



1 crwp 406/2012 group

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**Criminal Writ Petition No.406 of 2012**

Dr. Kalpana Pundlik Jamdade. .. **Petitioner.**

**Versus**

The State of Maharashtra  
And Another. .. **Respondents.**

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Shri. R.N. Dhorde, Senior Advocate, holding for Shri. V.S.  
Kadam, Advocate, for petitioner.

Shri. A.S. Shinde, Additional Public Prosecutor, for  
respondents.

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**With**

**Criminal Writ Petition No.407 of 2012**

Dr. Sheela W/o Subhash Rachewad. .. **Petitioner.**

**Versus**

The State of Maharashtra  
And Another. .. **Respondents.**

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Shri. R.N. Dhorde, Senior Advocate, holding for Shri. V.S.  
Kadam, Advocate, for petitioner.

Shri. A.S. Shinde, Additional Public Prosecutor, for  
respondents.

**Criminal Writ Petition No.408 of 2012**

Dr. Quamar Sultana W/o Mohd. Khursheed  
Ahmed. .. **Petitioner.**

**Versus**

The State of Maharashtra  
And Another. .. **Respondents.**

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Shri. R.N. Dhorde, Senior Advocate, holding for Shri. V.S.  
Kadam, Advocate, for petitioner.

Shri. S.K.Tambe, Additional Public Prosecutor, for  
respondents.

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**Criminal Writ Petition No.409 of 2011**

Dr. Sudhir Mahadeorao Nimkar. .. **Petitioner.**

**Versus**

The State of Maharashtra  
And Another. .. **Respondents.**

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Shri. R.N. Dhorde, Senior Advocate, holding for Shri. V.S.  
Kadam, Advocate, for petitioner.

Shri. A.S. Shinde, Additional Public Prosecutor, for  
respondents.

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**CORAM: T.V. NALAWADE, J.**

**DATE : 18th NOVEMBER 2014**

**ORDER:**

1) All the petitions are filed under the provisions of Articles 226 and 227 of the Constitution of India and section 482 of the Code of Criminal Procedure. The proceedings are in respect of action taken of filing complaint by the authority created under the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as "the Act") and so all the proceedings are being decided by common order.

2) Complaints are filed against the petitioners by an officer to whom the authority under the Act has been given to take action and file complaint for the breach of the provisions of the Act and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 framed under the Act (for short, "the Rules"). The matters are relating to the provisions of Sections 4 (3), 5,6, 23, 29 and 30 of the Act. The learned Judicial Magistrate has made order of issue process in all the complaints. Prayers are made for setting aside the order of issue process and also for quashing the proceeding itself. Only one

proceeding i.e. the petitioner in Criminal Writ Petition No.408/2012 had filed revision against the order of issue process and the petitioners in other three proceedings have directly come to this Court.

3) Against the petitioner of first proceeding, Regular Criminal Case No.636/2011 is pending in the Court of the Judicial Magistrate, First Class, Nanded. The petitioner, Dr. Kalpana Jamdade was running Ultra Sound Clinic and Hospital under the name and style as "Jamdade Maternity Home at Nanded". She had registered her Ultra Sound Clinic under the Act and she was conducting ultrasonography on pregnant women. There was information received by the authority that she was misusing the techniques for determining sex of the foetus. Inspection was done by the complainant in the presence of other officers and witnesses of the Sonography Centre.

4) In the hospital of Smt. Jamdade many discrepancies and irregularities were found and there was breach of the provisions of the Act and the Rules. Following discrepancies and irregularities were noticed :-

- (i) Record of Form "F" was not available for the period from June 2009 to September 2010. Attempt was made to create record of the names of the parties in diary but that was also not the complete information;
- (ii) monthly reports with regard to the cases of the patients who had come to the Centre were not submitted to the authority for the period from June 2009 to August 2010;
- (iii) declarations of pregnant women were not taken for the period from July 2009 to September 2010;

Some false reports were submitted and they were for the months of October 2010, November 2010, April, 2011, May 2011 and June 2011. For instance when 13 patients had come there were 10 Forms "F" and there were less declarations for the month of May 2011. For June there were 21 declarations but 20 Forms "F". Many other discrepancies of serious nature were noticed and they are mentioned in the complaint. They are not being quoted as the challenge is not on any ground relating to such discrepancies. In the petition, it is contended that there was time till 5th of next month to send the report and in some cases the discrepancies could have been removed.

