

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 797 OF 2011

Radiological & Imaging Association
(State Chapter- Jalna), through
Dr.Jignesh Gokuldas Thakker, its PC-PNDT
Coordinator for the Indian Radiological &
Imaging Association, having its office at
C/o. Shri Sai diagnostic Centre,
Post Office Road, Jalna-431 203.
(Maharashtra State)

... Petitioner

Versus

1. Union of India
Through its Secretary,
Ministry of Health and Family Welfare,
Having his address at Nirman Bhawan,
New Delhi – 110 001.
2. State of Maharashtra
Through its Secretary,
Ministry of Health and Family Welfare,
Having his address at Mantralaya,
Mumbai- 400 021.
3. Mr. Laxmikant Deshmukh,
Collector & District Magistrate,
Having his address at Collectorate,
Kolhapur Office, Swarajya Bhavan,
Nagala Park, Kolhapur-416 003.

... Respondents

Dr. Jignesh Thakker- Petitioner in person.
Mr. Anurag Gokhale for respondent No.1.
Mr. V.D. Patil, Government Pleader for respondent No.2-State.
Mr.A.A. Kumbhakoni with Mr. Amit Borkar for respondent No.3.

CORAM : MOHIT S. SHAH, C.J. &
SMT. R.P.SONDURBALDOTA, J.

Judgment Reserved on : 29 June 2011
Judgment Pronounced on : 26 August 2011

JUDGMENT (Per Chief Justice)

In this petition under Article 226 of the Constitution, the petitioner- Radiological & Imaging Association (State Chapter- Jalna) (hereafter referred to as "the petitioner" or "the Association") has challenged the circular dated 14 January 2011 of Collector and District Magistrate, Kolhapur (exhibit `F') requiring the Radiologists and Sonologists to submit on-line form F under the Pre-conception and Pre-natal Diagnostic Techniques Rules, 2003. The Association has also challenged the circular dated 10 March 2010 (exhibit `A') issued by the Collector in which reference is made to the workshop of doctors, sonologists and radiologists of Kolhapur held on 8 March 2010 and to the discussion at the said workshop for installation of SIOB (silent observer) for all the sonography machines, as a part of `save the baby' campaign for improving sex ratio in the district.

2. The petitioner-association is a society registered under the Societies Registration Act, 1860, formed for promoting, inter alia, the study and practice of Radio-diagnosis, ultra-sound, CT, MRI and other imaging modalities.

Members of the Association are medical practitioners who are imaging specialists engaged, inter alia, in foetal imaging, generally known as Sonologists/Radiologists and are governed by the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and Rules, 1996 (for brevity, PC&PNDT Act of 1994 and Rules, 1996).

3. According to the petitioner, ultra-sonography is a diagnostic technique which utilizes sound waves and reflections

leading to imaging of diverse muscular or soft tissue organs/ parts of human body for detection of disorders, abnormalities or malfunctioning. It is a non-invasive technique which does not have any side effects or after effects and is, therefore, widely used in India and abroad for diagnostic examination of diverse organs and parts of the human body, including heart, liver, bladder, abdomen, kidneys, intestines, pancreas, prostate etc. Since it is non-invasive and has no radiation hazard, ultra-sonography has proved to be a boon in evaluating the foetus during pregnancy.

Primary challenge

4. In this petition, the petitioner has challenged the action of Collector and District Magistrate, Kolhapur in issuing Circular dated 10 March 2010 whereby all doctors, sonologists and radiologists practicing in Kolhapur District are called upon to install device 'Silent Observer' in their sonography/ultra-sound machines. According to the petitioner, this machine and its software enables the Collector to directly review at district headquarters at Kolhapur to scan images of the patient which is illegal, against the provisions of the Act and invades privacy of the patients. It is contended that under the Rules, the ultra-sound clinics and other bodies governed by Act and the Rules are given time upto 5th day of the next month for submitting information in the format which is to be signed by the doctor and the patient. However, public notice dated 14 January 2011 (exhibit 'F') issued by the Collector and District Magistrate requiring the doctors/sonologists/radiologists to transmit form -F on-line within 24 hours is without authority of law.

Defence of Collector and District Magistrate

5. Collector and District Magistrate, Kolhapur has filed affidavit-in-reply dated 28 February 2011 submitting, inter alia, as under:-

5.1 Vide notifications issued under Section 17 of the Act, the Collectors and District Magistrates as well as Civil Surgeons or Deans of Medical Colleges (where Civil surgeons are not available) at every district level, are appointed as appropriate authorities. Reference is made to the power conferred by the Act and the Rules on the appropriate authority for enforcement of the provisions of the Act and the Rules.

5.2 (a) The Collector and Civil Surgeon found that Kolhapur district is having the worst sex ratio 839 females per 1000 males. After understanding the magnitude of the problem and illegal use of sonography centres for sex selection test resulting in female foeticide, the Collector organized the workshop of doctors/radiologists/sonologists.

