form F itself provides whether M.T.P. i.e. Medical Termination of Pregnancy was advised or conducted and thus non mentioning of reasons for termination of pregnancy would amount to defect and deficiency in keeping of the record.

10. The learned Public Prosecutor referred to the contents of the complaint and the documents relied on and the letter dated 12th May, 2012 sent by Petitioner No.1 as reply to the notice calling explanation. According to the Public Prosecutor, the reply itself shows that the Petitioners admitted that there were defects in maintaining of the records. The Public Prosecutor submitted that both the Petitioners were managing the hospital and both the Petitioners are liable for prosecution.

11. 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 pre-natal 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 pre¬natal 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)……..

ig 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:-

(1) …….. (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 counselled 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. Sub¬section (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 cwp26.13 Laboratory or Genetic Clinic without issuing any such notice referred to in sub-section (1)."

12. 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.

13. 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 pre-natal 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.

14. 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.

15. The Full Bench of High Court of Gujarat in Suo Motu 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 Councelling 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 PNDT 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 PNDT 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."

16. 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.

17(A). Reference needs to be made to the case of Sujit Govind 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 Hon'ble Division Bench recorded in Para 39, as under:-

"The observations made by the Division Bench in (Malpani Infertility Clinic Pvt. Ltd. & others Vs. Appropriate Authority cwp26.13 PNDT Act & 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 pre-natal 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."

18. Keeping in view the observations of the Hon'ble Division Bench in the case of "Sujit Govind 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.

19. 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.

20. 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.

[A.I.S. CHEEMA, J.]

**Case 11: Dr. Vijaymala v. the State of Maharashtra, May 2014**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
CRIMINAL WRIT PETITION NO.21 OF 2013

Dr. Vijaymala w/o Vishal Akate,
Age-32 years, Occu:Radiologist,
Indumati Netralaya &
Sonography Centre,
Main Market, Sillod,

Dist-Aurangabad.... PETITIONER

VERSUS

1. 1. The State of Maharashtra,
Through it's Secretary,
Drugs and Medical Education
Department, Mantralaya,
Mumbai-32

2.Medical Superintendent,
Sub District Hospital,
Sillod and Appropriate Authority
Tq-Sillod, Dist-Aurangabad.

.. RESPONDENTS

Shri B.R. Warma Advocate with Shri C.V.
Thombre Advocate for Petitioner.
Shri S.V. Kurundkar, Public Prosecutor with
Shri V.D. Godbharle and Mrs. S.G. Chincholkar,
A.P.P. for Respondent Nos.1 and 2.

CORAM: A.I.S. CHEEMA, J.
DATE OF RESERVING JUDGMENT : 8TH APRIL,2014.
DATE OF PRONOUNCING JUDGMENT: 9TH MAY, 2014.

JUDGMENT :

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 Pre-natal 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.

   The Petitioner claims as under:- .

   On 9th May, 2012, Medical Superintendent-complainant, along with Dr. Madhuri Thorat, Dr. Madhav Munde, Residential Medical Officer, District Civil Hospital, Aurangabad and Divisional Vigilance Cell and Technical Officer visited the hospital Indumati Netralaya and Sonography Centre, Main Market, Sillod, of the Petitioner. Respondent No.2 found certain lacunae in maintaining of Records and issued notice dated 9th May, 2012 regarding 5 lacunae, which was replied by the Petitioner on 12th May, 2012. Respondent No.2 on 22nd November, 2012 sealed Sonography Machine and suspended registration. Respondent No.2 filed S.C.C. No.862 of 2012 on 5th December, 2012 before Judicial Magistrate, First Class, Sillod and process was issued. Thus, the present Petition.

   According to the Petitioner, no offence is made out against the Petitioner and the criminal proceedings need to be quashed and set aside.

4. Respondent No.2 has filed affidavit-in reply opposing the Petition. According to the Respondent, in the trial Court evidence before charge is yet to be recorded and the trial Court will consider whether there are grounds for framing charge. Under the Act, Competent Authority has power to suspend or cancel the license. In the inspection of 9th May, 2012, lacunae were found and the Petitioner admitted the same in reply to the show cause notice that she will rectify the same. Non maintenance of record is admitted. There is violation of the provisions of the Act and the Petition deserves to be rejected. The Respondent has annexed documents to show that the record was not properly maintained and the provisions of the Act and Rules have been violated, attracting Sections 23 and 29 of the Act to punish for violation of mandate regarding maintenance of record.

5. Learned counsel for Petitioner referred to copy of the complaint Exhibit E which shows as to what were the defects found by the Appropriate Authority at the time of inspection. The defects noticed were:-

   "1) Monthly report indication is not specified.

   2) Form F including 19 points is not according to PNDT Act Book (Column No.11), 3 3) Self Referal of patients (without referal slip) is done.

   4) Timing of Radiologist not displayed out side.

   5) Referal slip are incomplete, No signature of Doctor, No indication."

6. It has been argued by the learned counsel for the Petitioner that for monthly reports, no Form has been prescribed under the Rules and so endorsement on the monthly reporting Form at Page 95 of the Petition that the Doctor should specify the cause of doing ultra sonography and submit the format, is not deficiency. According to him, Defect No.1 mentioned above, is not correct.

   Counsel then referred to copies of Form F which are on record, referring to Defect No.2, that the Form being used was not as per the Act. According to him there was printing error in Column No.11 as word "Non invasive" was missing. It was submitted that the error pointed out that without referal slips patients were examined, is also not correct as there can be self referal. It was argued that there is no form prescribed for reference. It is argued that if it is self referal, referal note would not be there. No signature is required of doctor for reference. Regarding defect that time of radiologist is not displayed outside, it is argued that Rules do not prescribe to write time of the radiologist and the Petitioner can serve as per emergencies. It was further argued that in Form F items of Column 11 onwards were not applicable for the purposes of the Petitioner. The counsel submitted that deficiencies do not indicate intention to determine sex.

7. 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.

8. It has been argued by the Public Prosecutor that the Petitioner vide reply dated 12th May, 2012 admitted that there were defects and errors in maintenance of the record. It is pointed out that defective forms were being used.

   Thus, according to him, prima facie case is clearly there and there is no reason to discharge or quash the proceedings at this stage. The learned Public Prosecutor submitted that the present Petition deserves to be rejected.

9. 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 pre-natal 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 counselled 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 prenatal 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. Sub-section (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)."

10. 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.

11. 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 pre-natal 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, prenatal 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.

12. 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.

13. The Full Bench of High Court of Gujarat in Suo Motu 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 cwp21.13 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 Councelling 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 subsection (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 PNDT 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 PNDT 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."

14. 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.

15. (A). Reference needs to be made to the case of Sujit Govind 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 Hon'ble Division Bench recorded in Para 39, as under:-

"The observations made by the Division Bench in (Malpani Infertility Clinic Pvt. Ltd. & others Vs. Appropriate Authority PNDT Act & 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 cwp21.13 Petitioner having admitted the existence of deficiency and inaccuracy in keeping and maintaining the record including form 'F' 0 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. Subrule (4) of rule 9 stipulates the record to be maintained by every 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'. 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."

16. Keeping in view the observations of the Hon'ble Division Bench in the case of "Sujit Govind 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.

17. 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 1 prima facie case is made out.

18. 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 (meansany) 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.

[A.I.S. CHEEMA, J.] asb/MAY14

After the pronouncement of the Judgment, counsel for Petitioner seeks stay. There is no justification. The request is rejected.

**Case 12: Dr. Vinayak v. the State of Maharashtra, May 2014**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
CRIMINAL WRIT PETITION NO.5 OF 2013

1. Dr. Vinayak s/o Vishnu Khedkar,
Age-44 years, Occu:Medical Practitioner,

2. Dr. Sau Jyoti w/o Vinayak Khedkar,
Age-44 years, Occu:Medical Practitioner,
Both R/o-52, Surananagar,
Jalna Road, Aurangabad, Dist-Aurangabad. ....PETITIONERS

VERSUS

1. The State of Maharashtra,
Through the Secretary,
Ministry for Health and Family Welfare Department,
Mantralaya, Mumbai,

2. The Appropriate Authority and
Medical Officer, Health Section,
Municipal Corporation, Aurangabad,
Dist-Aurangabad... .RESPONDENTS

Shri V.D. Hon Advocate for Petitioners.
Shri S.V. Kurundkar, Public Prosecutor with
Shri V.D. Godbharle and Mrs. S.G. Chincholkar,
A.P.P. for Respondent Nos.1.
Shri A.M. Karad Advocate for Respondent No.2.

CORAM: A.I.S. CHEEMA, J.
DATE OF RESERVING JUDGEMENT: 8TH APRIL, 2014.
DATE OF PRONOUNCING JUDGEMENT: 9TH MAY, 2014.

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 Pre-natal 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 cwp5.13 argued and Counsel for Petitioners adopted arguments of each other on law points to request for quashment of Criminal Trials against accused.