It is also contended that some times illiterate women do not make declaration. In respect of these contentions it can be said that if the period is considered, the first contention is not at all acceptable. Further in law such contention is not acceptable as report is required to be sent and not any record of Form "F" or declaration. It is also contention that some columns of Form "F" are relating to use to invasive technique and as no invasive technique was used, those columns were not filled. This contention was also not raised during the arguments but this Court is considering that point.

5) The main contention in the first proceeding on which argument was advanced is that the complaint is not filed by appropriate authority created under the Act [under section 17(2)] and so the learned Magistrate ought not to have taken cognizance of the offence. In this regard there is copy of State Government Notification dated 16-10-2007. In this Notification some officers are appointed as Appropriate Authorities for working under the Act for different areas and the Notification is as under :

"PUBLIC HEALTH DEPARTMENT

Mantralaya, Mumbai 400 032, dated the 16th  
October 2007.

NOTIFICATION

The Pre-conception and Pre-natal Diagnostic  
Techniques (Regulation and Prevention of Misuse)  
Act, 1994.

No. Prachini, 2007/525/C.R. 133 (Part-Ii)/FW-II,--In  
exercise of the powers conferred by sub-section (2)  
of section 17 of the Pre-conception and Pre-Natal  
Diagnostic Techniques (Regulation and Prevention of  
Misuse) Act, 1994 (57 of 1994) and of all other  
power enabling it in that behalf, the Government  
Maharashtra hereby appoints the Additional  
Collectors, Sub-Divisional Officers, Tahsildars,  
Nayab Tahsildars, Commissioners, Deputy  
Commissioners and Ward Officers of Municipal  
Corporations and Chief Officer of Municipal  
Councils, to be the Appropriate Authorities for the  
purposes of the said Act, for the areas within their  
jurisdiction.

By order and in the name of the Governor of  
Maharashtra.

SHOMITA BISWAS,  
Joint Secretary (Family Welfare) to Government."

6) In the aforesaid regard the respondent is  
placing reliance on the order made by the Commissioner  
of Nanded Municipal Corporation, copy of which is at  
Exhibit "G".

जा.कं. मनपा / पीसीपीएनडीटी / 57 / 2011  
नांदेड वाघाळा शहर महानगरपालिका, नांदेड.  
दिनांक :- 17 / 06 / 2011.

**"आदेश"**

संदर्भ :- महाराष्ट्र शासन अधिनियम, आरोग्य अधिसूचना  
कं. प्रशिनि 207 / 525 / प्र.कं. 123 (भाग 3) / प्र.कं. 2.

गर्भधारणपूर्व व प्रसवपूर्व निदान तंत्र (विनियमन आणि दुरुपयोग प्रतिबंध) 1994 ची नांदेड वाघाळा शहर महानगरपालिकेमध्ये प्रभावीपणे अंमलबजावणी होण्याच्या दृष्टिकोणातून संदर्भाकीत अधिसूचनेमध्ये नमुद प्रभाग अधिकारी या नात्याने सर्व क्षेत्रिय अधिकारी यांनी त्यांच्या कार्यक्षेत्रातील व सहाय्यक आयुक्त (महसुल), सहाय्यक आयुक्त (आरोग्य) यांनी मनपा हद्दमधील सोनोग्राफी सेंटरची वेळोवेळी तपासणी करावी व सदर कायद्याचे उल्लंघन करणा-या सेंटरवर उक्त कायद्यांतर्गत नमुद प्रशासकीय व फौजदारी स्वरूपाची कार्यवाही समुचित प्राधिकारी या नात्याने करावी.

आयुक्त,

नांदेड वाघाळा शहर महानगरपालिका, नांदेड."

