

HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

Writ Petition No.6029 of 2014

Pravir Krishn and others
Vs.
Dr. K.K.Dixit

Shri M.P.S.Raghuvanshi, Advocate for the petitioners.

Shri Pawan Dwivedi, Advocate for the respondent.

ORDER
(05/10/2015)

Rohit Arya, J

This writ petition under Article 226/227 of the Constitution of India is directed against the order dated 05/09/2014 passed by the Judicial Magistrate, First Class, Gwalior in complaint case No.10532/2014 for registration of the complaint for the offence punishable under section 25 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 filed against the petitioners by the complainant, Dr. K.K.Dixit.

2. Before advertng to the facts relevant for disposal of this writ petition and before examining the order impugned, on merits, it is considered apposite to reiterate the objects and reasons for enactment of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as the Act of 1994) which *inter alia* seeks to achieve primarily twin-object, namely; (i) to prohibit the misuse of pre-natal diagnostic techniques and for determination of sex of foetus, leading to female foeticide and (ii) by providing the punishments and regulatory measures as abuse of the aforesaid techniques is conceived to be discriminatory against the female sex and affects dignity and status of women.

3. To fulfill the aforesaid objectives, the Union Legislature has passed a Bill *inter alia* providing for prohibition of misuse of pre-natal diagnostic techniques for sex determination of foetus, leading to female foeticide, prohibition of advertisement of pre-natal diagnostic techniques for determination of sex, regulation of the use of pre-natal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorders and use of such techniques under certain conditions by registered institutions and also provides for punishments for violation of the provisions of the proposed legislation as deterrents.

4. Chapter II of the Act of 1994 deals with regulation of genetic counselling centres, genetic laboratories and genetic clinics and *inter alia* sections 3A and 3B of the Act of 1994 provides for prohibition of

sex-selection and prohibition on sale of ultrasound machine, etc., to persons laboratories, clinics, etc., not registered under the Act.

5. Chapter III of the Act of 1994 deals with regulation of pre-natal diagnostic techniques and *inter alia* makes provision as regards regulation for registered Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic and the purpose for which such techniques can be used and further conditions to be observed before pre-natal diagnostic techniques are used or conducted on a person of a pregnant woman. Further, no such test shall be conducted without the written consent of the pregnant woman and after having been explained the effects of such procedure to her by informing that there is complete prohibition of communicating sex of foetus either to the pregnant woman or any of her relatives. There is also complete prohibition against determination of sex.

6. As such, under Chapter II and Chapter III, regulation, control and prohibitions have been made in relation to genetic counselling centres, genetic laboratories and genetic clinics and pre-natal diagnostic techniques.

7. Chapter V provides for constitution, composition and functions of the Appropriate Authority and Advisory Committee. Under section 17(2) of the Act of 1994, the State Government by notification in the Official Gazette shall appoint one or more Appropriate Authorities for the whole or part of the State for the purpose of the Act having regard to the ***intensity of the problem of pre-natal sex determination leading to female foeticide.***

(Emphasis supplied)

Under section 17(4) thereof, the functions of the Appropriate Authority are provided as under:

- (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.”

Section 17(5) of the Act of 1994 provides for aid and advise to the “Appropriate Authority” for discharge of its functions. Sections 17(6) and 17(7) of the Act of 1994 enables the Central Government or the State Government to constitute Advisory Committee.

Under section 17A of the Act of 1994, the “Appropriate Authority” is conferred the powers in respect of the following matters:

- “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.”

8. Chapter IV deals with constitution of Central Supervisory Board and section 16A thereunder deals with constitution of State Supervisory Board and Union territory Supervisory Board which provides that the State Government shall constitute a Board to be known as State Supervisory Board with following functions:

- “i) to create public awareness against the practice of per-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.”