3. The Petitioners claim that the Petitioner No.1 has got registered sonography centre at Jyoti Maternity Home and Sonography Clinic in Surananagar, Aurangabad. Both the Petitioners are doctors. Petitioner No.1 is running the clinic since 1996. Municipal Corporation granted registration to

Petitioner No.1 to run sonography centre in 2002. Respondent No.2 - Appropriate Authority, on 4th June, 2012 carried out inspection and only on the ground that Form F has not been properly filled, sealed sonography machines and suspended the registration. The Petitioner No.1 carried appeal to the State Authorities and when the same failed, Petitioner No.1 filed Writ Petition No.10191 of 2012 and got relief in the same. During the pendency of the Writ Petition, Criminal Case No.1635 of 2012 was filed by Respondent No.2 in the Court of Chief Judicial Magistrate, Aurangabad and in the complaint both the Petitioners were made accused.

The Petitioner No.2 has no concern with the sonography centre, still she has been made accused. Petition claims that in the complaint no offence has been made out against the Petitioners and the proceedings need to be quashed and set aside.

4. On behalf of the Respondents, affidavitin- reply has been filed by Medical Officer of Health, Aurangabad Municipal Corporation denying the contentions raised in the Petition. According to the Respondents, the complaint concerned clearly makes out case under the Act and Rules.

5. The Petitioners have filed additional affidavit of Petitioner No.1 referring to the deficiencies pointed out in the complaint and it is claimed that there was no substance in the deficiencies pointed out and there was no intention to conceal information. Explanations are given as to the defects pointed out, with reference to Form F, in the additional affidavit filed by the Petitioners.

6. Counsel for Petitioners submitted that at the hospital concerned, the certificate of registration is in the name of Petitioner No.1 only and Petitioner No.2 has nothing to do with the offence. Counsel referred to the defects pointed out in the complaint which has been filed before Chief Judicial Magistrate. . The defects alleged in Complaint, in brief, are :-

   Records have not been kept as required by the Act and Rules. In filling of various form F, there were many deficiencies and irregularities.

   In form F, in column 10 no where there were indications filled in. Even where sonography report was "abnormal", in form F there were false entries of being "normal". In form F as on 29th May, 2012 the name of last patient was Jijabai Dhakne but thereafter in 42 F forms even before examination of the patients and filling of name of patients, entries have been made that sonography report is "normal". 33 pages are blank and thereafter on 22 pages except name of patients rest of the informations were found to have been already filled in. In form F register of 18 points, on blank pages signatures of sonologists were found to have already been taken. Complaint further points out defects that affidavit of pregnant women have not been taken in Marathi.

   Similarly on some affidavits signatures of pregnant lady are not there, while on some affidavits signatures of sonologists are not there. In Monthly Report, on 23rd November, 2011 entry regarding M.T.P.s done after 12 weeks, was not mentioned. Even where referal slips are there, cwp5.13 on form F self referal is mentioned. On sonography machine, photographs of Gods and Goddess have been pasted.

7. Learned counsel for the Petitioners, with reference to deficiencies in Form F, submitted that the forms used were old forms of 18 columns and new form of 19 columns came later on. It was submitted that the Petitioners had got the earlier forms printed and the same were used but there was no intention of criminality in the same. New form of 19 columns came into force on 20th May, 2011.

   Regarding not taking signatures of pregnant women on affidavit, it was submitted that ink fades but that the signatures were taken. Regarding pasting of photographs of Gods and Goddess, the counsel referred to the case of "Dr.Prakash s/o Shamrao Chaudhari vs. The State of Maharashtra and others", Criminal Writ Petition No.558 of 2012, Judgment dated January 28, 2013, passed by learned Single Judge of this Court. It was held that merely putting photograph of deity - Ganpati was no violation of Rules. It is argued that it is not the case of the complainant that Petitioners have disclosed sex of foetus to anybody.

   Counsel for the Petitioners argued that the Form F are being changed from time to time and wrongly include parts of "Non invasive" and "invasive" techniques in the same form. According to the counsel, the Petitioner No.1 was approved only for doing ultra sound sonography, which is "Non invasive" and thus for non applicable parts the Petitioner No.1 had mentioned as - N.A. i.e. non applicable. Regarding not giving indication against column 10 of F forms, the counsel submitted that it related to invasive procedures and did not apply to Petitioner No.1. Regarding mentioning of normal even in case of abnormal sonography report and forms pre-signed by sonologists, it was submitted that there was no criminal intention in it. Referring to the cwp5.13 additional affidavit of the Petitioner No.1, counsel submitted that the Petitioner has explained the defects regarding which the complaint has been filed. Regarding partially filling up of forms in advance, additional affidavit of Petitioner No.1, in Para 7, claims that the Petitioners were out of station and to save time Sister of Petitioner No.1 who was having no work in hospital, filled in F forms which is general in nature, for example, name of the hospital, registration number of doctor, registration date of the centre, address of the hospital etc. Argument is that in this, there was no criminal intention. Relying on the explanations mentioned in the additional affidavit of the Petitioners, the counsel for Petitioners submitted that no case is made out against the Petitioners and the complaint deserves to be quashed.

8. 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.

9. The learned Public Prosecutor submitted that the complaint filed, gives various details regarding deficiencies and inaccuracies in maintenance of the records and F Form. The complaint mentions that the inspection carried out was also videographed. According to the Public Prosecutor the trial will show the manner in which the records were maintained and the violation of the provisions of the Acts and Rules. The complaint is supported by documents, copies of which are before this Court and referring to the documents, the Public Prosecutor submitted that there are various irregularities in maintenance of the records. Wrong form was being used although new form F had been introduced. Reference has been made to Panchnama, copy of which is also available on record, and the complaint. Averments of the complaint show that the inspection carried out was of the hospital of both the Petitioners and that inspection showed that both of them had not kept the records as per the Act and Rules. According to the Public Prosecutor, both the Petitioners are liable to be proceeded against under the Act and Rules. If sonography is not normal, writing in the form that the same was "normal", is violation of the provisions of the Act and Rules. Taking signatures of sonologists in advance in F forms, is also not permissible. According to the Public Prosecutor, the explanations given in the additional affidavit of the Petitioner No.1 are matters of defences and at the present stage even before trial takes place, on the basis of such explanations the trial cannot be quashed or thrown out. According to him, Complaint discloses serious defects and illegalities in maintaining of records.

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 pre-natal 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 pre- natal 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 cwp5.13 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 counselled 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 prenatal 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 Dr. Vinayak vs The State Of Maharashtra on 9 May, 2014 Indian Kanoon - http://indiankanoon.org/doc/179170657/ 7 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 cwp5.13 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 pre-natal 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. Dr. Vinayak vs The State Of Maharashtra on 9 May, 2014

(E). In view of Section 3(3) of the Act, prenatal 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 Suo Motu 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 Councelling 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 subsection (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 PNDT 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 PNDT 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 Sujit Govind 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 Hon'ble Division Bench recorded in Para 39, as under:-

"The observations made by the Division Bench in (Malpani Infertility Clinic Pvt. Ltd. & others Vs. Appropriate Authority PNDT Act & 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 pre-natal 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 "Sujit Govind 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.

[A.I.S. CHEEMA, J.] asb/MAY14

**Case 13: Dr. Ravindra v. the State of Maharashtra, May 2014**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
CRIMINAL WRIT PETITION NO.26 OF 2013

1. Dr. Radhakrishna s/o Namdeo Zalwar,
Age-62 years, Occu:Medical Practitioner,
Zalwar Hospital and Sonography Centre,
R/o-Main Market, Sillod,
Tq-Sillod, Dist-Aurangabad.

2. Dr. Birendra s/o Radhakrishna Zalwar,
Age-34 years, Occu:Gynecologist,
Zalwar Hospital and Sonography Centre,
Main Market, Sillod, Tq-Sillod,
Dist-Aurangabad. ...PETITIONERS

VERSUS

1. The State of Maharashtra,
Through it's Secretary,
Drugs and Medical Education
Department, Mantralaya,
Mumbai-32,

2. Deputy Director of Health Services, Aurangabad.
3. The Tahsildar, Sillod,
Dist-Aurangabad.

4. Medical Superintendent,
Sub District Hospital,
Sillod, Tq-Sillod, Dist-Aurangabad
and the appropriate authority. ...RESPONDENTS

Shri B.R. Warma Advocate with Shri C.V.
Thombre Advocate for Petitioners.
Shri S.V. Kurundkar, Public Prosecutor with
Shri V.D. Godbharle and Mrs. S.G. Chincholkar,
A.P.P. for Respondent Nos. 1 to 4.

CORAM: A.I.S. CHEEMA, J.
DATE OF RESERVING JUDGMENT: 8TH APRIL, 2014.
DATE OF PRONOUNCING JUDGMENT: 9TH MAY, 2014.

JUDGMENT:

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 Pre-natal 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 Petitioners claim that on 9th May, 2012, Respondent No.2 and Dr.Madhuri Thorat and Dr. Madhav Munde, Residential Medical Officer, District Civil Hospital, Aurangabad and Divisional Vigilance Cell visited the hospital and noticed certain lacunae, for which notice was issued on 9th May, 2012 and reply was given by the Petitioners on 12th May, 2012 explaining the lacunae pointed out. The Petitioners claim that they denied the allegations made in the notice about Form F. On 29th November, 2012 Deputy Director of Health Services, informed that lacunae have been noticed and there was violation of the Act and Rules. Respondent No.4 filed S.C.C. No.863 of 2012 before Judicial Magistrate, First Class, Sillod, Dist-Aurangabad for violation of provisions under the Act, referring to Section 23 and 29 of the Act. Petitioners claim that the criminal proceeding is manifest with mala fides and there is no offence made out as claimed.