The order shows that the Assistant Commissioners of the Corporation were working as Ward Officers of respective areas of the Corporation. This order was issued on 17th June 2011 and the action was taken subsequent to the date of the order by the Assistant Commissioner in all the first three proceedings. In the first proceeding complaint was filed on 4-8-2011 and the order of issue process was also made on the same date.

7) The particulars of breach of the provisions of the Act and the Rules are given in the reply affidavit by the complainant. It is the contention the complainant that his initial appointment was as Tahsildar and he came to be sent on deputation basis to Corporation and he is working there as Assistant Commissioner. It is also contended that, he has been working in the capacity of *Prabhag Adhikari/Ward Officer* in the Corporation. It is contention that there is no separate cadre of *Prabhag Adhikari/Ward officer* in this Corporation and so the Assistant Commissioners are working as *Prabhag Adhikari*.

8) In the reply affidavit the respondent has placed reliance on the cases reported as :

- (i) **(2008 4 SCC 471 (CBI v. K.M. Sharan));**
- (ii) **(2010) 11 SCC 226 (State of A.P. v. Gourishetty Mahesh).**

This court is discussing the observations made by the Apex Court in the reported cases at appropriate place. It is further contended by the complainant that after 10

months of the order of issue process the order is challenged in the present proceedings and revision ought to have been filed within the prescribed period of limitation. It is contended that only to protract the things such tactics are being played by the petitioners.

9) Criminal Writ Petition No.407/2012 is filed by Dr. Sheela Rachewad. She runs Ultra Sound Clinic and Hospital in the name and style as "Shiva Hospital, at Nanded". The petitioner has registered ultra sonography machine. The inspection of the record for the period from 21-5-2010 to 4-8-2011 was done by paying visit on 4-8-2011 by the complainant. The irregularities which were found in the first proceeding were also found in the present case and similar contentions are made in the petition by this doctor also. Similar reply is given by the complainant in the reply affidavit. In this proceeding also cognizance is challenged only on the ground, contention that the complainant had no power to file the complaint and the cognizance is bad in law. Against this petitioner Regular Criminal Case No.660/2011 is pending in the Court of learned Judicial Magistrate, First Class, Nanded.

10) Criminal Writ Petition No.408/2012 is filed by Dr. Quamar Sultana who owns and runs ultra sound clinic and hospital in the name and style as "Neelofar Sonograph6y Centre, Nanded". The record of this Centre for the period of two years ending on 30th June 2011 was examined by the complainant on 30th June 2011. Similar irregularities were found. The petitioner had challenged the order of issue process by filing Criminal Revision No.106/2011 in the Sessions Court Nanded. The revision is dismissed. The learned Senior Counsel argued only on the ground which was argued in the first two proceedings to challenge the cognizance. One more contention was made that there is possibility of creation of record of the authority subsequent to the taking of action. But apparently there is no force as the order was issued by the authority on 17-6-2011 and the action was taken on 30-6-2011.

11) Dr. Sudhir Nimkar has filed Criminal Writ Petition No.409 of 2011 to challenge the cognizance of the offence taken against him by the Judicial Magistrate in Regular Criminal Case No.420/2011. This complaint is

filed by the Tahsildar Nanded. This proceeding is filed on different grounds and it is contended that there were no material discrepancies and irregularities in the record. This doctor owns and runs "Saket Diagnostic Center, at Nanded". The record of the period of two years ending on 31-1-2011 was inspected by paying visit on 31-1-2011 by the authority. In Regular Criminal Case No.420/2011 allegations are made that Dr. Nimkar did not maintain the record as required under the provisions of the Act and the Rules. Following irregularities were found which are mentioned in the complaint :

- (i) Forms "F" were not complete and some portion of the Form F was wrongly filled;
- (ii) declaration of pregnant women were not taken. Form "G" (consent forms) were not maintained in prescribed format and that way the illegal activities were concealed;
- (iii) copy of the Act and the Rules was not available in the premises of ultra sound clinic;
- (iv) there was non compliance of the provisions of the Act and the Rules for which action needs to be taken

under the provisions of Section 4(3) and other provisions as mentioned in the first three proceedings.