(b) Kolhapur has 250 sonography centres as on 1 January, 2011 and each month more than 12000 sonography tests are being conducted on pregnant women in the district i.e. 1,50,000 tests per annum in the district. Sonography centre has to maintain, as per Section 4 and Rule 9, record of each test on the pregnant woman in form 'F'. It is mandatory for the sonography centres to submit form 'F' to the office of the Civil Surgeon (District Appropriate Authority) by fifth of next month. The district and sub-district appropriate authorities are required to inspect each

centre once in three months to check whether the sonography centre has maintained the record properly or not. It requires a lot of manpower to monitor the submission of `F' form from all centres and its analysis for necessary action under the Act and the Rules. The overburdened district and sub-district authorities also entrusted with other public duties, find it almost impossible to carry out 100% inspection and to study and scrutinize `F' forms being received in such large numbers every month.

5.3. The district administration came across two blatant violations of the Act viz. under-reporting and false reporting of sonography tests.

- (a) Under-reporting is not filling `F' form even though sonography test is conducted on a pregnant woman, for the sole purpose of sex determination resulting in female foeticide.

- (b) False reporting is wrong mentioning of age of the foetus and incorrect and wrong particulars in the other relevant columns. It was noticed that even when the health, growth and other indicators of foetus is normal, many doctors/radiologists submit incorrect report of pre-natal diagnostic procedure and recommend Medical Termination of Pregnancy. Checking of `F' form after considerable long time lag was not yielding desirable result as the appropriate authority was unable to detect the sex selection abortion being carried out.

- (c) Study on doctors perspective on PC&PNDT Act shows that 55.9% of the doctors stated that the information submitted was absolutely false and 41.2% stated that they were not sure. Almost all, 97% of the doctors confirmed that there is demand for gender determination of foetus by patients (exhibit `M').

Several studies have shown that almost 70% of form `F' are incomplete whether deliberate or not.

6. In order to overcome these problems, the District administration evolved the impugned methods:

6.1 The on-line `F' form facilitates to fill in all 19 columns of form correctly and upload on daily basis. It also helps the district authority, namely, Civil Surgeon to analyse the monthly data expeditiously because on-line record in form `F' is readily available on computers for the analysis and, action if needed, and for corrective course for proper enforcement of the Act. This new scientific innovation of on-line `F' form is an added tool in the hands of district appropriate authorities for analysis of huge data (more than 12000 `F' forms on average per month) to take needful action.

6.2 Otherwise also, the information submitted in `F' form in hard copy was required to be scrutinized and analysed by the District administration and as indicated above, the number of `F' forms being received every year in Kolhapur district alone being 1.5 lakh, it was not possible for the administration to analyse the information submitted in `F' forms in such a large number. With on-line submission of `F' forms, it is possible for the appropriate authority to

analyse the data by referring to a few parameters like age of the foetus, number of children the pregnant woman already has etc.

6.3 On-line submission of `F' form is in consonance with the spirit and object of Section 4 and Rule 9.. which already require the sonography centre to submit submission of forms `F' every month. All sonography centres, in addition to on-line submission, still keep `form `F' manually in printed form where they sign and obtain signature of the patient undergoing sonography test.

6.4. After installation of silent observer on the ultra-sound machines in the sonography centres in Kolhapur district, reporting of sonography tests of pregnant women has increased to 34%. At the hearing also, Mr. Kumbhakoni, learned counsel for the Collector and District Magistrate, Kolhapur has placed before us the statement giving details of the number of `F' forms submitted in October 2009 and in May 2011 as under:-

| <u>Month</u> | <u>Kolhapur Rural</u> | <u>Kolhapur City</u> | <u>Kolhapur District</u> |
|--------------|-----------------------|----------------------|--------------------------|
| October 2009 | 4,932 | 4,970 | 9,902 |
| June 2010 | 6,618 | 5,290 | 11,908 |
| May 2011 | 8,909 | 6,688 | 15,597 |

7. It is the specific case in the reply affidavit that the information contained in `F' form submitted on-line is not accessible to anyone except the Collector and District Magistrate.

8. The second solution found out by the District Collector and District Magistrate, Kolhapur and Civil Surgeon is installation of silent observer (SIOB). Together with on-line submission of `F' forms, the silent observer addresses both the problems of under-reporting or false-reporting. As soon as doctor/radiologist opens the sonography

machine, the silent observer captures and stores the video output of each sonography test which shows the age of foetus and abnormality if any. Thus, each sonography test is counted and can be cross-checked with the 'F' form submitted on-line. In case of suspected medical termination of pregnancy, the district administration can check the 'F' form and verify the truthfulness by comparing video of sonography test. For instance, in order to show that the MTP is for medical purpose and not as a result of sex selection, the age of aborted foetus is normally shown as below 12 weeks, in which case the sex is not necessary to be mentioned in the report. In order to escape from the provisions of the Act, many doctors/radiologists indulge in false reporting in form 'F' in this fashion. By cross-checking, the information submitted in 'F' form on-line with the data stored in the silent observer, it is possible for the appropriate authority to detect false reporting in form 'F' and then to track down MTP for the purpose other than the medical purpose.