Sub-section (2) of section 16A thereof deals with composition of State Supervisory Board. **Sub-section (3) of section 16A thereof provides that the State Supervisory Board shall meet at least once in four months.** Besides, sub-sections (4) to (9) of section 16A deal with term of office of a member, other than an ex officio member, filling up of vacancies of members, quorum, co-option of members & limit, powers and functions of co-opted members and observance of the rules and regulations etc.,

(Emphasis supplied)

9. Chapter VII of the Act of 1994 deals with offences and penalties. Section 22 thereof provides for prohibition of advertisement relating to pre-conception and pre-natal determination of sex and punishment for contravention. Section 23 thereof prescribes the offences and penalties *inter alia* sub-section (1) provides that 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.

Under section 24 thereof, it is provided that there shall be presumption drawn by the Court unless 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 accordingly shall be punished.

Section 25 thereof provides that whoever contravenes any of the provisions of the Act or the rules for which no specific punishment 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.

Section 26(1) thereof deals with offences by companies. 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.

Section 27 thereof says that the offence to be cognizable, non-bailable and non-compoundable under the Act of 1994.

Section 28 deals with cognizance of offences and *inter alia* 28(1)(b) provides as under:

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

(a) ...

(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.”

10. Petitioners No.1 and 2 are working as Principal Secretary and Secretary of the Public Health & Family Welfare Department, Bhopal respectively. Petitioner No.3 though Director, Public Health & Family Welfare Department is at present under suspension.

11. As per the allegations made in the complaint, the petitioners are members of the State Supervisory Board and meeting of the Board though required to be convened in every four months as provided under section 16A(3) of the Act of 1994 but such meetings have not been convened after expiry of last meeting held on 08/05/2012 and, therefore, the petitioners have contravened the provisions of the Act of 1994 and hence, punishable under section 25 of the Act of 1994 with further allegation that the complainant gave a notice of 15 days' on 08/12/2012 in terms of section 28(1)(b) of the Act of 1994 to convene the meetings to the State Supervisory Board under section 16-A(3) of the Act of 1994 but no meeting was convened, therefore, the complaint was filed. On receiving the complaint, the Chief Judicial Magistrate referred the complaint to the Judicial Magistrate First Class, Gwalior. A notice was issued. The Directorate, Public Health and Family Welfare Department submitted reply on 22/08/2014 indicating that after 08/05/2012, the meetings were convened on 20/02/2013, 13/08/2013, 29/10/2013 and 26/07/2014. The aforesaid reply is on record as Annexure P/4. The JMFC, Gwalior examined the complainant, Dr. K.K.Dixit on 31/01/2013 and registered the complaint against the petitioners on the premise that though as per requirement of law, the State Supervisory Board is required to convene the meeting during the period of four months and since the meetings have not been held, there is violation of the provisions of section 16-A(3) of the Act of 1994 and, therefore, *prima facie* petitioners have contravened the provisions of the Act punishable under section 25 of the Act of 1994 thereof.

Accordingly, registered the complaint.

12. Learned counsel for the petitioners has challenged the aforesaid impugned order dated 05/09/2014 on the following grounds:

(i) No notice was served by the respondent in the manner prescribed of not less than 15 days to the "Appropriate Authority" for the alleged offence and of his intention to make a complaint to the Court as contemplated under section 28(1)(b) of the Act of 1994. Hence, the Court below had committed grave error of law and fact having acted contrary to the provisions of section 28 of the Act of 1994 in the matter of taking cognizance of the alleged offence.

(ii) Section 197 Cr.P.C., provides protection against spurious prosecution against the Government servants. Undisputedly, all the three petitioners are senior Government servants and holding the public office. Hence, protection under section 197 Cr.P.C., is available to them. Without sanction of the competent authority, the Court below ought not to have taken cognizance and register the complaint for prosecution of the petitioners; and

(iii) Even otherwise, in the reply submitted on 22/08/2014 before the Court below, petitioners had aptly made it clear that after 08/05/2012, the meetings were convened by the State Supervisory Board on 20/02/2013, 13/08/2013, 29/10/2013 and 26/07/2014. The respondent himself participated in the meeting held on 26/07/2014 wherein the Board resolved to reward an amount of Rs.50,000/- under the RAJYA PROTSAHAN RASHI YOJANA. Hence, the Court below had committed jurisdictional error having altogether ignored the aforesaid facts on record by registering the complaint against petitioners.