12) This Court has gone through the record like panchanama under which the sonography machine of Dr. Nimkar was taken over and also the relevant "F" Forms. There is force in the contentions made in the complaint. In the reply affidavit there is contention of the complainant that even complete record was not made available in respect of two years for which the inspection was made.

13) In all the proceedings submissions were made by the learned Senior Counsel for the petitioners that the orders suspending the registration made against them by the so called Appropriate Authority created under the Act are set aside either by this Court or the Appellate Authority and so there was no room for taking cognizance of the aforesaid offences.

14) In view of the contentions/arguments advanced by the learned Senior Counsel in the first three proceedings that the Assistant Commissioner who has

filed the complaint has no power to file the complaint and the Magistrate has committed error in taking cognizance of the matter, relevant provisions need to be seen and the case law developed on these provisions also needs to be seen. Both the sides have placed reliance on some reported and unreported cases.

15) To ascertain as to who can file complaint for offences committed under the Act, the scheme of the Act needs to be seen. The petitioners want to show that the order suspending the registration could not sustain in law and so cognizance of the offence is bad in law and due to this contention also, it needs to be seen as to whether there is similarity in the provision made with regard to the registration of the Centre and with regard to the taking cognizance of the matter by the Judicial Magistrate.

16) Statement of Objects and Reasons in respect of the Act (as amended in 2003) shows that, the Act seeks to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. The Act is

Central Legislation. In Chapter I of the Act definitions are given. Central Supervisory Board is created and it is required to be constituted under the Act by the Central Government. The rule making power is also kept with the Central Government. It is the Central Board which is given power to review and monitor the implementation of the Act and the Rules and it is also expected to oversee the performance of the various bodies constituted under the Act. The State is expected to constitute State Advisory Board. The State Advisory Board is given power to review the activities of the Appropriate Authorities functioning in the State. It is expected to monitor the implementation of the provisions of the Act and the Rules and it is also expected to make suitable recommendation to the Central Board.

17) In Section 2(a) the definition of "Appropriate Authority" is given and it is as under :-

"Appropriate Authority" means the Appropriate Authority appointed under section 17."

In Section 17(2) and (3) of the Act power of the State Government to appoint Appropriate Authorities is given and this portion runs as under :--

**"17. Appropriate Authority and Advisory Committee:**

(1) .....

(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 Prohibition 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. "

18) The power regarding appointment of Appropriate Authority given to the State shows that only if the authority is to work for the whole of the State, the authority shall be multi-member authority constituted as per section 17(3) of the Act. If the authorities are created for different areas, any officer of the State also can be appointed as Appropriate Authority.

19) The provision of section 17(4) of the Act shows that the Appropriate Authority has the functions like grant registration in respect of bodies like Genetic Clinic (Sonography Centre), investigate complaint against such centres, to take action for breach of the provisions of the Act and the Rules against the bodies and this action includes the action of suspending or cancelling the registration. Suspension or cancellation of the registration can be done on the recommendations of the Advisory

Board created under the Act. The Advisory Board consists of experts and it is also created under section 17 of the Act.

20) In Section 17-A some other powers of Appropriate Authority are given and the powers are as under :--

**"17-A, Powers of Appropriate Authorities.--** The Appropriate Authority shall have the powers in respect of the following matter, 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 the indulging in sex selection techniques or pre-natal sex determination; and

(d) any other matter which may be prescribed."

21) In Chapter VI of the Act, procedure for registration of bodies like Genetic Clinic (sonography Centres) is given. Procedure for cancellation registration certificate is also given. It is provided that appeal against

the order of State Appropriate Authorities lies to the State Government. Thus the functions and powers of the State Board, the Appropriate Authorities are mentioned in the Act and it can be said that the Appropriate Authority has the power to grant registration to such centre and it can cancel the registration. However, the Appropriate Authority has other powers like the powers mentioned in sections 17 and 17-A of the Act.

22) In Chapter VII of the act there are provisions with regard to offences and penalties. Relevant provisions are sections 27 and 28. Sections 27 and 28 run as under :-

**"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 authorized 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" included a social organization.