9. Rule 9(6) of the PC&PNDT Rules provides that all case-related records, forms of consent, laboratory results, microscopic pictures, sonographic plates or slides, recommendations and letters shall be preserved for two years. With few exceptions, no sonography centres preserve such records except 'F' form. What the silent observer or SIOB does is, facilitate storage of video record of each sonography test. The silent observer is embedded on the ultra-sound machine which remains in the concerned sonography centre. The information stored in the said silent observer is not transmitted on-line to any authority but it remains stored in the device installed on the ultra-sound machine. It is accessed by the appropriate authority only when required in case of suspected MTP after sex selection.

10. In paras 10 and 31 of the affidavit-in-reply, the Collector and District Magistrate, Kolhapur (respondent No.3) has specifically stated as under:-

“.....Respondent No.3 submits that petitioner has stated without ascertaining the facts and functions of SIOB that it enables the Respondent No.3 to directly review at his district level (Kolhapur District) the scanned images of a patient is not correct. The device SIOB stores the video of sonography tests of pregnant women carried out at the sonography centre and not transmitted to district server for viewing by the Collector. The SIOB is sealed in presence of the concerned doctor/Radiologist with his signature. The Appropriate Authority, whenever it deems fit, request the concerned doctor/Radiologist and his authorized person go to the centre and access the selected data on pen drive and it is being viewed by a member of Radiologist Association of Kolhapur and they offer us their observation.

Hereto annexed and marked as Exh. `C` is the protocol made for use of “silent Observer”.”

31..... Silent Observer is not connected to any district server, no internet is connected to Silent Observer. The appropriate authority with the help of silent observer can check for suspected centres and suspected cases like pregnant females with one or more previous girls, pregnant females with age of 35 and above. The solution also provides various medical data of the entire district that can be used for various decision making.”

11. It is further stated in the affidavit-in-reply that the Collector and District Magistrate, Kolhapur alongwith Civil Surgeon, Chairperson of Federation of Obstetric and Gynecological Societies of India and Chairperson of Radiologist Association organized a one day workshop at Kolhapur on 8 March 2010 and demonstrated the new device i.e. SIOB or popularly called the “silent observer”- to all the doctors/radiologists and sonologists present at the workshop and the object of installation of silent observer. It was also explained that this device will help the administration in solving the problem of under-reporting and false-reporting. It will protect the practitioners doing

ethical and legal practice and will act as a deterrent against sex selection practice resulting in female foeticide. All the doctors/radiologists present at the workshop agreed and resolved unanimously to install the silent observer (SIOB) at their own cost as concerned citizen of India to curb the illegal practice female foeticide and improving the sex ratio and it was, thereafter that the Collector and District Magistrate, Kolhapur issued letter dated 10 March 2010 (exhibit `A') appealing to all the doctors and radiologists in the district to install the silent observer at the earliest. All 250 sonography centres in Kolhapur district have installed the silent observer at their own cost and there is not a single complaint to any higher authority.

Central Government stand

12. At the hearing of this writ petition, Mr. Anurag Gokhale, learned counsel for Union of India has placed on record office memorandum dated 16 June 2011 issued by the Director, Ministry of Health & Family Welfare (PNDDT Division) to the learned Additional Government Advocate on the subject matter of the present petition, which reads as under:-

“The undersigned is directed to refer to your letter dated 4961/LIT/2011 dated 24.5.2011 on the subject cited above and to convey that the declining child sex ratio and the reducing number of girl children in many states as per 2011 Census is a matter of great concern.

2. Tracking of pregnancy tests and detection of unreported termination of pregnancies have been a challenge for Appropriate Authorities in monitoring the activities of clinics offering diagnostic services. Clearly, it is the mandate of the Appropriate Authorities to effectively implement the PC & PNDDT Act, 1994, as provided under Sub-section 4 of Section 17 of the Act. District Appropriate Authorities thus have the discretion to facilitate the mechanisms to check illegal sex

determination tests, including innovative strategies like the `Silent Observer` among others.

3. This issues with the approval of competent authority.”

Sd/-
Director
(PNDT Division)

Rival Submissions

13. At the hearing of the petition, the learned advocate as well as the learned counsel for the petitioner sought discharge, as the Coordinator of the petitioner-association himself desired to argue the case. Accordingly, Dr. Jignesh G. Thakker, Coordinator of the petitioner-association made the following submissions:-

- (i) The impugned letter/circular of the Collector and District Magistrate, Kolhapur requiring the doctors/radiologists /sonologists to submit form `F` is without authority of law and not supported by any provision of the Act or the Rules.
- (ii) The patient gives consent for sonography test to be conducted by the concerned doctor/radiologist/sonologist and gives no consent for giving access to the information contained in the sonography test to any other person. Hence, there is invasion into the patient's right to privacy.
- (iii) The sonography test is undertaken by a pregnant woman in view of faith and trust on the radiologist/sonologist/doctor that all the information relating to the test will remain confidential and private. However, the impugned actions of the Collector and District Magistrate, Kolhapur result into breach of confidentiality and privacy and therefore, constitute an offence punishable under section 72 of the Information Technology Act, 2000.