   Petitioners want the S.C.C. No.863 of 2012 to be quashed and set aside.

4. On behalf of the Respondents, affidavit in reply has been filed by the Medical Superintendent, denying averments in the Petition and claiming that provisions of the Act and Rules have been violated and the Petition deserves to be rejected. Copies of documents have been filed in support.

5. Petitioner No.1 has filed Rejoinder to the Affidavit-in-reply.

6. I have heard learned counsel for the Petitioners as well as learned Public Prosecutor for the Respondents.

7. Learned counsel for the Petitioners referred to copy of the complaint where 5 deficiencies and inaccuracies have been enlisted.

   It was argued that defect No.1 pointed out is claimed to be with reference to Form F that the Form being used was not as per the Act. It was argued that this was only regarding missing of words "Non invasive" of the format. Counsel submitted that the defect No.2 pointed out was of not taking steps to get entry made in the certificate of registration, of portable ALOKA sonography machine kept in the store. With this regard, counsel submitted that the Petitioner No.1 had informed regarding the portable machine to the Authorities before the incident and subsequent to the incident entry regarding the said machine has been taken in the certificate of registration.

It was further argued that Defect No.3 pointed out in the complaint is that time is not specified regarding sonologist in the certificate.

It was argued that no rule requires specifying of such time. The counsel further argued that Defect No.4 pointed out in the complaint claims that signatures of Dr. Zalwar in the forms are different. According to the learned counsel in reply dated 12th May, 2012 the Petitioner No.1 had informed that it appeared to be so due to poor print of carbon copy.

It was argued for the Petitioners that Defect No.5 relates to non mentioning of reasons for abortion in the records. The argument is that this does not relate to the present Act and it would be matter under the Medical Termination of Pregnancy Act, which is different.

Learned counsel for Petitioners further argued that in the present matter, both the Petitioners have been made accused, which is not correct and that the registration of the Clinic was standing only in the name of Petitioner No.1 and so Petitioner No.2 could not be proceeded against.

8. 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.

9. Learned Public Prosecutor pointed out to the copies of documents filed with the affidavit-in-reply to show that the concerned records were not kept properly and there are various defects.

The Public Prosecutor submitted that Form F itself provides whether M.T.P. i.e. Medical Termination of Pregnancy was advised or conducted and thus non mentioning of reasons for termination of pregnancy would amount to defect and deficiency in keeping of the record.

10. The learned Public Prosecutor referred to the contents of the complaint and the documents relied on and the letter dated 12th May, 2012 sent by Petitioner No.1 as reply to the notice calling explanation. According to the Public Prosecutor, the reply itself shows that the Petitioners admitted that there were defects in maintaining of the records. The Public Prosecutor submitted that both the Petitioners were managing the hospital and both the Petitioners are liable for prosecution.

11. 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 pre-natal 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 pre¬natal 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)

ig 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 counselled 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.

(4)……

(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. Sub¬section (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)."

12. 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.

13. 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 pre-natal 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.

14. 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.

15. The Full Bench of High Court of Gujarat in Suo Motu 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 Councelling 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 PNDT 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 PNDT 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."

16. 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.

17.(A) Reference needs to be made to the case of Sujit Govind 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 Hon'ble Division Bench recorded in Para 39, as under:-

"The observations made by the Division Bench in (Malpani Infertility Clinic Pvt. Ltd.

& others Vs. Appropriate Authority PNDT Act & 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 pre-natal 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."

18. Keeping in view the observations of the Hon'ble Division Bench in the case of "Sujit Govind 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.

19. 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.

20. 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.

[A.I.S. CHEEMA, J.] asb/MAY14 Cont:-P.33. After the pronouncement of the Judgment, counsel for Petitioners seeks stay. There is no justification. The request is rejected.

[A.I.S. CHEEMA, J.] asb/MAY14

## Case 14: Faijan Multi Speciality Hospital v. the State of Maharashtra, May 2014

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
CRIMINAL WRIT PETITION NO.627 OF 2013

Smt. Zaheda w/o Jahur Sayyed,
Age-41 years, Occu:President of
Mundadatai Charitable Trust Sanchalit
Faijan Multi Speciality Hospital,
Kaij, Dist-Beed. ...PETITIONER

VERSUS
The State of Maharashtra,
Through the Appropriate Authority
and Naib Tahsildar, Kaij,
Dist-Beed. ...RESPONDENT

Shri B.R. Kedar Advocate for Petitioner.

Shri S.V. Kurundkar, Public Prosecutor with
Shri V.D. Godbharle and Mrs. S.G. Chincholkar,
A.P.P. for Respondent.

CORAM: A.I.S. CHEEMA, J.
DATE OF RESERVING JUDGMENT: 8TH APRIL,2014.

DATE OF PRONOUNCING JUDGMENT: 9TH MAY, 2014.

JUDGMENT :

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 Pre-natal 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. Appopriate 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 (1-A) 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. cwp627.13 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 incharge 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 pre-natal 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 pre-natal 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)…..

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 counselled shall be as specified in Form D.

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. Sub-section (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 pre-natal 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 cwp627.13 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 anybody corporate and includes a firm and other asso ciation 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 Suo Motu 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 Councelling 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 PNDT 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 PNDT 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 Sujit Govind 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 Hon'ble Division Bench recorded in Para 39, as under:-

"The observations made by the Division Bench in (Malpani Infertility Clinic Pvt. Ltd. & others Vs. Appropriate Authority PNDT Act & 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 cwp627.13 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 pre-natal 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 "Sujit Govind 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.

[A.I.S. CHEEMA, J.] asb/MAY14

**Case 15: Dr. Dattatraya v. the State of Maharashtra, May 2014**

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
**CRIMINAL WRIT PETITION NO.198 OF 2013**
Dr. Dattatraya s/o Keshav Kanade,
Age-37 years, Occu:Medical Practitioner,
R/o-Dr. Kanade Hospital & Maternity Home,
Near Bus Stand, At Post-Rahata,
Dist-Ahmednagar. ...PETITIONER

VERSUS

1.The State of Maharashtra,

2 Taluka Adhikari @
The Medical Superintendent Class-I,
Rural Hospital, Rahata,
Dist-Ahmednagar.... RESPONDENTS

Shri R.S. Shinde Advocate h/Shri N.L. Choudhari Advocate for Petitioner.
Shri S.V. Kurundkar, Public Prosecutor with
Shri V.D. Godbharle and Mrs. S.G. Chincholkar, A.P.P. for Respondent Nos.1 and 2.

CORAM: A.I.S. CHEEMA, J.
DATE OF RESERVING JUDGMENT: 8TH APRIL, 2014.
DATE OF PRONOUNCING JUDGMENT: 9TH MAY, 2014.

**JUDGMENT:**

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 Pre-natal 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 Petitioner claims that he is running his hospital at Rahata. On 16th July, 2007 Medical Superintendent, Rural Hospital, Rahata- Respondent No.2 along with other Officers visited his hospital and carried out inspection and found technical discrepancies/faults on the part of the Petitioner. Respondent No.2 issued show cause notice on 17th July, 2007. The Petitioner replied the same on the same day. Respondent No.2 suspended registration certificate of sonography machines and sealed the machines. Respondent filed Complaint bearing R.T.C. No.153 of 2007 in the Court of Judicial Magistrate, First Class, Rahata, under Section 29, Rule 9(4) of the Act alleging that there were various discrepancies in the maintenance of the Records. Thus, breach of Sections of the Act and Rules was alleged. The Judicial Magistrate, First Class, Rahata issued summons to present Petitioner.

   The Petitioner filed Criminal Revision No.17 of 2008 before District and Sessions Judge, Kopargaon, which came to be rejected and thus the present Petition has been filed, claiming that the complaint concerned before the Judicial Magistrate should be quashed.

   The Petitioner claims that only irregularities and no illegalities are there and no offence has been made out.

4. On behalf of the Respondents, affidavit-in-reply has been filed by the Medical Superintendent, Rural Hospital, Rahata. In affidavit-in-reply the claims made by the Petitioner are denied. According to the Respondent, there are irregularities in record keeping as per revised Form F. As per the Respondents, Petitioner has not completely filled up Form F and only half portion of the Form is filled up. Second part of the Form F is filled up, which is also incomplete. The affidavit claims that in the forms concerned, the Petitioner has not mentioned how many issues are there i.e. male/female. It is further the affidavit that in the declaration given by doctor, authorized signatory was radiologist Dr. Yogendra Sachdeo, but the declaration is signed by the present Petitioner. For such reasons, the Respondents want the Petition to be rejected.