(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 sub-section (1), the Court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant record in its possession to such person."

23) Provisions of Sections 27 and 28 need to be read together. The two sections need to be read together as care needs to be taken by the Court to see that the Appropriate Authority is discharging its functions. So opportunity needs to be given first to the Appropriate Authority as provided in the aforesaid sections as the Appropriate Authority needs to file complaint. These provisions also show that criminal Court is not bound by the opinion which may be formed by the Appropriate Authority in this regard. Even if the Appropriate Authority has refused to take legal action, filing complaint, the Court can take cognizance of the offence on the complaint made by any private person provided that the private party has followed the procedure given under section 28(1)(b) of the Act. Further, it is not only the

Appropriate Authority who can file complaint, in view of the wording of these sections. The provisions show that any officer authorized in this behalf by the Central or the State Government as the case may be or any officer authorised by the Appropriate Authority can file complaint. Thus, the provision is not that rigid. The Central or the State Government, as the case may be can appoint any officer or class of officers to file complaint and even the Appropriate Authority can authorise any officer or officers for filing complaint.

24) The provision of section 30(1) of the Act is also relevant for the present purpose and it runs as under :-

**"30(1) 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, Genetic Clinic or any other place, such Authority or any officer authorised 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, 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 offence punishable under this Act."

The aforesaid provisions show that Appropriate Authority appointed by the State Government can authorise other officer to make the investigation of the case, to take action like search and seizure of the record and to file complaint. From this angle also it can be said that there is no force in the ground taken by the petitioners. Further, the complainant was originally appointed as Tahsildar, he was working on deputation in the Corporation and he was discharging the duties as *Prabhag Adhikari* / Ward Officer (officer mentioned in State Notification) and this circumstance also cannot be ignored. It will be a matter of evidence, to prove this contention.

25) Copy of judgment delivered in Writ Petition No.1637/2013 which was filed by Dr. Smt. Kaplana Jamdade, petitioner from Criminal Writ Petition No.406/2012, is produced. This record shows that order suspending the registration was challenged and this Court allowed the petition filed by Dr. Smt. Kalpana Jamdade and held that the Assistant Commissioner was not Appropriate Authority for taking such action. However, the Court also observed that the Appropriate Authority

was at liberty to take action in accordance with the provisions of the Act and the Rules. Special Leave Petition filed by the complainant against the order made by this Court is dismissed by the Hon'ble Apex Court. Similar decision is given in favour of Dr. Smt. Sheela, petitioner from Criminal Writ Petition No.407/2012 and Dr. Quamar, petitioner from Criminal Writ petition No.408/2012. In view of the discussion made about the provisions of the Act this Court has no hesitation to observe that the decision given by this Court in favour of the accused, petitioners, in respect of the action taken of suspending the registration cannot help them in criminal cases. This Court has no hesitation to observe that the complainant from these cases was authorised to take action under section 30 and also to file complaint under section 28 of the Act. Thus, no error is committed by the learned Magistrate in taking cognizance of the matter and in issuing process against these accused.

26) In support of the contentions made for the petitioner from Criminal Writ Petition No.409/2012, a copy of decision delivered by this Court in Criminal Writ

Petition No.406/2011 is produced. In the said proceeding this Court (presided over by other Hon'ble Judge) quashed one criminal case in view of the facts of that case. The reasoning is given on the basis of the facts of that case and due to the provisions of the Act, this Court is avoiding to discuss the reasons given in that proceeding. Similarly, the facts of other case, Criminal Writ Petition No.206/2013, decided by other Hon'ble Judge of this Court were different.

27) So far as the contentions made by the petitioner from Criminal Writ Petition No.409/2012 are concerned, similar stand was taken by the petitioner from Criminal Writ Petition No.680/2012 which is decided by this Court. Relevant observations at paragraphs 13 to 26 are as under :--

"13) For ascertaining as to which record needs to be created and maintained and which columns of the form need to be filled by the owner of the Ultra Sound Clinic and by the persons conducting the procedure, the relevant provisions of the Act and the Rules need to be seen. The relevant provisions of the Act are Section 2(d), (i), (k), Sections 4 and 5. they are as under :-

**"2. Definitions.--** In this Act, unless the context otherwise requires, -

**(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.”

**(i)** “pre-natal diagnostic procedures” means all gynecological 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.”

