

**CASE COMMENT: FEDERATION OF OBSTETRICS AND  
GYNAECOLOGICAL SOCIETIES OF INDIA (FOGSI) V. UNION OF INDIA  
AND ORS.  
WRIT PETITION (CIVIL) NO. 129 OF 2017**

*by*

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**FACTS OF THE CASE:**

The writ petition was filed by the Federation of Obstetrics and Gynecological Societies of India (FOGSI) challenging the constitutional validity of the proviso to Section 4(3), Section 23 clause (1) and clause (2) of the Pre- conception and Pre- Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. By virtue of the writ, petitioners sought for decriminalizing anomalies in paperwork, record keeping and clerical errors in regard of the provisions of the Act by alleging that criminalizing the same is violative of Article 14, 19(1) (g) and 21 of the Indian Constitution. They contended that equating clerical errors on the same footing as the actual offence of sex determination shows the inherent defect in the language of the Act and hence such provisions must be struck down or be diluted.

**ISSUE DISCUSSED:**

1. Whether the Sections 23 clause (1) and clause (2) and the proviso to Section 4 clause (3) of the PCPNDT Act of 1994 be struck down as violative of Articles 14, 19(1) (g) and 21 of the Constitution of India?

**JUDGMENT:**

In its judgment, the court held that non maintenance of record is a spring board for commission of the offence of female foeticide and is not just a clerical error. The court observed that dilution of provisions of the Act or the Rules would defeat the purpose of the Act and relegate the right to life of the girl child under the Article 21 of the Constitution, to a mere formality. The Court concluded that there is no case made out to strike down provisions of

Section 23 clause (1), (2) and proviso to section 4(3) or to read down Section 20 and 30 of the Act.

### **CRITICAL ANALYSIS:**

The petition is founded upon the contentions that the Act equates the actual commission of offence with mere clerical errors and for mere anomalies, machines are sealed. It is also another contention that via Section 23 (2), State Medical Council can suspend the registration of doctors during the pendency of trial.

Clerical errors should be seen as an unintentional addition or omission of a word, phrase or a figure or it could be a change in figures to be stated. But in the present case, considering Form F and Form D which is to be maintained by the clinic and counseling centers respectively as per the Act, the contents required under these Forms are specifically mandated by the provisions of the Act.<sup>1</sup> Further, at the end of Form F, a condition is imposed on the person conducting ultrasonography on any pregnant woman as below;

*“Person conducting ultrasonography on a pregnant women shall keep complete record thereof in the clinic/centre in Form – F 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 ultrasonography.”*

Hence, whatever is claimed to be clerical errors by the petitioner society is not in fact clerical errors because, each and every particular required by Form F is mandated by the

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<sup>1</sup> **Rule 9, PNDT Rules 1996: Maintenance and preservation of records.** - “(2) The record to be maintained by every Genetic Counselling Centre, in respect of each woman counseled shall be as specified in Form D....(4) The record to be maintained by every Genetic Clinic, in respect of each woman subjected to any pre-natal diagnostic procedure, shall be as specified in Form F.”

**Rule 10(1A):** “(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 declare that she does not want to know the sex of her foetus.”

**Section 4(3) of the Act:** “(3) no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied for reasons to be recorded in writing that any of the following conditions are fulfilled namely:- ( i) age of the pregnant woman is above thirty-five years, (ii) the pregnant woman has undergone 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 family history of mental retardation or physical deformities such as, spasticity 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; ”

provisions of the Act and the corresponding Rules. This can be further made clear by analyzing the conditions mandated by Section 4 (3) and comparing the same with the various requirements under Form F. These are nothing but the condition precedents to conducting ultrasonography, non-fulfillment of which attracts punishment under Section 23.<sup>2</sup> Though the Act mandates the particulars to be filled in certain prescribed forms, whether such mandates exists or not, the persons conducting the test must satisfy such particulars, prior to the test.

Form F is prescribed as a mandatory criterion as it is the only barometer to find out why a diagnostic procedure has been conducted. If such an important information is kept vague or excluded, it would defeat the very purpose of the Act and the safeguards provided there under as it would become impossible to check violations of the Act. Hence, the significance of the Form cannot be belittled as a mere clerical job.