14. On the other hand, Mr. Kumbhakoni, learned counsel for the Collector and District Magistrate, Kolhapur, Mr. V.D. Patil, learned Government Pleader for the State of Maharashtra and Mr. Anurag Gokhale, learned counsel for respondent No.1 Union of India have opposed the petition and made the following submissions:-

- (i) The appropriate authorities under the Act are required to supervise and implement the provisions of the Act and the Rules and to take appropriate legal action against the use of any sex selection technique by any person at any place suo motu or otherwise and also to undertake independent investigation. The appropriate authorities also have the powers to summon any person who is in possession of any information relating to violation of possession of any Act or the Rules and to produce any document or material object relating thereto. The appropriate authorities have also power to issue search warrant for any place suspected to be indulging in sex selection techniques or prenatal sex determination.
- (ii) Section 4 and Rule 9 also require the ultra-sound clinic to preserve the records and documents for a period of two years and to afford all reasonable facilities for inspection of the place, equipment and records to the appropriate authority or to any other person authorized by the appropriate authority. Rule 9(8) also requires the ultra-sound clinic to submit the information in form 'F' by fifth day of the next month. Hence, requiring the ultra-sound clinics to submit 'F' forms on-line is only requiring the ultra-sound clinics to submit information in electronic form which is otherwise also required to

be submitted by the ultra-sound clinics in physical form. Referring to the averments made in the affidavit-in-reply as to how on-line submission of 'F' forms will help the authorities in making proper analysis of the data submitted in large numbers (almost more than 1,50,000 forms of ultra-sound test done on pregnant women in one district alone in a year, it would not be possible to make proper analysis and to enforce the Act and the Rules, if such information is not received by the appropriate authority in electronic form.

- (iii) Only the appropriate authority has access to this information and only the appropriate authority can assign the work of analysis to the officer authorized by the appropriate authority. Since the existing provisions of the Act and the Rules themselves require the ultra-sound clinics to give access to the information to the appropriate authorities and to the officers authorized by the appropriate authority, and the on-line information is not available on public domain, there is no question of breach of privacy right of the patient
- (iv) It is only on account of introduction of on-line submission of 'F' form that the authorities have been able to overcome the problem of under-reporting of 'F' forms as per the data given. The statement placed on record by the Collector and District Magistrate shows the number of 'F' forms in 250 ultra-sound centres in Kolhapur district has gone up from 9,902 in October 2009 to 15,597 in May 2011.
- (v) As regards the silent observer, it is submitted after referring to the relevant averments in the reply affidavit that silent observer does not transmit the information

stored in the device embedded on the ultra-sound machine to the office of the Collector through any district server or any other server but it very much remains within the premises of the registered ultra-sound centre. Otherwise also, the registered ultra-sound centre is required to store all its records, registers, sonography slides etc. for a period of two years. The silent observer stores images generated during the ultra sonography test, so that when the appropriate authority desires, or the officer authorized by the appropriate authority is required, to cross-check the information supplied in the 'F' form on-line, the appropriate authority or authorized officer will go to the ultra-sound centre and obtain the information stored in the silent observer in the presence of the concerned radiologist/sonologist and in the presence of another radiologist/sonologist of the District.

- (vi) It is submitted that there are sufficient safeguards for ensuring that there is no breach of privacy rights of the patient and that the Collector and District Magistrate welcomes any further suggestions or any other safeguards which may be made or suggested by the petitioner-Association or others.
- (vii) Mr. Kumbhakoni has lastly submitted that the impact of innovative measures introduced by the Collector and District Magistrate, Kolhapur is so significant that the sex ratio, which was 839 girls as to 1000 boys in the district in May 2010, has gone upto 876 girls as to 1000 boys in January 2011. It is submitted that the innovative initiatives taken by the

Collector and District Magistrate, Kolhapur may not be interfered with.

15. Having heard the coordinator of the petitioner-Association and the learned counsel for the respondents, we have given our anxious consideration to the rival submissions.

Statutory Provisions

16. Before dealing with the submissions, we may refer to the relevant provisions of the Act and the Rules. The scheme of the PC&PNDT Act and Rules thereunder has very recently been examined by a Full Bench of this Court in Judgment dated 6 June 2011 in Writ Petition No.7869 of 2010.

17. The preamble to the Act which was initially enacted in 1994 and which underwent substantial amendments in 2003 indicates that it is an Act to provide for the prohibition of sex selection, before or after conception, and for regulations of pre-natal diagnostic techniques and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto.

18. The Act came to be amended by Amendment Act 14 of 2003. The Statement of Objects and Reasons to the Amendment Act, inter alia, read as under :-

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

Government, which has necessitated amendments in the said Act.