**(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.”

**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) heamoglobinopathies;
- (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 technique 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 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."

14) The learned counsel for petitioner No.2 of first proceeding submitted that as he is not the owner of the ultrasound clinic, the provisions with regard to creation and maintenance of the aforesaid record cannot be used against him. For considering this defence, the aforesaid provisions [viz. section 5(1)(a)] and some more rules need to be considered. In rule 2(b) of the Rules, definition of "employee" is given as under :-

"(b) "employee" means a person working in or employed by a Genetic Counseling Centre, a Genetic Laboratory or a Genetic Clinic or an Ultra Sound Clinic or Imaging Centre, and includes those working on part-time,

contractual, consultancy, honorary or on any other basis.”.

In rule 4 nature of undertaking required to be given by the person applying for registration is given. Reading of this rule shows that such certificate is to be used only as per the contents of the certificate. Rule 9 provides for maintenance and preservation of record in respect of persons who come for diagnosis and this record is to be created to enable to identify the person who had come to the centre for sonography. Rule 9(4) shows that Form "F" need to be filled and it runs as under :-

**“9. Maintenance and preservation of records.--**

(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.”

Rule 9 (6) runs as under :--

“(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 or Genetic Clinic, Ultra Sound 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 records shall be preserved till the final disposal of legal proceedings, or till the expiry of the said period of two years, whichever is later.”

Rule 9 (8) runs as under :-

“(8) Every Genetic Counselling Centre,

Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centres 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 5<sup>th</sup> day of the following month to the concerned Appropriate Authority.”

15) Submission was made that record can be created before 5<sup>th</sup> of next month as report needs to be sent during this period and so there was time to correct the things. In view of the aforesaid sections and rules the record needs to be created immediately at Ultra Sound Clinic and it needs to be completed before leaving of the patient with the report regarding diagnosis though report to authority needs to be sent before 5<sup>th</sup> of next month. Thus, the provision of Rule 9(8) of the Rules cannot be used as the defence in such a case.

16) Another submission is made that as computerized record was maintained, rule 9 (7) needs to be used. This rule shows that when there is computerized record, printed copy is to be taken and preserved after authentication by the person responsible for such record. Such authentication and signature are missing.

17) Rule 10(1) and 10(1-A) are as under :-

**“10. Conditions for conducting pre-natal diagnostic procedure.--** (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.

“(10-A) 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 declare that she does not want to know the sex of her foetus.”

18) These two rules show that declaration form needs to be obtained if pre-natal diagnostic technique, procedure is to be conducted. The taking of such declaration is necessary when there is no invasive procedure. In the present case Form "F" is shown to be prepared by accused as per section 4(3) and rule 9(4) and Rule 10(1-A). In this form there is no printed declaration of pregnant woman as required by Rule 10(1-A). It appears that separate declaration and consent form which is also titled as Form "F" is maintained. A book of the form is seen by this Court. Even if this record is considered and accepted as annexure to the Form "F" maintained in the register, they need to be complete in every respect including for the purpose of declaration. Under the law, such declaration needs to be made in Form "F" itself.

19) The wording of section 5 shows the procedure that needs to be followed for conducting of pre-natal diagnosis. However in section 5(1)(b) the term "prescribed" is used in respect of consent form of pregnant woman. In rule 10 and in Form "G" prepared under rule 10 it is made clear that this form is applicable to invasive techniques. In view of clause (c) of section 5 it needs to be presumed that written consent of pregnant woman is necessary when invasive procedure needs to be used. When no invasive procedure is to be used and when it is to be done without invasive procedure by using ultra sound machine, only declaration as required in rule 10(1-A) as mentioned in Form "F" of section 4(3) needs to be obtained from the pregnant woman. Submissions made in this regard by the learned counsel need to be accepted. However, the record needs to be seen to ascertain as to whether at least the declaration was complete as per the requirement. These provisions also show that person using the procedure needs to give declaration and so he is also involved in creation and maintenance of record.

