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REKHA SENGAR

v.

STATE OF MADHYA PRADESH

(Special Leave Petition (Criminal) No.380 of 2021)

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JANUARY 21, 2021

**[MOHAN M.SHANTANAGOUDAR, VINEET SARAN AND
AJAY RASTOGI, JJ.]**

Code of Criminal Procedure, 1973 – s.439 – Bail – Non-bailable cases – FIR against petitioner and another person alleging involvement in pre-natal sex determination and sex selective abortion – Bail denied – Held: In non-bailable cases, the primary factors the court must consider while exercising the discretion to grant bail are nature and gravity of the offence, its impact on society, and whether there is a prima facie case against the accused – In the present case, there is prima facie evidence against the petitioner – No ground for granting parity with the co-accused whose alleged role was limited to merely picking up and dropping off the petitioner’s clients – Petitioner prima facie had a more active role in conducting the alleged illegal medical practices – Impugned order of High Court upheld – Medical Termination of Pregnancy Act, 1971 – Pre-Conception and Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 – ss.6, 23, 27 – Indian Evidence Act, 1872 – s.27

Dismissing the petition, the Court

HELD: 1. The gravamen of the allegations against the petitioner pertain to violation of the provisions of the Pre-Conception and Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PC & PNDT Act). Section 6 prohibits the use of pre-natal diagnostic techniques, including ultrasonography, for determining the sex of a fetus. Section 23 provides that any violation of the provisions of the Act constitutes a penal offence. Additionally, Section 27 stipulates that all offences under the said Act are to be non-bailable, non-compoundable and cognizable. In non-bailable cases, the primary factors the court must consider while exercising the discretion to grant bail are the nature and gravity of the offence, its impact on society, and

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whether there is a prima facie case against the accused. The charge sheet prima facie demonstrates the presence of a case against the petitioner. A sting operation was conducted upon the order of the Collector, by the member of the PC & PNDT Advisory Committee, Gwalior; the Nodal Officer, PC & PNDNT; and lady police officers. The team used the services of an anonymous pregnant woman, who approached the petitioner seeking sex-determination of the fetus and sex-selective abortion. The petitioner accepted Rs 7,000 for the same whereupon the team searched her residence. From the residence, an ultrasound machine with no registration or license, adopter and gel used in sex-determination, and other medical instruments used during abortion and sex-determination were seized. This constitutes sufficient evidence to hold that there is a prima facie case against the petitioner. [Paras 2, 3][316-F-H; 317-A-C]

1.2 The allegations in the FIR and the charge sheet, as well the disclosure statements made by the petitioner and the co-accused under Section 27 of the Indian Evidence Act, 1872, reveal that prima facie, the petitioner had a more active role in conducting the alleged illegal medical practices of sex determination and sex selective abortion. Whereas the alleged role of the co-accused was limited to merely picking up and dropping off the petitioner's clients. No grounds for granting parity with the co-accused to the petitioner. The impugned order of the High Court denying bail to the petitioner is upheld. [Paras 6, 7][319-E-G]

Voluntary Health Association of India v. State of Punjab
(2013) 4 SCC 1: [2013] 5 SCR 111 – relied on.

Case Law Reference

[2013] 5 SCR 111 relied on Para 5

CRIMINAL APPELLATE JURISDICTION : Special Leave
Petition (Criminal) No. 380 Of 2021

From the Judgment and Order dated 07.12.2020 of the High Court of Madhya Pradesh, Bench at Gwalior in MCRC No. 48262 of 2020.

Ms. Sakshi Vijay, Tapendra Sharma, Palav Agarwal, Ashutosh Kumar, Astik Gupta, Mnan Patel, Varun Kumar, Triloki Nath Razdan, Advs. for the Petitioner.

A The Judgment of the Court was delivered by
MOHAN M. SHANTANAGOUDAR, J.

B 1. By the impugned order passed by the Madhya Pradesh High Court on 7.12.2020 in MCRC No. 48262 of 2020, the Petitioner's application for bail under Section 439 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been rejected.

C The record shows that an FIR was registered against the Petitioner and another person on 26.9.2020 in PS City Kotwali Morena, Madhya Pradesh alleging their involvement in pre-natal sex determination and abortion of female fetuses at their residence, without the required registration or license under law. The petitioner has been in custody since September 2020. Her first application for bail (Bail Application No. 1203/2020) was rejected by the learned IV Addnl. Sessions Judge, Morena on 01.10.2020, and her subsequent bail application before the High Court (MCRC-39649-2020) was dismissed as withdrawn on D 14.10.2020. Chargesheet was filed against the petitioner and the co-accused on 6.11.2020, for offences under the certain relevant provisions of Indian Penal Code, Medical Termination of Pregnancy Act, 1971 and under the provisions of the Pre- Conception and Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (‘PC&PNDT Act’). Trial is pending. E

In the meanwhile, the petitioner again approached the High Court for grant of bail under Section 439, Cr.P.C. The High Court, vide impugned order dated 7.12.2020, has denied bail on facts. Aggrieved, the petitioner has approached this Court seeking bail.

F 2. The gravamen of the allegations against the petitioner pertain to violation of the provisions of the PC&PNDT Act. Section 6 prohibits the use of pre-natal diagnostic techniques, including ultrasonography, for determining the sex of a fetus. Section 23 provides that any violation of the provisions of the Act constitutes a penal offence. Additionally, Section G 27 stipulates that all offences under the said Act are to be non-bailable, non-compoundable and cognizable.