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

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

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

(emphasis supplied)

19. Having realized that ultra sonography on a pregnant woman with an ultrasound machine is an very important part of the sex determination test and procedure, which is being misused, Parliament has made a specific reference to sonography and ultrasound machine and other machines in some of the newly inserted sections and also by amendments to existing provisions.

Sub-section (1) of amended section 4 now specifically provides that the person conducting ultra sonography on a pregnant woman has to maintain the complete record thereof in the manner prescribed in the Rules and any deficiency or inaccuracy found therein amounts to contravention of Section 5 and 6, unless contrary is proved by the person conducting such ultra sonography.

Sub-section (2) of amended section 4 mentions the purpose/s for which, and for which alone, the pre-natal diagnostic test or procedure can be conducted.

Section 6 also specifically prohibits 'any genetic clinic... or any person' from conducting any pre natal diagnostic techniques including ultra sonography for the purpose of detecting sex of foetus.

20. Section 23 provides that any medical geneticist, gynecologist, registered medical practitioner or any person who owning a Genetic Centre, etc., or is employed to render his professional or technical services to or at such a centre, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment for a period upto three years and with fine which may extend to ten thousand rupees, which may extend to five years and with fine which may extend to fifty thousand rupees, in case of subsequent conviction.

Sub-section (2) of section 23 even provides that the name of the errant registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action.

21. Section 17(4) of the Act, even prior to the Amendment Act of 2003, provided that the Appropriate Authority shall perform various functions including the following :-

- (c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action; and
- (d) any other matter which may be prescribed.

Section 17-A inserted by the Amendment Act, 2003 confers additional powers on the Appropriate Authority including the power in respect of :

- (c) issuing search warrant for any place suspected to be indulging in sex selection techniques or prenatal sex determination ; and
- (d) any other matter which may be prescribed.

22. Section 29 provides for maintenance of records and preservation of such record for a period of two years till the final disposal of proceeding under the Act. Section 30 of the Act read with Rule 12 confers power to search, seize and seal records and ultra-sound machine.

23. Section 32 confers upon the Central Government powers to make rules for carrying out the provisions of the Act, ;

- (xiii) the manner in which the seizure of documents, records, objects, etc., shall be made and the manner in which seized list shall be prepared and delivered to the person from whose custody such documents, records or objects were seized under sub section (1) of Section 30.

In exercise of the aforesaid powers under Section 32 read with Section 30 the Central Government has made the Pre conception and Pre- natal Diagnostic Techniques (Prohibition of Sex Selection) Rules 1996.

24. Rule 9 provides for maintenance and preservation of records and sub-rule (6) provides for particulars of the manner in

which the records are to be maintained and also provides that all case related records, forms of consent, laboratory results, microscopic pictures, sonographic plates or slides, recommendations and letters shall be preserved by Genetic Centre etc., for a period of two years from the date of completion of counseling, pre- natal diagnostic procedure or pre-natal diagnostic test, as the case may be. In the event of any legal proceedings, the records etc., shall be preserved till final disposal of the legal proceedings.

Rule 9 (7) further provides that in case the Genetic Clinic etc. maintains records on computer or other electronic equipment, a printed copy of the record shall be taken and preserved after authentication by a person responsible for such record and further that such centre is required to send a complete report in respect of all pre conception or pregnancy related procedures/techniques /tests conducted by them in respect of each month by fifth day of the following month to the concerned Appropriate Authority.

Sub rule (1) of Rule 11 provides that Every Genetic Centre, Ultrasound Clinic etc., or any other place where any of the machines or equipments capable or performing any procedure, techniques or test capable of pre- natal determination of sex or selection of sex before or after conception is used, shall afford all reasonable facilities for inspection of the place, equipment and records to the Appropriate Authority or to any other person authorized by the Appropriate Authority.

Rule 12 lays down the procedure for search and seizure as under:

“12. The Appropriate Authority or any officer authorized in this behalf may enter and search at all reasonable times any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Imaging Centre or Ultrasound Clinic in the presence of two or more independent witnesses, for the purposes of search and

examination of any record, register, document, book, pamphlet, advertisement, or any other material object found therein and seal and seize the same if there is reason to believe that it may furnish evidence of commission of an offence punishable under the Act.

Explanation-In these rules-

- (1) “Genetic Laboratory/Genetic Clinic/ Genetic Counselling Centre” would include an ultrasound centre/imaging centre/nursing home/hospital/institute or any other place, by whatever name called, where any of the machines or equipments capable of selection of sex before or after conception or performing any procedure technique or test for pre-natal detection of sex of foetus, is used;
- (2) **“material object” would include records, machines and equipments; and**
- (3) “seize” and “seizure” would include “seal” and “sealing” respectively.