5. Learned counsel for the Petitioner referred to copy of the complaint filed in the trial Court and the defects or deficiencies pointed out in the same. According to the learned counsel, Defect Nos.1 and 5 relate to non compliance with Form F. Defect No.1 mentions that F Form's columns 1 to 18 do not appear to have been filled in. Defect No.5 mentions that it does not appear that specialist doctor who did the sonography, filled the form F. The counsel submitted that in February, 2003 State Appropriate Authority and Additional Director of Health Services had issued guidelines to the District Appropriate Authorities regarding implementation of the Act. Referring to the same, according to the counsel, the present defects pointed out, need to be ignored.

   It is argued, Defect No.3 mentions that notice giving information to public to the effect that disclosure of sex of foetus is prohibited under law, was necessary to be displayed. The same had not

been displayed in the room where sonography is done. The counsel argued that the Act and Rules do not say that notice should be displayed in the sonography room. He submitted that board in this regard was put in the O.P.D. and on gate of the hospital. (the counsel was, however, unable to show material in support of this submission at the stage of arguments.). Counsel referred to Defect No.4 which stated that between 8th July, 2007 to 15th July, 2007 in Form F in portion of declaration, as Radiologist name of visiting doctor, Dr. Sachdeo has been put, however the form was signed by Dr. Kanade. With regard to this Defect, the argument was that even the owner of the hospital can sign the form.

Regarding Defect No.5 that the doctor who did sonography, did not fill F Form, the argument was that the owner can sign the same. The Defect No.6 mentions that in the concerned form, information regarding living children was not filled up. With regard to this, learned counsel submitted that merely by not filling such information, it would not be a criminal act.

In the complaint, Defect No.7 is that one copy of each of the Act and the Rules was not available in the O.P.D. With regard to this Defect, the learned counsel for Petitioner argued that such copy was available but it was in the table of the doctor. (the counsel was unable to support the argument that such copy was indeed available.) . Regarding getting ultra sound sonography machine released, the counsel submitted that the Petitioner had already filed Criminal Writ Petition No.490 of 2009 and obtained relief.

6. 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.

7. The learned Public Prosecutor referred to the affidavit in reply, to submit that the F Forms filled, were incomplete and that important information as to how many issues are there, male or female, was not filled in and that the doctor signing the declaration form was not the doctor who was authorized signatory or the radiologist.

   The Public Prosecutor referred to the copies of documents regarding the records maintained, to show various defects regarding which the complaint has been filed. It was pointed out that there are forms having signatures of patients without requisite information being filled in or incomplete information. As per the Public Prosecutor, the letter issued by State Appropriate Authority, to the Appropriate Authorities in Districts, which is in the nature of guidance, does not substitute requirements of the Act and the Rules. There was non compliance of prominently displaying the board and keeping copy of the Act and Rules available, and this would be a matter of evidence at the time of trial. According to the Public Prosecutor, the defects pointed out in the complaint are supported by documents and clear-cut case is made out regarding violation of the provisions of the Act and Rules. Not filling information regarding number of living children, is deficiency in keeping of records, attracting penal provisions of the Act.

8. 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 pre-natal 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 pre- natal 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 counselled 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. Sub-section (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)."

9. 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.

10. 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 pre-natal 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.

11. 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.

12. The Full Bench of High Court of Gujarat in Suo Motu 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 or6. 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 Councelling 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 PNDT 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 PNDT 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."

13. 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.

14 (A). Reference needs to be made to the case of Sujit Govind 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 cwp198.13 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 Hon'ble Division Bench recorded in Para 39, as under:-

"The observations made by the Division Bench in (Malpani Infertility Clinic Pvt. Ltd. & others Vs. Appropriate Authority PNDT Act & 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 pre-natal 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."

15. Keeping in view the observations of the Hon'ble Division Bench in the case of "Sujit Govind 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.

16. 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.

17. 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.

[A.I.S. CHEEMA, J.] asb/MAY14

## Case 16: Dr. Sau Nirmala w/o Ramprasad Bajaj v. the State of Maharashtra, May 2014

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
**CRIMINAL APPLICATION NO.3966 OF 2013**

Dr. Sau. Nirmala w/o Ramprasad Bajaj,
Age-59 years, Occu:Medical Practitioner,
R/o-Ganesh Clinic & Sonography Centre,
Majalgaon, Tq-Majalgaon, Dist-Beed. ... PETITIONER

VERSUS

1. The State of Maharashtra,
Through its Secretary, Health Department,
Mantralaya, Mumbai,

2.Appropriate Authority & Medical Superintendent,
Rural Hospital, Majalgaon, Through Dr. S.A. Sable,
Age-Major, Occu:Service,
R/o-Majalgaon,
Tq-Majalgaon, Dist-Beed.. RESPONDENTS

Shri S.R. Choukidar Advocate for Petitioner
Shri S.V. Kurundkar, Public Prosecutor with
Shri V.D. Godbharle and Mrs. S.G. Chincholkar,
A.P.P. for Respondent Nos.1 and 2

CORAM: A.I.S. CHEEMA, J.
DATE OF RESERVING JUDGMENT: 8TH APRIL, 2014
DATE OF PRONOUNCING JUDGMENT: 9TH MAY, 2014

JUDGMENT:

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 Pre-natal 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 the Petitioner is that the Appropriate Authority - Respondent No.2 along with other officers had, on 6th October, 2010 carried out inspection at the clinic of the Petitioner and found certain deficiencies. The Respondent No.2 issued notice on 7th October, 2010 and in response, the Petitioner did the necessary compliances and informed vide letter dated 8th October, 2010. Still the Respondent No.2 filed complaint bearing R.C.C. No.174 of 2010 against the Petitioner and others for offence under Sections 3(2), 4(3), 29(1), 5(1), 3(3), 4(2), 6 and 3-B of the Act. The Judicial Magistrate, First Class, Majalgaon issued summons. Being aggrieved, Criminal Revision No.28 of 2010 was filed before the Additional Sessions Judge, Majalgaon but the same was dismissed, hence the present Petition. According to the Petitioner, she was not involved in sex determination and the complaint does not disclose that criminal offence was committed. Various explanations are given regarding alleged deficiencies. The Petitioner wants the complaint to be quashed and set aside.

4. For the Respondents, affidavit-in-reply has been filed by Respondent No.2. According to the Respondent, at the time of inspection it was found that the Petitioner was using unregistered

"Thoshbro Shimadzu" Sonography Machine. The sonography tests were being carried out without obtaining consent forms of the patient or pregnant women in the language known to them and the sonography tests were being done without maintaining necessary records such as Form 'F', and O.P.D. register, receipt books, charts, report etc. In addition to present Petitioner, complaint has been filed against Dr. Rajendra Kalantri (Accused No.2), Dr. Anand Karnawat (Accused No.3) and one Ravi Nandapurkar of Toshbro Private Limited (Accused No.4). According to Respondent No.2, as mentioned in affidavit-in reply, in the inspection it was found that Accused No.2 was registered as radiologist, however the sonography tests were being performed by Accused No.3 who was not registered and such illegalities were found in the hospital. For such reasons, Respondent claims that the Petition deserves to be rejected.

5. Learned counsel for the Petitioner referred to the defects and submitted that the complaint is that concerned Forms were not got filled in. According to the counsel, vide letter dated 8th October, 2010 (Exhibit C) the Petitioner informed to the Authorities that the concerned deficiencies had been removed. The deficiency regarding non maintaining Form F in Marathi has also been corrected, as the book of said Form has been got printed. It was argued that steps were taken to get the machine registered which was being used. The argument is that there are no allegations that the Petitioner disclosed gender and thus, according to the counsel for Petitioner, no offence was made out and there were minor non compliances and errors which the Petitioner has corrected.

6. 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.

7. It has been argued by the Public Prosecutor that the Petitioner vide reply dated 8th October, 2010 admitted that there were defects and errors in maintenance of the record. The learned Public

Prosecutor submitted that perusal of the complaint shows various non compliances of the provisions of the law and there were many deficiencies and defects noticed at the time of inspection. It is submitted that the Petitioner was using unregistered sonography machine "Thoshbro Shimadzu", although the machine got registered with the Authorities was "Toshiba Shirmo-24". Section 3-B of the Act prohibits sale of ultra sound machines to persons, laboratories, clinics which are not registered and as per Rule 13, any change of equipment is required to be informed to the Authorities. There are clear violations of the provisions of the Acts and Rules. The sonography tests were being carried out without maintaining necessary records such as Form F, and O.P.D. register, receipt books, charts reports etc. It transpired that Accused No.2 was registered Radiologist to carry out sonography tests but in the inspection it was found that Accused No.3 was carrying out the sonography tests. Thus, according to the Public Prosecutor, these are various acts of violation of the provisions which has attracted the various Sections mentioned above. The learned Public Prosecutor submitted that no defect can be found in the order of issue of summons passed by the Magistrate and also the Judgment of revisional Court rejecting the revision filed by the Petitioner. According the learned Public Prosecutor, the Petition deserves to be rejected.

8. 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 pre-natal 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 counselled 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 prenatal 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) ig 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)."

9. 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.

10. 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 pre-natal 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 anybody 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.

11. 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.

12. The Full Bench of High Court of Gujarat in Suo Motu 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 Councelling 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 subsection (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 PNDT 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 PNDT 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 identityand address were otherwise mentioned in a manner sufficient to identify and trace her."