20) For interpretation of the provisions of the Act and the Rules, learned counsel for the petitioners has placed reliance on following four cases decided by this Court (Aurangabad Bench) :--

(1) *Criminal Writ Petition No.232/2012 (Satyaprem v. the State of Maharashtra), decided on 11<sup>th</sup> September 2014;*

(2) *Criminal Application No.3500/2011 (Dr. Alka Gite v. The State of Maharashtra), decided on 11<sup>th</sup> May 2012;*

(3) *Criminal Application No.3044/2012 (Dr. Pratidnya Jayesh Shinde v. Appropriate Authority), decided on 4<sup>th</sup> December 2013; and,*

(4) *Criminal Application No.2065/2012 (Dr. Pradip Prabhuappa Dama v. The State of Maharashtra), decided on 28<sup>th</sup> January 2014.*

21) In the first case, the Court considered Form "F" which needs to be used from 31<sup>st</sup> January 2014 and observed that there are separate requirements in respect of maintenance of record for Ultrasound Clinic not using invasive technique and genetic test using invasive procedure. The Court further found that the allegations were very vague in nature and gave relief to the accused. In the second case there were referral letters. This Court held that flimsy mistakes can be ignored and relief was given to the accused in the second case also. In the third case there was allegation that the record was not properly maintained. As the allegations were found baseless, relief was given to the accused. In the last case, this Court held that there was no allegation against the applicant and the shortcoming or deficiency in maintaining the record could not be attributed to him.

This Court is avoiding to discuss more the reasons given. The relevant provisions which are quoted above, were not considered and discussed.

22) For the State, the learned Additional Public Prosecutor has placed reliance on the following cases :--

- (1) 2013(2) Bom. C.R. 351 (Sujit Govind Dange v. State of Maharashtra);
- (2) 2009 Cri.L.J. 721 (Suo Motu v. State of Gujarat);
- (3) Criminal Application No.4513/2012 (Dr. Harsha Patil v. The State of Maharashtra) decided by this Court (Aurangabad Bench) on 4<sup>th</sup> December 2013;
- (4) 2011 (4) Bom. C.R. 293 (Suhasini Umesh Karanjkar v. Kolhapur Municipal Corporation);
- (5) Criminal Application No.3966/2013 (Dr. Nirmala Bajaj v. The State of Maharashtra), decided by this Court (Aurangabad Bench) on 9<sup>th</sup> May 2014; and,
- (6) Criminal Writ Petition No.5 of 2013 (Dr. Vinayak Khedkar v. The State of Maharashtra), decided by this Court (Aurangabad Bench) on 9<sup>th</sup> May 2014.

23) In the first case, the Division Bench of this Court has discussed the provisions of sections 4,5,6 and 20 of the Act and it is laid own that if there is deficiency or inaccuracy in the record, that amounts to contravention of sections 5 and 6 unless contrary is proved by the doctor / person conducting ultrasonography. Thus the defence of the accused in such case can be considered during trial. The Court has made it clear that the Act does not distinguish discrepancy as minor or major and in view of the object behind the provisions they need to be strictly complied with. In the second case, the Full Bench of Gujarat High Court has made similar observations and has laid down that such defence can be considered only during trial. In the fourth case the Full Bench of the Bombay High Court at paragraphs 14 and 24 has made similar observations. It is made clear by the Full Bench that if there is contravention in respect of maintenance of record and the persons

conducting the process do not maintain necessary record complete in every respect that contravention amounts to offence. Though different point was involved in the matter pending before the Full Bench, the relevant provisions are discussed by the Full Bench even from the angle of commission of offence. In the last two proceedings, this Court refused to quash the proceeding by relying on the observations made by the Division Bench of this Court and the Full Bench of the Gujarat High Court, cited supra.