(emphasis supplied)

Discussion

25. A bare perusal of the aforesaid statutory provisions, both in the Act and in the Rules framed thereunder, makes it abundantly clear that an ultra sonography test on a pregnant woman is considered to be an important part of a pre-natal diagnostic test or pre-natal diagnostic procedure, which cannot be conducted except for the purpose of section 4(2). The person conducting ultra sonography on a pregnant woman has to maintain a complete record thereof in the manner prescribed in the Rules and a deficiency or inaccuracy in maintaining such records would amount to an offence, unless the person conducting such sonography is able to show that there was no deficiency or inaccuracy.

26. In our opinion, the aforesaid provisions of the Act and the Rules make it amply clear that the persons running the sonography clinic/sonography centre etc. are required to store, maintain and

preserve the complete records including the sonography plates or slides for a period of two years from the date of pre-natal diagnostic techniques procedure/test and that in the event of legal proceedings, such records, letter etc. have to be preserved in light of the legal proceedings. The sonography clinic is also required to send a complete report in respect of a pre-conception of pregnancy related procedure for technical procedure or test conducted by them in respect of each month for the perusal of the concerned appropriate authority. As per Rule 11(1) the Clinic is also duty bound to afford all reasonable facilities for inspection of equipments and records to the appropriate authority or any other person authorized by the appropriate authority and such authority/authorized officer has also been vested with the power to search, seal and seize such equipments/records. All these provisions are required to be read with the express power conferred by section 17(4) of the Act which empowers the appropriate authority to take immediate action in case of breach of the provisions of the Act or the Rules.

27. We find considerable substance in the submission of Mr. Kumbhakoni, learned counsel for the Collector and District Magistrate, Kolhapur that if the number of `F' forms giving particulars about sonography test conducted on pregnant women in Kolhapur district alone runs into almost 1,50,000 `F' forms per year or 15,000 forms per month, and if they are not submitted on-line, it will be impossible for any appropriate authority or officer authorized by the appropriate authority to make any meaningful scrutiny and analysis of `F' forms being received in such large numbers. The on-line submission of `F' forms in such large numbers has four distinct advantages.

In the first place, the sonography centres sending such forms in physical form very often take the plea in the prosecution under the Act that some columns in the form were not filled in inadvertently, but there was no mens rea and, therefore, the appropriate authority should not take a harsh view by prosecuting the radiologist/sonologist merely for incomplete information submitted in 'F' form. The advantage of the on-line submission of 'F' form will be that if any column in the form is left blank, the form will not be accepted on-line. Hence, the person filling in the form is immediately alerted that some column/s in the form/s is/are incomplete. Hence, all the columns in form 'F' will have to be filled in.

The second advantage will be that since 'F' form is to be submitted on-line within 24 hours, the concerned persons required to submit the information in 'F' form will have to complete their work on day-to-day basis and, therefore, will have no excuse to plead that the information cannot be submitted after lapse of one month. In fact, having gone through the contents of 'F' form, we find that it would be possible for the person assisting the radiologist/sonologist to fill in the form immediately after the sonography test is undertaken.

The third advantage is to the district administration. On account of a large number of such 'F' forms being received on-line (15,000 per month in one district), it will be possible for the appropriate authority and the officer authorized by it to make a meaningful scrutiny and analysis of the 'F' forms by searching the relevant data such as age of the foetus, the number of children of the pregnant woman as on the date of the sonography test, etc. This will help the Appropriate Authority to zero in on cases where MTP was resorted to after sex selection.

The fourth advantage will be that Section 17(4) requires the Appropriate Authority to "take immediate action" in case of complaints of breach of provisions of the Act and the Rules, but it would not be possible to take immediate action if the authority had to wait for submission, hard copy of the "F" form till the 5th day of the next month. In every field electronic filing is to be followed by submitting paper documents. Hence the instructions to submit "F" form on-line within 24 hours are in keeping with the letter and spirit of Section 17(4).

28. Coming to the "silent observer", the entire petition is based on the premise that the information stored in the silent observer which contains the images of ultra sonography on all patients will be transmitted on-line and will be available in public domain and thereby would violate the privacy rights of the patients undergoing ultrasonography. The entire premise and the apprehension based thereon is without any basis. The affidavit of the Collector and District Magistrate, Kolhapur states in terms that the silent observer is embedded on the ultra-sound machine, that the images stored therein are not at all transmitted on-line to any server, and that it is only for the purpose of cross-checking the information supplied in the 'F' forms submitted on-line, that as and when any violation of the Act and the Rules is suspected, the appropriate authority will obtain the images stored in the silent observer for the purpose of cross-checking the information submitted in the 'F' form on-line. Since the appropriate authorities have been invested specifically with the power to take appropriate legal action against the use of any sex selection or sex determination technique by any person at any place even suo motu as provided in section 17(4)(e), and section 17-A also specifically empowers the appropriate authority to summon any person who is in possession of the information relating to violation of the provisions of

any Act or the Rules and to obtain production of any document or any material object relating to violation of the provisions of the Act and also to issue search warrant for any place suspected to the indulging in sex selection techniques or pre-natal sex determination and proviso to section 4(3) specifically provides that the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic and Rule 9 also provides that all case-related records, microscopic pictures, sonographic plates or slides etc. are required to be preserved in the sonography centre for a period of two years and Rule 9(8) also requires the Ultra-sound Clinic to send a complete report in respect of all pre-conception or pregnancy related procedures/techniques/tests conducted by them to the concerned appropriate authority, in our view, the instructions sent by the Collector and District Magistrate, Kolhapur requiring the sonologists/persons incharge of ultra-sound machines to install SIOB (popularly known as silent observer) are within the letter and spirit of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act and Rules made thereunder.