Further Form F asks for a referral note and Form D asks for the name of the clinic to which the patient is referred from the Counselling Center. This makes it possible to keep track of the system or a chain which usually functions in secrecy and privacy<sup>3</sup>. There won't be a third person who can give details of the illegal act being conducted as there is generally a collusive behavior between the Doctor and the patients involved under the Act. Examination of records maintained by the clinics is hence crucial in investigation of offences under the Act and irregularity in this regard raises a reasonable presumption of guilt. The Act in issue is not the only statute which makes non-maintenance of records a punishable offence. The Medical Council of India Regulations, Pharmacy Practice Regulations, 2015, The Medical Termination of

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<sup>2</sup>**Section 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 who has been convicted by the court under subsection (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. (3) Any person who seeks the aid of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or of a medical geneticist, gynaecologist or registered medical practitioner for conducting prenatal diagnostic techniques on any pregnant woman (including such woman unless she was compelled to undergo such diagnostic techniques) for purposes other than those specified in clause (2) of section 4, 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.

<sup>3</sup> *CEHAT v. Union of India*, (2003) 8 SCC 398

Pregnancy Act, 1971, Transplantation of Human Organs and Tissues Act, 1994 are other statutes which have similar mandates.

In addition to this, the Form F is to be filled by the person conducting the ultrasonography or the director or the owner of the clinic or laboratory or the counseling center as the case may be and a responsible doctor is supposed to know before undertaking such pre-natal diagnostic test etc. what is he undertaking and what his responsibilities in doing so are. If he cannot understand the form he is required to fill and the impact of medical findings and its consequences which is virtually the pre-requisite for undertaking a test, he is not fit to be a member of a noble medical profession. Such culpable negligence is not warranted from a doctor.

On examining the legislative intent behind the Act, we can see that there is a declining child sex ratio in India and the mischief which the legislature has intended to prevent by means of the Act primarily female foeticide as well as pre conception and post conception sex selection. When such is the objective of the Act, violation of the rights under Part III of the Constitution is not found. This mischief cannot be effectively prevented and the legislative intent cannot be effectively carried out unless there are proper checks and inspections which in turn require a proper maintenance of records.

Section 23(2) of the Act is attacked on the ground that suspension of the accused at the point of framing of charges should not be on the basis of clerical mistake. As already mentioned, what is contended to be clerical or technical error cannot be taken to be so and the suspension on framing of charges cannot be said to be unwarranted and is in consonance with the legislative intent. Further framing of charges would mean that prima facie case has been found by the court. The power of appropriate authority to report to State Medical Council to suspend the registration after the charge is framed till the case is disposed was added to section 23 (2) through the 2003 amendment in order to prevent commission of further crimes by the accused and for proper implementation of the Act. The question of removal only arises on actual conviction and not on framing of charges. Even on conviction the petitioners are not devoid of remedies. They can approach the prescribed authority by means of an appeal under the Act.

The non-maintenance of records hence, raises a presumption of doubt against the accused and the burden to prove otherwise lies upon him. In relation to this the court has in its judgment relied upon the judgment of *Namit Sharma case*<sup>4</sup> and the case of *State of Bombay v. F.N.*

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<sup>4</sup> *Namit Sharma v. Union of India*; (2013) 1 SCC 745

*Balsara*<sup>5</sup> to state that the burden of proof shall be on the one who attacks a statute on the ground of constitutionality.

### **CONCLUSION:**

By placing reliance on the afore stated facts, contentions and views, it can be concluded that non fulfillment of information cannot be blind-foldedly tagged as clerical errors and a proper trial is necessary to determine the dispute. Being so, sealing of ultrasonography machines and suspension of registration after framing of charges by the court cannot be held to be arbitrary and un warranted because non maintenance of statutorily required records raises a presumption of doubt against the accused and the burden of proof is upon him to prove that such default does not relate to any crime being committed by him. In addition, such suspension and sealing is in the furtherance of the object of the Act and is to prevent the mischief which is indented to be avoided by the legislature by invoking the act and its stringent provisions, specifically considering the dreadful list of female foeticides in India.



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<sup>5</sup> 1951 SCR 682 at p. 708