13. 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.

14(A). Reference needs to be made to the case of Sujit Govind 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 inaccuracyfound 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 Hon'ble Division Bench recorded in Para 39, as under:-

"The observations made by the Division Bench in (Malpani Infertility Clinic Pvt. Ltd. & others Vs. Appropriate Authority PNDT Act & 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 subsection (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:-

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 pre-natal 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."

15. Keeping in view the observations of the Hon'ble Division Bench in the case of "Sujit Govind 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.

16. 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.

17. 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.

18. 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.

[A.I.S. CHEEMA, J.] asb/MAY14

## Case 17: Gagandeep v. District Appropriate Authority-cum-CMO Ambala and others, March 2015

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. Crl. Misc. No.M- 27591 of 2013(O&M)
Date of Decision: March 23, 2015.

Gagandeep ..... PETITIONER(s)

VERSUS

District Appropriate Authority-cum-CMO Ambala and others ….. RESPONDENT (s)

2. Crl. Misc. No. M- 5345 of 2014(O&M).

Pankaj Kumar Gupta ..... PETITIONER(s)

VERSUS

State of Haryana ..... RESPONDENT (s)

CORAM: HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. H.C.Arora, Advocate and
Mr. Hemen Aggarwal, Advocate for the petitioners.
Mr. Pawan Girdhar, Addl.A.G., Haryana.

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporters or not?
3. Whether the judgment should be reported in the digest?

LISA GILL, J.

This order shall dispose of Crl. Misc.No.M-27591 of 2013 (Gagandeep v. District Appropriate Authority-cum-CMO, Ambala and others) and Crl. Misc.No.M-5345 of 2014 (Pankaj Kumar v. State of Haryana).

Petitioners in both the above noted cases are accused in complaint No.47 of 2012, under Sections 3/4/5/6/18/23 of the Pre Conception and Pre Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter called as the 'PC-PNDT Act'). They seek quashing of the complaint as well as summoning order dated 21.01.2013 passed by the learned Judicial Magistrate First Class, Ambala whereby they have been summoned to face trial for offence punishable under Section 23 of the PC-PNDT Act for violation of provisions of Sections 4, 5, 6, 18 of the PC-PNDT Act.

The aforementioned complaint has been filed by the District Appropriate Authority-cum-Chief Medical Officer, Ambala through Dr.Sangeeta Goyal, Deputy CMO-cum-Nodal Officer, Ambala. As per the complaint, Dr. B.B.Lala, SMO, CHC Barara received information from reliable sources that a medical practitioner, namely, Jaspal Singh is actively involved in sex determination racket at Ambala. Dr.B.B.Lala took the aid of two SMS (Shakshar Mahila Samooh) Pardhan, namely, Mrs. Pooja Rani of village Ugala and Ms. Rajni Sharma of village Adhoi. He was informed by Ms. Rajni Sharma on 08.07.2012 that she was asked by Jaspal Singh to come at Ambala on 09.07.2012 alongwith the pregnant lady for sex determination of the foetus. Subhash Chander, Multi Purpose Health Worker (Male), Civil Hospital, Barara was directed to hire a vehicle for bringing the abovementioned ladies on 09.07.2012 from their respective villages to Ambala. A request was forwarded to the District Appropriate Authority, Ambala-cum-CMO to constitute a team of officials for unearthing the said racket. A team consisting of Dr. B.B.Lala, SMO, CHC Barara and Dr. Pawan Kumar, Medical Officer, PHC Majri was constituted by the District Appropriate Authority. Mrs. Pooja Rani was used as a decoy patient seeking sex determination from petitioner - Pankaj Kumar Gupta and co-accused Jaspal Singh. Ms. Rajni Sharma in the presence of Dr. B.B.Lala intimated Jaspal Singh that they had reached Kalka Chowk, Ambala. They were asked to wait at the Bus Stop Kalka Chowk, Ambala by Jaspal Singh. Accordingly, they went to Bus Stop Kalka Chowk, Ambala. After an hour, a person supporting a turban came on a motorcycle and asked them to sit on the motorcycle. He took them to Manav Chowk, Ambala City where TATA Indica car bearing registration No.PB-39-F-0608 arrived. Ms. Rajni Sharma and Mrs. Pooja Rani (decoy patient) were

asked to board the said car. The ladies were taken to village Sonda near Khera. Ms. Rajni Sharma and the decoy patient were taken to a house. On seeing the raiding party, driver of the Indica car tried to run away. The said driver was apprehended on the spot and identified as Gagandeep i.e., the petitioner. On raiding the premises, two ladies alongwith two other persons were found sitting in one room. One of the ladies disclosed her name to be Manjinder Kaur wife of Kuldeep Singh, resident of Banur and revealed that she had come to the premises for sex determination of the foetus she was carrying. Smt. Pooja Rani, the decoy patient was also sitting there. Petitioner - Pankaj Kumar was found using an unregistered Portable Ultrasound machine. The fourth person, Jaspal Singh owner of the house where the illegal clinic was set up was also found present. Portable ultrasound machine make Philips was recovered alongwith other articles. Petitioner - Pankaj Kumar is averred to have been running one Sanjeevni Lab near Bara Thakur Dwara, Ambala City. Raid was conducted on the said lab as well. It was found to be running illegally.

On the basis of the incriminating evidence recovered and violation of the provisions of Section 3, 4, 5, 6, 18 and 23 of the PC-PNDT Act being revealed, the present complaint was filed. FIR No.143 dated 01.07.2012 was also lodged.

Learned counsel for the petitioners vehemently contend that the present complaint itself is not maintainable having been filed by a person not authorised to do so under the PC-PNDT Act. While referring to Section 28 of the PC-PNDT Act, it is submitted that it is only the appropriate authority which is competent to file the complaint. It is urged that in the present case, complaint has been filed by Dr. Sangeeta Goyal. As per Section 17(3) of the PC-PNDT Act, an appropriate authority has to be a Committee consisting of three members. State Government has to appoint one or more appropriate authority/ authorities for whole or part of the State for the purposes of PC-PNDT Act.

Sh. H.C.Arora while referring to decision dated 18.09.2013 of this Court in Civil Writ Petition No.21565 of 2011 (Help Welfare Group Society v. The State of Haryana and others) contends that an appropriate authority necessarily has to be a three member body to ensure compliance of Section 17 (5) of the PC-PNDT Act. State of Haryana had designated Civil Surgeon as the Appropriate Authority vide notification dated 25.08.2003. This Court has held that a multi-member body of three members would far better serve the ends rather than the Civil Surgeon alone being the appropriate authority.

It is submitted that in view of this decision all actions taken under the previous notification have to be set at naught. Proceedings cannot continue against the petitioners on this ground alone.

Sh.Hemen Aggarwal while referring to notification dated 14.09.2009 submits that notification dated 24.10.1997 itself was not published in the official gazette. Vide notification dated 24.10.1997, Civil Surgeon was nominated to be the Appropriate Authority and an Advisory Committee was constituted to assist or advise the Appropriate Authority. Therefore, in view of the mandatory provision of Section 17 of the PC-PNDT Act, which provides that the appropriate authority can be appointed by the State Government only by notification in the official gazette, it has to be held that the notification dated 24.10.1997 itself is

a nullity not having been published in the official gazette and all actions taken thereunder are illegal, null and void.

It is additionally argued that even on bare perusal of the complaint, no offence is made out against the petitioners as detailed in the complaint.

Learned counsel for the State while opposing this petition has submitted that appointment of District Appropriate Authority for the whole of State of Haryana was made vide notification dated 24.10.1997 (Annexure R1 with affidavit dated 23.04.2014 of Dr.B.B.Lalla). When the procedural defect of this notification not having been published in the official gazette came to light, an ordinance was issued vide notification 21.07.2009 (Annexure R2) whereby all the acts , proceedings or the things done or actions taken or which maybe done or taken by the said Appropriate Authority were declared to be valid. Subsequently, this ordinance was superseded by the PC-PNDT, Haryana Validation Act, 2009 (Haryana Act No.19 of 2009) published on 14.09.2009 (Annexure R3).

It is further informed that vide notification dated 07.11.2013, District Appropriate Authority has been constituted as a multi-member Authority consisting of three members i.e., Civil Surgeon as the Chairperson, District Programme officer Women and Child Development Department and District Attorney as its members. This has been done pursuant to order dated 18.09.2013 passed in CWP No.21565 of 2011.

It is submitted that the role of the petitioners is clearly mentioned in the complaint. Trial in this case is at its fag end. Defence evidence has also been led. It is due to interim order dated 22.08.2013 passed by this Court that the final order had not been passed. Therefore, no case is made out for the quashing of the abovesaid complaint and summoning order.

I have heard learned counsel for the parties and gone through the file.

Contention of learned counsel for the petitioners that all actions taken or proceedings initiated by the Appropriate Authority since the year 1997 are liable to be set aside, is not tenable. PC-PNDT Act was promulgated in order to address a social evil i.e., pre-natal diagnostic techniques for sex determination of foetus. Female foeticide pursuant to sex determination is a reality to which eyes cannot be closed.