H It is well settled that in non-bailable cases, the primary factors the court must consider while exercising the discretion to grant bail are the nature and gravity of the offence, its impact on society, and whether there is a *prima facie* case against the accused.

3. The charge sheet *prima facie* demonstrates the presence of a case against the petitioner. A sting operation was conducted upon the order of the Collector, by the member of the PC&PNDT Advisory Committee, Gwalior; the Nodal Officer, PC&PNDNT; and lady police officers. The team used the services of an anonymous pregnant woman, who approached the petitioner seeking sex-determination of the fetus and sex-selective abortion. The petitioner accepted Rs 7,000 for the same whereupon the team searched her residence. From the residence, an ultrasound machine with no registration or license, adoper and gel used in sex-determination, and other medical instruments used during abortion and sex-determination were seized. This constitutes sufficient evidence to hold that there is a *prima facie* case against the petitioner.

4. To understand the severity of the offence, it is imperative to note the legislative history of the PC&PNDT Act. Reference may be had to the Preamble; which states as follows:

“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.”

(emphasis supplied)

The passage of this Act was compelled by a cultural history of preference for the male child in India, rooted in a patriarchal web of religious, economic and social factors. This has birthed numerous social evils such as female infanticide, trafficking of young girls, and bride buying and now, with the advent of technology, sex-selection and female feticide. The pervasiveness of this preference is reflected through the census data on the skewed sex-ratio in India. Starting from the 1901 census which recorded 972 females per 1000 males; there was an overall decline to 941 females in 1961, and 930 females in 1971, going further down to 927 females in 1991. Records of Lok Sabha discussions on the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Bill, 1991 reflect various members’ concern with this alarming state of affairs, which acted as a clarion call to the passage of the PC&PNDT

- A Act. (*See* : Lok Sabha Debates, Tenth Series, Vol. XXXIII No.2, July 26, 1994, Eleventh Session, at pages 506-544).

The prevalence of pre-natal sex selection and feticide has also attracted international censure and provoked calls for strict regulation. In September 1995, the UN 4th World Conference on Women, adopted the Beijing Declaration and Platform for Action which *inter alia* declared female feticide and pre-natal sex-selection as forms of violence against women. (*See* : Beijing Declaration and Platform for Action, adopted in 16th plenary meeting of UN 4th World Conference on Women, (15th September, 1995), Article 115).

- C While the sex ratio has improved since after the passage of the PC&PNDT Act, rising to 933 as per the 2001 census, and then to 943 in the 2011 census, these pernicious practices still remain rampant. As per the reply filed by the then Minister of State, Health and Family Welfare in the Rajya Sabha on 27.3.2018, as of December 2017, around 3,986 court cases had been filed under the Act, resulting in only 449 convictions and 136 cases of suspension of medical licenses.

The unrelenting continuation of this immoral practice, the globally shared understanding that it constitutes a form of violence against women, and its potential to damage the very fabric of gender equality and dignity that forms the bedrock of our Constitution are all factors that categorically establish pre-natal sex-determination as a grave offence with serious consequences for the society as a whole.

- E 5. We may also refer with benefit to the observations of this Court in *Voluntary Health Association of India v. State of Punjab*, (2013) 4 SCC 1, as follows:

F “6...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,
G 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
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they are misusing the pre-natal diagnostic techniques for A
determination of sex of foetus leading to foeticide.

7...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. B
The 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...”

In the present case, contrary to the prevailing practice, the C
investigative team has seized the sonography machine and made out a
strong *prima-facie* case against the petitioner. Therefore, we find it
imperative that no leniency should be granted at this stage as the same
may reinforce the notion that the PC&PNDT Act is only a paper tiger
and that clinics and laboratories can carry out sex-determination and
feticide with impunity. A strict approach has to be adopted if we are to D
eliminate the scourge of female feticide and iniquity towards girl children
from our society. Though it certainly remains open to the petitioner to
disprove the merits of these allegations at the stage of trial.

6. The fact that on 13.10.2020, the co-accused in the present
case was released on bail by the High Court in MCRC No.39380/2020 E
does not alter our conclusions. The allegations in the FIR and the charge
sheet, as well the disclosure statements made by the petitioner and the
co-accused under Section 27 of the Indian Evidence Act, 1872, reveal
that *prima facie*, the petitioner had a more active role in conducting the
alleged illegal medical practices of sex determination and sex-selective F
abortion. Whereas the alleged role of the co-accused was limited to
merely picking up and dropping off the petitioner’s clients. Hence, we
find no grounds for granting parity with the co- accused to the petitioner.

7. Thus, in view of the presence of *prima facie* evidence against
the petitioner and other factors as referred to supra, we find ourselves G
compelled to uphold the impugned order of the High Court denying bail
to the petitioner. However, in light of this Court’s directions in ***Voluntary
Health Association of India*** (supra) mandating speedy disposal of such
cases it is open for the petitioner to request the Trial Court to expedite
her trial and decide it within a period of 1 year.

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A 8. We make it clear that the above observations on facts are made only to decide the present petition. Any of the observations made on facts will not come in the way of the Trial Court to complete the trial and decide the matter. The matter shall be decided by the Trial Court on its own merits based on facts. The Special Leave Petition is dismissed accordingly.

Divya Pandey

Petition dismissed.