13. Apart from the aforesaid submissions, learned counsel for the petitioners has also raised a serious question of law as to whether non-convening of the meeting as contemplated under section 16A(3) of the Act of 1994 by the State Supervisory Board shall tantamount conviction of cognizable offence under section 25 of the Act of 1994?

14. Learned counsel submitted that under the facts and circumstances of the case, the Court below by registering the

complaint has acted in excess of authority doing violence with provisions of the Act of 1994. Therefore, it is a case of abuse of the process of the Court and relied upon the judgment of the Hon'ble Supreme Court reported in **2013(6) SCC 740, Chandran Ratnaswami and another vs. K.C.Palanisamy and another.**

15. *Per contra*, learned counsel for the respondent supported the order impugned and also submitted that in the event this Court finds that no offence is made out against petitioners, direction may be issued to members of the State Supervisory Board for convening the meetings at scheduled intervals to ensure effective implementation of the Act as observed by the Hon'ble Supreme Court in ***Writ Petition (Civil) No.349 of 2006, Voluntary Health Association of Punjab vs. Union of India and others decided on 04/03/2013.***

16. Heard learned counsel for the parties.

17. Before advertng to the aforesaid contentions advanced by learned counsel for the parties, this Court considers it apposite to address upon the primary issue as to whether the members of the State Supervisory Board can be said to have committed an **offence allegedly not convening meetings as provided for under section 16A(3) of the Act of 1994**, of which cognizance can be taken by the trial Court and can be subjected to conviction and sentence under section 25 of the Act of 1994?

18. The word "offence" is not defined in the Act of 1994. According to Concise Oxford English Dictionary, it means, "an act or instance of offending". Offend means, "commit an illegal act" and illegal means, "contrary to or forbidden by law". According to *New Shorter Oxford English Dictionary*, an offence is "a breach of law, rules, duty, propriety, etiquette, an illegal act, a transgression, sin, wrong, misdemeanour, misdeed, fault". The "offence" only means the commission of an act contrary to or forbidden by law. It is an act committed against law or omitted where the law requires it and punishable by it. Thus, the offence only means the commission of an act contrary to or forbidden by law. In its legal signification, an offence is the transgression of a law; a breach of the laws established for the protection of the public as distinguished from an infringement of mere private rights; a punishable violation of law, a crime, the doing that which a penal law forbids to be done or omitting to do what it commands, is the view reiterated by the Hon'ble Supreme Court in the case of **Standard Chartered Bank and others vs. Directorate of Enforcement and others,(2006) 4 SCC 278.**

19. The expression "offence" as defined in Section 3(38) of the

General Clauses Act means an act or omission made punishable by any law for the time being in force. According to *Concise Oxford English Dictionary*, “punish” means, “inflict a penalty on as retribution for an offence, inflict a penalty on someone for (an offence)”. *Black’s Law Dictionary* (8th Edn.) defined the word “punish” as:

“A sanction—such as a fine, penalty, confinement, or loss of property, right, or privilege—assessed against a person who has violated the law.”

20. The Hon'ble Supreme Court in the case of **Jawala Ram and others vs. State of Pepsu (now Punjab) and others, AIR 1962 SC 1246** while considering the use of water constitute an 'offence' and liable for imposition of enhanced water charges under the provisions of the Northern India Canal & Drainage Act, 1873 does amounts to a “penalty” for such an offence has observed in paragraphs 8 and 9 as under:

“8. "Offence" s as was pointed out by this Court in *Maqbool Hussain vs. State of Bombay, AIR 1953 SC 325* where [Art. 20\(2\)](#) of the Constitution came up for consideration has not been defined in the Constitution. So under [Art. 367](#) which provides that the [General Clauses Act, 1897](#), shall apply for the interpretation of the Constitution the word "offence" in the several clauses of [Art. 20](#) must be understood to convey the meaning given to it in [section 3\(37\)](#) of the General Clauses Act. That section defines an "offence" to mean an act or omission made punishable by any law for the time being in force.