24) While interpreting the provisions and considering the prayers made in the proceedings like present one, the object behind the special legislature needs to be kept in mind. The object is to prohibit use of pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. Pre-natal diagnostics techniques like sonography are useful for detection of sex. They can be used also for detecting disorders in the foetus. In view of the possibility of use of this technique for determination of sex and then for termination of pregnancy of unborn child, the aforesaid provisions are made. Sale of ultrasound machines to persons not registered under the Act (rule 3-A of the Rules) is prohibited. The study made by Population Research Centre Pune (PRC) shows that most of the bodies like Genetic Counseling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic, Imaging Centre are registered in Maharashtra and there are maximum number of sonography Centers in Maharashtra. More than 60% of such bodies are ultrasound clinics. The studies have revealed that the pre-natal diagnostic techniques are easily available in sonography centres for sex determination. The cases registered in Maharashtra show that these centers are being misused. Due to misuse of the centres the sex ratio has come down alarmingly in Marathwada region and by the end of year 2012 the ratio of female child birth had got down below 800 in most of the Districts of Marathwada. Only when the authority started making inspection and the cases were registered for causing illegal abortion, the female birth ratio improved and it has now crossed 900 in this region.

25) When there is object like the object behind the present Act, the provisions need to be strictly implemented. It can be said that no sufficient powers are with the authority and powers need to be given to the authority to do sample checking of such cases to ascertain as to whether pregnant woman opted to undergo abortion and then, the Act will become more effective.

26) In view of the discussion made above, this Court has no hesitation to observe that for ensuring effective implementation of the aforesaid provisions strict compliance of the aforesaid provisions needs to be made. Thumb impressions need to be attested as it involves identification of pregnant women. The declaration form needs to be signed by the doctor conducting procedure also as the things are required to be explained to pregnant woman by the doctor. Referral slips need to be maintained and preserved and unless it is self referred case the person conducting processes and the persons who own the Centre need to insist for production of referral slip and if it not done it needs to be presumed that there is contravention of the provisions. Blank pages of forms cannot be kept in the book as it gives opportunity for creation of record subsequently. If record is not created and maintained as per aforesaid provisions, the Court has to go with the presumption that there is contravention of the provisions and the offence is committed unless the accused rebuts the presumption. In view of the facts of both the cases this Court has no hesitation to hold that the Magistrate has not committed error in ordering issuance of process. Thus there is no possibility of quashing of the proceedings filed against the applicants."

28) In view of the facts of the present case and the observations which are quoted above, this Court has no hesitation to hold that the learned Judicial Magistrate has

not committed any error in making order of issue process against the petitioner from Criminal Writ Petition No.409 of 2012 also. The other submissions made by the learned Senior Counsel for the petitioners that the order of issue process does not contain reasons cannot be accepted in matters like the present one. Reliance was placed on some observations made by the apex Court in the case reported as **(2013) 4 SCC 505** (GHCL Employees Stock Option Trust v. India Infoline Ltd.). The facts of this case were different and it was necessary to ascertain as to whether dispute was of civil nature. In the present case the complaints are filed by public servant under the Act which has specific object behind the provisions. In the order of issue process relevant provisions of the Act are mentioned. The allegations made in the complaint and the record discussed shows that no error is committed in making order of issue process.

29) Learned Additional Public Prosecutor has placed reliance on reported cases as **(2008) 4 SCC 471** (CBI v. K.M. Sharan) and **(2010) 11 SCC 226** (State of A.P. v. Gourishetty Mahesh), cited supra. In these cases the Apex

Court has discussed the scope of powers of this Court under section 482 of the Criminal Procedure Code. It cannot be disputed that the acceptability of the material to fasten culpability on accused is a matter of trial and whether the matter in existence would be sufficient for holding accused guilty or not also needs to be considered only at the time of trial. If the material allegations on their face value would *prima facie* constitute an offence, for making out a case against the accused, the matter needs to be left with the trial Court and this Court is not expected to use the powers given under Section 482 of the Cr.P.C. This Court is also not expected to use/exercise extraordinary powers.

30) In the result, all the writ petitions stand dismissed.

Sd/-  
**(T.V. NALAWADE, J.)**

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