29. In *State of Maharashtra v. Praful B. Desai*,¹ and in *Sakshi v. Union of India and others*,² the Supreme Court has held that the principles of interpreting an ongoing statute have been specifically set out by the leading jurist Francis Bennion in his commentaries titled Statutory Interpretation:-

"It is presumed Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

1 (2003)4 SCC 601

2 (2004)5 SCC 518

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters....

An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials."

(emphasis supplied)

30. The Supreme Court then noted that the above principle of updating construction has been approved in a number of decisions. "Handwriting" in Section 45 of the Evidence Act is construed to include "typewriting"; "notice in writing" construed to include a notice by fax"; "telegraph" to include "telephone"; "banker's books" to include "microfilm"; "to take note" to include the "use of tape recorder", and "documents" to include "computer databases".

31. In *Sakshi v. Union of India and other (supra)*, the Court has also held that there is a major difference between the substantive provisions defining the crimes and providing punishment for the same on the one hand and procedural enactments on the other hand. Rules of procedure are handmaidens of justice and are meant to advance and not to obstruct the cause of justice. It is, therefore, permissible for the Court to expand or enlarge the meanings of such provisions to elicit the truth and do justice to the parties.

32. The Parliament has taken notice of the socio-cultural mindset of the people as regards the circumstances in which they resort to female foeticide after ascertaining sex of the foetus. When the number of `F' forms being received by the appropriate authority in a district runs into a large number like 15,000 forms of pregnant women undergoing ultra-sonography test in a single district in a month and more than 1,50,000 sonography tests on pregnant women in a single district in a year, the object of the Act requiring the ultrasound clinics to submit information in `F' form and giving the Appropriate Authority power to inspect the place, equipments and records for the purpose of investigating violations of the PC&PNDT Act and the Rules can be fulfilled if, and only if, the `F' forms are submitted on-line and such information can be cross-checked with the sonography slides in the silent observer.

33. Hence the requirement of sub-section (1) of Section 4 of the Act to maintain the complete record of ultra sonography on pregnant women and the mandate of Section 17(4) of the Act requiring the Appropriate Authority to take immediate action on investigation of complaints of breach of provisions of the Act and the Rules would include the power to require the ultrasound clinic to submit the on-line information in form `F' within 24 hours, and to keep the ultra sonography slides stored in the silent observer embedded on the ultrasound machine.

34. As regards reliance placed by the petitioner on the provisions of Section 72 and 72A of the Information Technology Act, 2000, we find no merit in this contention. Section 72 refers to a person having got access to the electronic record in pursuance to any powers conferred by Information Technology Act, 2000 or the Rules and Regulations made thereunder. Obviously, the information

received by the appropriate authority through `F' forms on-line are not received in exercise of any powers under the Information Technology Act,2000 nor under the Rules and regulations thereunder. Moreover, Section 72 as well as 72-A both specifically provide that those provisions are subject to any other law for the time being in force. The provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and the Rules thereunder, therefore, definitely prevail over the provisions of sections 72 and 72-A of the Information Technology Act, 2000.

35. As regards the allegation of invasion of privacy rights, it is amply clear from the affidavit of the Collector and District Magistrate, that the images stored in the silent observer are not transmitted on-line to any server and thus they remain very much part of the ultra-sound machine on which the silent observer is embedded and that the silent observer is to be opened only in the presence of the concerned radiologist/sonologist/doctor incharge of the Ultra-sound Clinic.

Silent observer is an electronic device which is attached to Sonography machine. In the event of the appropriate authority needing to check the sonographies which have taken place through a particular machine, the appropriate authority i.e. the Collector/the civil surgeon may himself or his authorized officer will have to actually go to the site of the ultra-sound machine and it is only on the authorization of Collector that the silent observer can be removed from a particular ultra-sound machine and only on putting the user name and password under the control of Collector that the officer can actually see the sonographies done with the ultra-sound machine on a Computer. Moreover, mere seeing of these sonographies by lay person would be of no help and hence as per the protocol made by appropriate authority under the Act, whenever the silent observer is to

be opened, presence of the concerned doctor at the sonography center as well as a third expert doctor would be necessary. The protocol made by the appropriate authority for seeing the results of the silent observer is annexed to the reply affidavit at exhibit 'C'.

36. In view of the above factual backdrop, the submission that there will be violation of privacy rights is without any substance. Even so, we may refer to the decisions of the Apex Court having some bearing on the subject.