It is undisputed that in compliance of Section 17(2) of the PC- PNDT Act, Appropriate Authority had been notified to be the Civil Surgeon by the State of Haryana. Though it was not published in the official gazette, necessary steps were immediately taken when this procedural defect came to light in the year 2009. Ordinance dated 17.07.2009 as well as Haryana Validation Act No.19 of 2009 dated 28.08.2009 were passed and were duly notified on 21.07.2009 and 14.09.2009, respectively. To say that all acts undertaken earlier would be set at naught due to non-publication of 1997 notification in the official gazette, is not justifiable. It cannot be said to be a flaw which is fatal. At best, it can be termed to be an irregularity which has been set at right.

Furthermore, direction of this Court that the Appropriate Authority should a multi-member body rather than the Civil Surgeon alone, cannot be stretched to mean that all acts, proceedings or actions undertaken or done by the Appropriate Authority as notified earlier would be set at naught or rendered illegal. This

Court in CWP No.21565 of 2011 specifically afforded time to the State of Haryana for taking necessary steps to rectify the same. Admittedly, the multi-member Appropriate Authority has been notified.

Specific allegations of conducting illegal sex determination of pregnant women are levelled against petitioner - Pankaj and petitioner - Gagandeep is alleged to be actively participating in the same by ferrying the pregnant women for conduct of the said tests. It cannot be said at this stage that a perusal of the complaint does not disclose any offence against the petitioners or that continuance of the proceedings are an abuse of the process of law. However, no opinion is expressed on the merits of the case, lest prejudice be caused to either side.

It can also not loss sight of that trial of this case is almost over. Entire evidence has already been led. Interference at this stage is neither warranted nor justified.

Therefore, keeping in view the facts and circumstances of the case, both petitions seeking quashing of complaint as well as summoning order, are hereby dismissed.

Any observations made here-in-above shall not be construed to be a reflection on merits of the case and shall have no bearing on trial.

(LISA GILL) March 23, 2015. JUDGE

# ANNEX 1. PC&PNDT ACT

# Pre-Conception & Pre-Natal Diagnostic Techniques Act, 1994

## THE PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) ACT, 1994

(ACT NO. 57 OF 1994)
AND
THE PRE-NATAL DIAGNOSTIC TECHNIQUES
(REGULATION AND PREVENTION OF MISUSE) AMENDMENT ACT, 2002
**(No.14 OF 2003)**

***[20th September, 1994]***

*An Act 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 thereto.*

BE it enacted by Parliament in the Forty-fifth Year of the Republic of India as follows:—

### CHAPTER I
PRELIMINARY

1. ***Short title, extent and commencement.-*** (1) This Act may be called the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.

   (2)It shall extend to the whole of India except the State of Jammu and Kashmir.

   (3)It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

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

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

   (b) "Board" means the Central Supervisory Board constituted under section 7;

   (ba) "conceptus" means any product of conception at any stage of development from fertilization until birth including extra embryonic membranes as well as the embryo or foetus;

   (bb) "embryo" means a developing human organism after fertilization till the end of eight weeks (fifty-six days);

(bc) "foetus" means a human organism during the period of its development beginning on the fifty-seventh day following fertilization or creation (excluding any time in which its development has been suspended) and ending at the birth;

(c) "Genetic Counseling Centre" means an institute, hospital, nursing home or any place, by whatever name called, which provides for genetic counselling to patients;

(d) "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.

*Explanation*- For the purposes of this clause, 'Genetic Clinic' includes a vehicle, where ultrasound machine or imaging machine or scanner or other equipment capable of determining sex of the foetus or a portable equipment which has the potential for detection of sex during pregnancy or selection of sex before conception, is used.

(e) "Genetic Laboratory" means a laboratory and includes a place where facilities are provided for conducting analysis or tests of samples received from Genetic Clinic for pre-natal diagnostic test.

*Explanation*- For the purposes of this clause, 'Genetic Laboratory' includes a place where ultrasound machine or imaging machine or scanner or other equipment capable of determining sex of the foetus or a portable equipment which has the potential for detection of sex during pregnancy or selection of sex before conception, is used.

(f) "Gynaecologist" means a person who possesses a post- graduate qualification in gynaecology and obstetrics;

(g) "Medical geneticist" includes a person who possesses a degree or diploma in genetic science in the fields of sex selection and pre-natal diagnostic techniques or has experience of not less than two years in such field after obtaining—

(i) any one of the medical qualifications recognised under the Indian Medical Council Act, 1956 (102 of 1956); or

(ii) a post-graduate degree in biological sciences;

(h) "Pediatrician" means a person who possesses a post-graduate qualification in pediatrics;

(i) "pre-natal diagnostic procedures" means all gynaecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, blood or any other tissue or fluid of a man, or of a woman for being sent to a Genetic Laboratory or Genetic Clinic for conducting any type of analysis or pre-natal diagnostic tests for selection of sex before or after conception;

(j) "pre-natal diagnostic techniques" includes all pre-natal diagnostic procedures and pre-natal diagnostic tests;

(k) "pre-natal diagnostic test" means ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue or fluid of a pregnant woman or conceptus conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex-linked diseases;

(l) "prescribed" means prescribed by rules made under this Act;

(m) "registered medical practitioner" means a medical practitioner who possesses any recognised

edical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956, (102 of 1956.) and whose name has been entered in a State Medical Register;

(n) "regulations" means regulations framed by the Board under this Act;

(o) "sex selection" includes any procedure, technique, test or administration or prescription or provision of anything for the purpose of ensuring or increasing the probability that an embryo will be of a particular sex;

(p) "sonologist or imaging specialist" means a person who possesses any one of the medical qualifications recognized under the Indian Medical Council Act, 1956 or who possesses a post-graduate qualification in ultrasonography or imaging techniques or radiology;

(q) "State Board" means a State Supervisory Board or a Union territory Supervisory Board constituted under Section 16A;

(r) "State Government" in relation to Union territory with Legislature means the Administrator of that Union territory appointed by the President under article 239 of Constitution.

## CHAPTER II

## REGULATION OF GENETIC COUNSELLING CENTRES, GENETIC LABORATORIES AND GENETIC CLINICS

3. ***Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics***.- On and from the commencement of this Act,—

1. no Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic unless registered under this Act, shall conduct or associate with, or help in, conducting activities relating to pre-natal diagnostic techniques;

2. no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall employ or cause to be employed or take services of any person, whether on honorary basis or on payment who does not possess qualifications as may be prescribed;

3. no medical geneticist, gynaecologist, paediatrician, registered medical practitioner or any other person shall conduct or cause to be conducted or aid in conducting by himself or through any other person, any pre-natal diagnostic techniques at a place other than a place registered under this Act.

3A. ***Prohibition of sex-selection***- No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them.

3B. ***Prohibition on sale of ultrasound machines, etc., to persons, laboratories, clinics, etc. not registered under the Act***.- No person shall sell any ultrasound machine or imaging machine or scanner or any other equipment capable of detecting sex of foetus to any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other person not registered under the Act.

## CHAPTER III

## REGULATION OF PRE-NATAL DIAGNOSTIC TECHNIQUES

4. ***Regulation of pre-natal 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 pre-natal 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) chromosomal abnormalities;

   (ii) genetic metabolic diseases;

   (iii) haemoglobinopathies;

   (iv) sex-linked genetic diseases;

   (v) congenital anomalies;

   (vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board;

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;

4. no person including a relative or husband of the pregnant woman shall seek or encourage the conduct of any pre-natal diagnostic techniques on her except for the purposes specified in clause (2).

5. no person including a relative or husband of a woman shall seek or encourage the conduct of any sex-selection technique on her or him or both.

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—

(a) he has explained all known side and after effects of such procedures to the pregnant woman concerned;

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

(c) a copy of her written consent obtained under clause (b) is given to the pregnant woman.

2. No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs or in any other manner.

6. ***Determination of sex prohibited***.- On and from the commencement of this Act,—

(a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;

(b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus;

(c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

## CHAPTER IV

## CENTRAL SUPERVISORY BOARD

7. ***Constitution of Central Supervisory Board***.-

1. The Central Government shall constitute a Board to be known as the Central Supervisory Board to exercise the powers and perform the functions conferred on the Board under this Act.

2. The Board shall consist of—

(a) the Minister in charge of the Ministry or Department of Family Welfare, who shall be the Chairman, *ex-officio*;

(b) the Secretary to the Government of India in charge of the Department of Family Welfare, who shall be the Vice-Chairman, *ex-officio*;

(c) three members to be appointed by the Central Government to represent the Ministries of Central Government in charge of Women and Child Development, Department of Legal Affairs or Legislative Department in the Ministry of Law and Justice, and Indian System of Medicine and Homoeopathy, *ex-officio*;

(d) the Director General of Health Services of the Central Government, *ex-officio*;

(e) ten members to be appointed by the Central Government, two each from amongst—

(i) eminent medical geneticists;

(ii) eminent gynaecologist and obstetrician or expert of *stri-roga or prasuti-tantra*;

(iii) eminent paediatricians;

(iv) eminent social scientists; and

(v) representatives of women welfare organisations;

(f) three women Members of Parliament, of whom two shall be elected by the House of the People and one by the Council of States;

(g) four members to be appointed by the Central Government by rotation to represent the States and the Union territories, two in the alphabetical order and two in the reverse alphabetical order:

Provided that no appointment under this clause shall be made except on the recommendation of the State Government or, as the case may be, the Union territory;

(h) an officer, not below the rank of a Joint Secretary or equivalent of the Central Government, in charge of Family Welfare, who shall be the Member-Secretary, ex-officio.