9. Punishment is the mode by which the State enforces its laws forbidding the doing of something, or omission to do something. Punishment may take different forms. It may be a mere reprimand; it may be a fine; it may be whipping; it may be imprisonment-simple or rigorous; it may even extend to death. But whatever the form, punishment is always co-related to a law of the State forbidding the doing or the omission to do something. Unless such a law exists, there is no question of any act or omission being made "-punish- able". Have we in the present case any law forbidding the unauthorised user of the water which section 31 of the Canal Act provides will be charged at rates that may be prescribed by rules? Quite clearly, there is none. In providing for a charge to be made for use of water at rates that may be prescribed by rules the legislature is not prohibiting the use of water. The word "unauthorised use" in the section does not import any idea of prohibition. The intention of the law clearly is to obtain payment for water used; and the fact that the rates prescribed may be high cannot alter this position.”

21. The word “offence” means “an act or instance of offending”; “commit an illegal act” and “illegal means”, “contrary to or forbidden by

law". "Offence" has to be read and understood in the context as it has been prescribed under the provisions of Sections 40, 41 and 42 IPC which cover the offences punishable under IPC or under special or local law or as defined under Section 2(n) Cr.PC or Section 3(38) of the General Clauses Act, 1897; thus the view expressed by Hon'ble Supreme Court in the case of **S.Khushboo vs. Kanniammal and another, (2010) 5 SCC 600** by relying upon the following judgments of

Proprietary Articles Trade Assn., vs. Attorney General of Canada, AIR 1931 PC 94, Thomas Dana vs. State of Punjab, AIR 1959 SC 375, Jawala Ram vs. State of Pepsu, AIR 1962 SC 1246 and Standard Chartered Bank Vs. Directorate of Enforcement, (2006) 4 SCC 278).

22. In the backdrop of the aforesaid legal connotations and dictionary meanings of the word "offence", the question formulated above as to whether non-convening of the meeting by the State Supervisory Board will constitute an offence punishable under section 25 of the Act of 1994 need to be addressed bearing in mind the aims, objects and various provisions of the Act of 1994?

23. The purpose of Act of 1994 is to prohibit the misuse of pre-natal diagnostic techniques and for determination of sex of foetus, leading to female foeticide and for providing punishment therefor. Besides, prohibition of advertisement of pre-natal diagnostic techniques for determination of sex, regulation thereof and punishment for violation of such provisions as deterrents. As such, aforesaid nature of acts or omissions forbidden by law are offences punishable under the Act of 1994. Provisions in that behalf are made for under Chapter II and Chapter III and cognizance of such offences can be taken under section 28 of the Act of 1994. Sections 7 and 16 deals with constitution of Central Supervisory Board and its functions. Section 16A deals with constitution of State Supervisory Board and the Union Territory Supervisory Board with functions as described thereunder as detailed in paragraph 8 of this order. The State Supervisory Board functions as an authority of the supervisory nature to create public awareness against the offences perceived under the Act, to review the activities, make suitable recommendations relating thereto, monitor implementation of provisions of the Act and rules framed thereunder, to consolidate reports in respect of various activities undertaken to the State Government or the Central Government, as the case may be by the "Appropriate Authorities" constituted under section 17(2) of the Act of 1994.

24. Section 16A(3) of the Act of 1994, therefore, provides that the State Supervisory Board shall meet at least once in four months in the context of the aforesaid functions of the State Supervisory Board.