37. In *R. Rajagopal alias R.R.Gopal and another v. State of T.N. and others*¹ the Supreme Court considered the right of privacy vis-a-vis a right of the press laid down under Article 19 of the Constitution and laid down, inter alia, the following principles:-

"(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent - whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

38. In *Sharda v. Dharmpal*² a three Judge Bench of the Supreme Court explained the interplay between the right to privacy on the one hand and public interest on the other hand in the following terms:-

"56. With the expansive interpretation of the phrase "personal liberty", this right has been read into Article 21 of the Indian Constitution. (See *R. Rajagopal v. State of T.N.*¹ and

1 (1994)6 SCC 632

2 (2003)4 SCC 493

*People's Union for Civil Liberties v. Union of India*³. In some cases the right has been held to be amalgam of various rights.

57. But the right to privacy in terms of Article 21 of the Constitution is not an absolute right.

58. In *Gobind v. State of M.P.*⁴, it was held :

"Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest."

59. If there were a conflict between fundamental rights of two parties, that right which advances public morality would prevail. (See '*X v. Hospital 'Z'*'⁵, and '*X v. Hospital 'Z'*'⁶. In *R. Rajagopal v. State of T.N.*, , this Court upon formulating six principles, however, hastened to add that they are only broad principles and neither exhaustive nor all-comprehending and indeed no such enunciation is possible or advisable.

60. In *Gobind v. State of M.P.*,⁴ it was held :

"28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."

(emphasis supplied)

39. In *Mr. 'X' v. Hospital 'Z'*⁵ after referring to the principles laid down in *R. Rajagopal v. State of T.N.* (Supra), the Apex Court referred to Article 8 of the European Convention on Human Rights and then laid down the following principle:-

"26. As one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action

3 (1997) 1 SCC 301

4 (1975)2 SCCP.157, para 31

5 (1998)8 SCC 296

6 (2003)1 SCC 500

as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.

In that case, the appellant was suffering from HIV positive. The doctor in the respondent-hospital disclosed this fact to the persons related to the girl to whom the appellant intended to marry. The Court held that the girl had a right to know about the HIV positive status of the appellant.

40. Having regard to the aforesaid principles and considering the matter in the factual backdrop already highlighted hereinabove that the information contained in 'F' form submitted on-line is submitted only to the Collector and District Magistrate and that except the authorized officer no third party can have access to it and that the information contained in the silent observer remains embedded on the ultrasound machine and that after analysis of the information contained in 'F' form submitted on-line, the appropriate authority or the officer authorised by the authority has to access the information contained in the silent observer including the visual images, we are of the considered opinion that there is no violation of the doctor's duty of confidentiality or the patient's right to privacy. The contours of the right to privacy must be circumscribed by the compelling public interest flowing through each and every provision of the PC&PNDT Act, when read in the background of the following figures of declining sex ratio in the last five decades:

| Year | <u>No. of girls per 1000 boys (in the age group 0-6 years)</u> | |
|------|--|-------------|
| | National Average | Maharashtra |
| 1961 | 976 | |
| 1991 | 927 | 946 |
| 2001 | 933 | 913 |
| 2011 | 914 | 883 |

While the Court cannot close its eyes to these depressing figures, the assertion of Collector and District Magistrate, Kolhapur that after introduction of the impugned innovative measures, the sex ratio in the district has gone up from 839 in May 2010 to 876 in January 2011- is certainly a heart warming eye opener.

41. In the above view of the matter, it is not necessary to consider the further submission on behalf of the respondents that the right of the unborn child to be born would also be a fundamental right, and therefore, when there is a conflict of fundamental rights of two parties, that right which advances public morality will prevail.

42. Accordingly, we find no merit in the challenge to the instructions of the Collector and District Magistrate, Kolhapur requiring the ultra sound clinics to submit the information in 'F' form on-line within 24 hours and to instal the "silent observer" on the ultrasound machine.

43. Before parting with the matter, in order to allay any apprehension that any person, other than the appropriate authority or a medical person may have access to such information, we make it clear that the appropriate authority shall not allow access to such data stored in a silent observer to a non-medical officer except himself and senior officers not below the rank of Deputy Collector and that no access shall be given to such images in silent observer to any lower officer of the Revenue Department or to any officer in the Police Department below the rank of Deputy Superintendent of Police, except when such information is required in connection with or, for the purpose of registration of an offence. As regards medical personnel, only medical officers of the rank of Civil Surgeon or Deans of medical college or

officers-incharge of the Primary Health Centre shall be given access to the images in the silent observer.

In our view, it will be open to the radiologist/sonologist/doctor incharge of ultra-sound clinic to require that such images in a silent observer may be accessed by such a medical officer in the presence of the appropriate authority or an officer authorised by the appropriate authority.

44. Subject to the above observations, we find no merit in this petition. The petition is accordingly, dismissed.

CHIEF JUSTICE

SMT. R.P. SONDURBALDOTA, J.