8. ***Terms of office of members.-*** (1) The term of office of a member, other than an ex-officio member, shall be,—

(a) in case of appointment under clause (e) or clause (f) of sub-section (2) of section 7, three years; and

(b) in case of appointment under clause (g) of the said subsection, one year.

2. If a casual vacancy occurs in the office of any other members, whether by reason of his death, resignation or inability to discharge his functions owing to illness or other incapacity, such vacancy shall be filled by the Central Government by making a fresh appointment and the member so appointed shall hold office for the remainder of the term of office of the person in whose place he is so appointed.

3. The Vice-Chairman shall perform such functions as may be assigned to him by the Chairman from time to time.

4. The procedure to be followed by the members in the discharge of their functions shall be such as may be prescribed.

9. ***Meetings of the Board***.-

1. The Board shall meet at such time and place, and shall observe such rules of procedure in regard to the transaction of business at its meetings (including the quorum at such meetings) as may be provided by regulations:

Provided that the Board shall meet at least once in six months.

2. The Chairman and in his absence the Vice-Chairman shall preside at the meetings of the Board.

3. If for any reason the Chairman or the Vice-Chairman is unable to attend any meeting of the Board, any other member chosen by the members present at the meeting shall preside at the meeting.

4. All questions which come up before any meeting of the Board shall be decided by a majority of the votes of the members present and voting, and in the event of an equality of votes, the Chairman, or in his absence, the person presiding, shall have and exercise a second or casting vote.

5. Members other than ex-officio members shall receive such allowances, if any, from the Board as may be prescribed.

10. ***Vacancies, etc., not to invalidate proceedings of the Board.-*** No act or proceeding of the Board shall be invalid merely by reason of—

    (a) any vacancy in, or any defect in the constitution of, the Board; or

    (b) any defect in the appointment of a person acting as a member of the Board; or

    (c) any irregularity in the procedure of the Board not affecting the merits of the case.

11. ***Temporary association of persons with the Board for particular purposes.***

    1. The Board may associate with itself, in such manner and for such purposes as may be determined by regulations, any person whose assistance or advice it may desire in carrying out any of the provisions of this Act.

    2. A person associated with it by the Board under sub-section (1) for any purpose shall have a right to take part in the discussions relevant to that purpose, but shall not have a right to vote at a meeting of the Board and shall not be a member for any other purpose.

12. ***Appointment or officers and other employees of the Board.-***

    1. For the purpose of enabling it efficiently to discharge its functions under this Act, the Board may, subject to such regulations as may be made in this behalf, appoint (whether on deputation or otherwise) such number of officers and other employees as it may consider necessary:

       Provided that the appointment of such category of officers, as may be specified in such regulations, shall be subject to the approval of the Central Government.

    2. Every officer or other employee appointed by the Board shall be subject to such conditions of service and shall be entitled to such remuneration as may be specified in the regulations.

13. ***Authentication of orders and other instruments of the Board.-*** All orders and decisions of the Board shall be authenticated by the signature of the Chairman or any other member authorised by the Board in this behalf, and all other instruments issued by the Board shall be authenticated by the signature of the Member-Secretary or any other officer of the Board authorised in like manner in this behalf.

14. ***Disqualifications for appointment as member.-*** A person shall be disqualified for being appointed as a member if, he—

    (a) has been convicted and sentenced to imprisonment for an offence which, in the opinion of the Central Government, involves moral turpitude; or

    (b) is an undischarged insolvent; or

    (c) is of unsound mind and stands so declared by a competent court; or

    (d) has been removed or dismissed from the service of the Government or a Corporation owned or controlled by the Government; or

    (e) has, in the opinion of the Central Government, such financial or other interest in the Board as is likely to affect prejudicially the discharge by him of his functions as a member; or

    (f) has, in the opinion of the Central Government, been associated with the use or promotion of pre-natal diagnostic technique for determination of sex or with any sex selection technique.

15. ***Eligibility of member for reappointment***.- Subject to the other terms and conditions of service as may be prescribed, any person ceasing to be a member shall be eligible for reappointment as such member.

Provided that no member other than an *ex-officio* member shall be appointed for more than two consecutive terms.

16. ***Functions of the Board***. - The Board shall have the following functions, namely:—

(i) to advise the Central Government on policy matters relating to use of pre-natal diagnostic techniques, sex selection techniques and against their misuse;

(ii) to review and monitor implementation of the Act and rules made thereunder and recommend to the Central Government changes in the said Act and rules;

(iii) to create public awareness against the practice of pre-conception sex selection and pre-natal determination of sex of foetus leading to female foeticide;

(iv) to lay down code of conduct to be observed by persons working at Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics;

(v) to oversee the performance of various bodies constituted under the Act and take appropriate steps to ensure its proper and effective implementation;

(vi) any other functions as may be prescribed under the Act.

16A. ***Constitution of State Supervisory Board and Union territory Supervisory Board***.-

1. Each State and Union territory having Legislature shall constitute a Board to be known as the State Supervisory Board or the Union territory Supervisory Board, as the case may be, which shall have the following functions:-

i) to create public awareness against the practice of pre-conception sex selection and pre-natal determination of sex of foetus leading to female foeticide in the State;

ii) to review the activities of the Appropriate Authorities functioning in the State and recommend appropriate action against them;

iii) to monitor the implementation of provisions of the Act and the rules and make suitable recommendations relating thereto, to the Board;

iv) to send such consolidated reports as may be prescribed in respect of the various activities undertaken in the State under the Act to the Board and the Central Government; and

v) any other functions as may be prescribed under the Act.

2. The State Board shall consist of,-

a) the Minister in charge of Health and Family Welfare in the State, who shall be the Chairperson, *ex-officio*;

b) the Secretary in charge of the Department of Health and Family Welfare who shall be the Vice-Chairperson, *ex-officio*;

c) Secretaries or Commissioners in charge of Departments of Women and Child Development, Social Welfare, Law and Indian System of Medicines and Homoeopathy, *ex-officio*, or their representatives;

d) Director of Health and Family Welfare or Indian System of Medicines and Homoeopathy of the State Government, *ex-officio*;

e) Three women members of Legislative Assembly or Legislative Council;

f) Ten members to be appointed by the State Government out of which two each shall be from the following categories:

i) eminent social scientists and legal experts;

ii) eminent women activists from non-governmental organizations or otherwise;

iii) eminent gynaecologists and obstetricians or experts of *stri-roga or prasuti tantra*;

iv) eminent paediatricians or medical geneticists;

v) eminent radiologists or sonologists;

g) an officer not below the rank of Joint Director in charge of Family Welfare, who shall be the Member Secretary, *ex-officio.*

3. The State Board shall meet at least once in four months.

4. The term of office of a member, other than an *ex-officio* member, shall be three years.

5. If a vacancy occurs in the office of any member other than an *ex-officio* member, it shall be filled by making fresh appointment.

6. If a member of the Legislative Assembly or member of the Legislative Council who is a member of the State Board, becomes Minister or Speaker or Deputy Speaker of the Legislative Assembly or Chairperson or Deputy Chairperson of the Legislative Council, she shall cease to be a member of the State Board.

7. One-third of the total number of members of the State Board shall constitute the quorum.

8. The State Board may co-opt a member as and when required, provided that the number of co-opted members does not exceed one-third of the total strength of the State Board.

9. The co-opted members shall have the same powers and functions as other members, except the right to vote and shall abide by the rules and regulations.

10. In respect of matters not specified in this section, the State Board shall follow procedures and conditions as are applicable to the Board.

## CHAPTER V

## APPROPRIATE AUTHORITY AND ADVISORY COMMITTEE

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, obstericians, 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 selection techniques or pre-natal sex determination; and

d) any other matter which may be prescribed.

## CHAPTER VI

## REGISTRATION OF GENETIC COUNSELLING CENTRES, GENETIC LABORATORIES AND GENETIC CLINICS

18. ***Registration of Genetic Counselling Centres, Genetic Laboratories or Genetic Clinics***. (1) No person shall open any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including clinic, laboratory or centre having ultrasound or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus and sex selection, or render services to any of them, after the commencement of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 unless such centre, laboratory or clinic is duly registered under the Act.

2. Every application for registration under sub-section (1), shall be made to the Appropriate Authority in such form and in such manner and shall be accompanied by such fees as may be prescribed.
3. Every Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic engaged, either partly or exclusively, in counselling or conducting pre-natal diagnostic techniques for any of the purposes mentioned in section 4, immediately before the commencement of this Act, shall apply for registration within sixty days from the date of such commencement.
4. Subject to the provisions of section 6, every Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic engaged in counselling or conducting pre-natal diagnostic techniques shall cease to conduct any such counselling or technique on the expiry of six months from the date of commencement of this Act unless such Centre, Laboratory or Clinic has applied for registration and is so registered separately or jointly or till such application is disposed of, whichever is earlier.
5. No Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall be registered under this Act unless the Appropriate Authority is satisfied that such Centre, Laboratory or Clinic is in a position to provide such facilities, maintain such equipment and standards as may be prescribed.