25. Periodical meetings of the State Supervisory Board as contemplated under section 16A(3) of the Act of 1994 are as a matter of fact in the realm of administrative dispensation in the context of provisions of the Act related to functions of the Board referred to above. If for any reason, meeting of the State Supervisory Board is not convened, in the opinion of this Court, that by itself cannot be construed to be culpable for an offence to bring it within the provisions of section 25 of the Act of 1994, for the word "offence" as explained above is the transgression of law; i.e., doing the act, penal law forbids to be done or omitting to do what it commands, therefore, liable for punishment as retribution of law as understood at legal parlance. There cannot be penalty of the nature specified, i.e., three months imprisonment and/or with fine as contemplated under section 25 of the Act of 1994 unless the acts complained of has attributes of an "offence". Besides, punishment is the mode by which the State enforces its laws which forbids to do something or omission to do something and, therefore, punishment is always co-related with such acts, i.e., "offence". State Supervisory Board is an authority to advise the "Appropriate Authority" constituted under section 17(2) of the Act of 1994 being a supervisory authority. In fact, the "Appropriate Authority" ensures the effective direct check, control and regulate punishable activities contemplated under the Act of 1994 and is competent to file complaint as provided for under section 28(1)(a) of the Act of 1994 and under section 28(1)(b) of the Act of 1994, a person is required to give the notice not less than fifteen days to the "Appropriate Authority" of the alleged offence in the manner prescribed and of his intention to make complaint to the Court. The Courts are required to take cognizance of the offence at the instance of the Appropriate Authority or any officer authorised in this behalf by the Central Government or State Government, with the knowledge of the authority, on notice by a complainant.

26. Accordingly, this Court answers the question that no offence can be said to have been committed by the members of the State Supervisory Board allegedly for not convening meetings as provided for under section 16A(3) of the Act of 1994, of which cognizance can be taken by the trial Court and can be subjected to conviction and sentence under section 25 of the Act of 1994. Further more, learned counsel for the petitioners has contended that the Court below even

otherwise has committed serious error of law and fact while registering the complaint without considering the provision as contained under section 28(1)(b) of the Act of 1994 inasmuch as, no notice was given by the complainant to the Appropriate Authority in the prescribed manner of the alleged offence and of his intention to make a complaint to the Court. Instead mere writing a letter to the members of the State Supervisory Board as reflected from the order impugned cannot be said to be fulfillment of the requirement of section 28(1)(b) of the Act of 1994. Hence, no cognizance of the offence could have been taken by the Court below under section 28 of the Act of 1994.

27. Learned counsel for the respondent has not been able to place on record any evidence as regards service of notice to the Appropriate Authority as contemplated under section 28(1)(b) of the Act of 1994. Accordingly, this Court accepts the submission canvassed by petitioners counsel in that behalf.

28. Learned counsel for the petitioners further contends that as a matter of fact in the reply submitted before the Court below on 22/08/2014, the petitioners had aptly made it clear that after 08/05/2012, the State Supervisory Board had convened meetings on 20/02/2013, 13/08/2013, 29/10/2013 and 26/07/2014 so much so, the respondent/complainant himself had participated in the meeting held on 22/08/2014 in which the Board has resolved to reward Rs.50,000/- to the respondent under the RAJYA PROTSAHAN RASHI YOJANA. Under such circumstances, the Court below has committed a serious error of law and fact having not perused and considered the reply so submitted and in a abrupt manner registered the complaint against the petitioners on the mere allegation of the respondent/complainant based on misrepresentation of facts. Therefore, even otherwise, it is incorrect to say that the State Supervisory Board has not convened the meeting as contemplated under section 16A(3) of the Act of 1994.

29. The respondent has not been able to deny the aforesaid assertions as made in the writ petition and canvassed during the course of hearing except the contention that the meeting was convened beyond the period for under section 16A(3) of the Act of 1994. As such, this Court is of the view that it cannot be said that the petitioners have committed any offence punishable under section 25 of the Act of 1994.

30. Further, the trial Court ought to have considered that before taking cognizance of the offence under section 28(1)(b) of the Act of 1994, on a complaint made by the respondent, sanction for prosecution by the State Government was mandatory under section

197 Cr.P.C., Without previous sanction under section 197 Cr.P.C., for taking cognizance of the offence against petitioners, in fact, the trial Court has acted in excess of its jurisdiction and authority by passing the impugned order for registering the complaint under section 28(1) (b) of the Act of 1994.

31. Consequently, this Court is of the opinion that the trial Court while exercising the jurisdiction under section 200 Cr. P.C., in the context of special laws though was required to observe due diligence with care, caution and circumspection but has acted with serious illegality and in excess of its jurisdiction.

32. Accordingly, this writ petition is allowed and the order impugned dated 05/09/2014 (Annexure P/1) is quashed.

(Rohit Arya)
Judge
05-10-2015

b/-