19. ***Certificate of registration***.-
    1. The Appropriate Authority shall, after holding an inquiry and after satisfying itself that the applicant has complied with all the requirements of this Act and the rules made thereunder and having regard to the advice of the Advisory Committee in this behalf, grant a certificate of registration in the prescribed form jointly or separately to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, as the case may be.
    2. If, after the inquiry and after giving an opportunity of being heard to the applicant and having regard to the advice of the Advisory Committee, the Appropriate Authority is satisfied that the applicant has not complied with the requirements of this Act or the rules, it shall, for reasons to be recorded in writing, reject the application for registration.
    3. Every certificate of registration shall be renewed in such manner and after such period and on payment of such fees as may be prescribed.
    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.

20. ***Cancellation or suspension of registration***.-
    1. The Appropriate Authority may *suo moto*, or on complaint, issue a notice to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic to show cause why its registration should not be suspended or cancelled for the reasons mentioned in the notice.
    2. If, after giving a reasonable opportunity of being heard to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and having regard to the advice of the Advisory Committee, the Appropriate Authority is satisfied that there has been a breach of the provisions of this Act or the rules, it may, without prejudice to any criminal action that it may take against such Centre, Laboratory or Clinic, suspend its registration for such period as it may think fit or cancel its registration, as the case may be.

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).

21. ***Appeal***. The Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic may, within thirty days from the date of receipt of the order of suspension or cancellation of registration passed by the Appropriate Authority under section 20, prefer an appeal against such order to—

    (i) the Central Government, where the appeal is against the order of the Central Appropriate Authority; and

    (ii) the State Government, where the appeal is against the order of the State Appropriate Authority, in the prescribed manner.

## CHAPTER VII
## OFFENCES AND PENALTIES

22. ***Prohibition of advertisement relating to pre-natal determination of sex and punishment for contravention.-***

    1. No person, organization, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including clinic, laboratory or centre having ultrasound machine or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus or sex selection shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement, in any form, including internet, regarding facilities of pre-natal determination of sex or sex selection before conception available at such centre, laboratory, clinic or at any other place.

    2. No person or organization including Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement in any manner regarding pre-natal determination or pre-conception selection of sex by any means whatsoever, scientific or otherwise.

    3. Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees.

    *Explanation*.—For the purposes of this section, "advertisement" includes any notice, circular, label, wrapper or any other document including advertisement through internet or any other media in electronic or print form and also includes any visible representation made by means of any hoarding, wall-painting, signal, light, sound, smoke or gas.

23. ***Offences and penalties***.- (1) Any medical geneticist, gynaecologist, 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 this Act or rules made thereunder shall be punishable with

imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.

2. The name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.
3. Any person who seeks the aid of a Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or ultrasound clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging specialist or registered medical practitioner or any other person for sex selection or for conducting pre- natal diagnostic techniques on any pregnant women for the purposes other than those specified in sub-section (2) of section 4, he shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees.
4. For the removal of doubts, it is hereby provided, that the provisions of sub-section (3) shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection.

24. ***Presumption in the case of conduct of pre-natal diagnostic techniques***.- Notwithstanding anything contained in the Indian Evidence Act, 1872, the court shall presume unless the contrary is proved that the pregnant woman was compelled by her husband or any other relative, as the case may be, to undergo pre-natal diagnostic technique for the purposes other than those specified in sub-section (2) of section 4 and such person shall be liable for abetment of offence under sub-section (3) of section 23 and shall be punishable for the offence specified under that section.

25. ***Penalty for contravention of the provisions of the Act or rules for which no specific punishment is provided***.- Whoever contravenes any of the provisions of this Act or any rules made thereunder, for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one thousand rupees or with both and in the case of continuing contravention with an additional fine which may extend to five hundred rupees for every day during which such contravention continues after conviction for the first such contravention.

26. ***Offences by companies***.-

1. Where any offence, punishable under this Act has been committed by a 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 of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

   Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

. Notwithstanding anything contained in sub-section (1), where any offence punishable under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

*Explanation*.—For the purposes of this section,—

(a) "company" means any body corporate and includes a firm or other association of individuals, and

(b) "director", in relation to a firm, means a partner in the firm.

27. ***Offence to be cognizable, non-bailable and non-compoundable***.-Every offence under this Act shall be cognizable, non-bailable and non-compoundable.

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.

## CHAPTER VIII
## MISCELLANEOUS

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.

30. ***Power to search and seize records, etc.*** -

1. If the Appropriate Authority has reason to believe that an offence under this Act has been or is being committed at any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or any other place, such Authority or any officer authorised thereof in this behalf may, subject to such rules as may be prescribed, enter and search at all reasonable times with such assistance, if any, as such authority or officer considers necessary, such Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or any other place and examine any record, register, document, book, pamphlet, advertisement or any other material object found therein and seize and seal the same if such Authority or officer has reason to believe that it may furnish evidence of the commission of an office punishable under this Act.
2. The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to searches and seizures shall, so far as may be, apply to every search or seizure made under this Act.

31. ***Protection of action taken in good faith***.- No suit, prosecution or other legal proceeding shall lie against the Central or the State Government or the Appropriate Authority or any officer authorised by the Central or State Government or by the Authority for anything which is in good faith, done or intended to be done in pursuance of the provisions of this Act.

31A. ***Removal of difficulties***.-

1. If any difficulty arises in giving effect to the provisions of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of the said Act as appear to it to be necessary or expedient for removing the difficulty.

   Provided that no order shall be made under this section after the expiry of a period of three years from the date of commencement of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002.
2. Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

32. ***Power to make rules***.-

1. The Central Government may make rules for carrying out the provisions of this Act.
2. In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

   (i) the minimum qualifications for persons employed at a registered Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic under clause (2) of section 3;

   (ia) the manner in which the person conducting ultrasonography on a pregnant woman shall keep record thereof in the clinic under the proviso to sub-section (3) of section 4;

   (ii) the form in which consent of a pregnant woman has to be obtained under section 5;

   iii) the procedure to be followed by the members of the Central Supervisory Board in the discharge of their functions under sub-section (4) of section 8;

(iv) allowances for members other than ex-officio members admissible under subsection (5) of section 9;

(iva) code of conduct to be observed by persons working at Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics to be laid down by the Central Supervisory Board under clause (iv) of Section 16;

(ivb) the manner in which reports shall be furnished by the State and Union territory Supervisory Boards to the Board and the Central Government in respect of various activities undertaken in the State under the Act under clause (iv) of sub-section (1) of section 16A;

(ivc) empowering the Appropriate Authority in any other matter under clause (d) of section 17A;

(v) the period intervening between any two meetings of the Advisory Committee under the proviso to subsection (8) of section 17;

(vi) 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 under sub-section (9) of section 17;

(vii) the form and manner in which an application shall be made for registration and the fee payable thereof under sub-section (2) of section 18;

(viii) the facilities to be provided, equipment and other standards to be maintained by the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic under sub-section (5) of section 18;

(ix) the form in which a certificate of registration shall be issued under sub-section (1) of section 19;

(x) the manner in which and the period after which a certificate of registration shall be renewed and the fee payable for such renewal under sub-section (3) of section 19;

(xi) the manner in which an appeal may be preferred under section 21;

(xii) the period up to which records, charts, etc., shall be preserved under sub-section (1) of section 29;

(xiii) the manner in which the seizure of documents, records, objects, etc., shall be made and the manner in which seizure list shall be prepared and delivered to the person from whose custody such documents, records or objects were seized under sub-section (1) of section 30;

(xiv) any other matter that is required to be, or may be, prescribed.

33. ***Power to make regulations***.- The Board may, with the previous sanction of the Central Government, by notification in the Official Gazette, make regulations not inconsistent with the provisions of this Act and the rules made thereunder to provide for—

(a) the time and place of the meetings of the Board and the procedure to be followed for the transaction of business at such meetings and the number of members which shall form the quorum under sub-section (1) of section 9;

(b) the manner in which a person may be temporarily associated with the Board under sub-section (1) of section 11;

(c) the method of appointment, the conditions of service and the scales of pay and allowances of the officer and other employees of the Board appointed under section 12;

(d) generally for the efficient conduct of the affairs of the Board.

34. ***Rules and regulations to be laid before Parliament***. – Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

This report is being published as a part of the ACHR's "National Campaign for elimination of female foeticide in India", a project funded by the European Commission under the European Instrument for Human Rights and Democracy – the European Union's programme that aims to promote and support human rights and democracy worldwide. The views expressed are of the Asian Centre for Human Rights, and not of the European Commission

All the reports and forthcoming publications are available at:
http://www.stopfemaleinfanticide.org/

**ASIAN CENTRE FOR HUMAN RIGHTS**
C-3/441-C, Janakpuri, New Delhi 110058 INDIA
Phone/Fax: +91 11 25620583, 45501889
Website: www.achrweb.org
Email: director@achrweb.org