

CLAIMING DIGNITY

REPRODUCTIVE RIGHTS & THE LAW

ANUBHA RASTOGI



Human Rights Law Network's Vision

- To protect fundamental human rights, increase access to basic resources for the marginalised communities, and eliminate discrimination.
- To create a justice delivery system that is accessible, accountable, transparent, efficient and affordable, and works for the underprivileged. Raise the level of pro bono legal expertise for the poor to make the work uniformly competent as well as compassionate.
- Professionally train a new generation of public interest lawyers and paralegals who are comfortable in the world of law as well as in social movements, and who learn from such movements to refine legal concepts and strategies.

CLAIMING DIGNITY: REPRODUCTIVE RIGHTS & THE LAW

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Thank you very much.

A Terrible Crisis in the Making

Colin Gonsalves*

The Human Rights Law Network (HRLN) began doing public interest writ petitions to implement the reproductive rights of women in a rather spontaneous and incremental fashion. The Supreme Court decision in *Javed Vs State of Haryana* (2003 8 SCC 369) provoked much discussion among social activists because the Supreme Court had gone totally off the track. The judgement was a blunder of epic proportions.

Persons who were disqualified from contesting the Panchayat elections in Haryana filed a petition in the Supreme Court impugning the constitutionality of the State notifications laying down the norm. In these proceedings, the central government appears to have given the Supreme Court the impression that the two-child norm was indeed part of the national population policy. Nothing could be further from the truth. The consultations that took place prior to the announcement of the national population policy, showed that the two-child norm with its package of disincentives was emphatically opposed due to the anticipated adverse impact on poor women and hence omitted from the policy altogether.

The decision of the Supreme Court in *Javed's* case is a classic example of how a court can make a terrible mistake while dealing with an intricate social issue merely because the parties before the court are unable or unwilling to properly explain the complexities involved. The court made several mistakes.

Firstly, it relied on an obsolete 1960s Club of Rome framework and characterised "the torrential increase in the population ... as more dangerous than a hydrogen bomb (Russel)". It quotes with approval two obscure writers on the subject who say that "the rate of population growth has not moved one bit from 1979." This was very wrong. The truth is that India has experienced the sharpest fall in decadal growth from 23.81 in 1991 to 21.34 in 2001. This is the lowest population growth rate since Independence!

Secondly, it referred to the five-year plans from the first to the seventh (ending 1991) in which emphasis was placed on punitive disincentives and failed to notice the landmark departure within approach in the Cairo Conference (1994) with the emphasis now placed on development, quality of life, women's welfare, and the rejection of disincentives.

Thirdly, it failed to notice that none of the grounds taken in the petition related to the impact on women. Towards the end of the judgement under the title "incidental questions" reference was made to the impact on women but even these were dismissed out of hand. The court was not informed that population experts throughout the country were unanimous in their view that the impact on poor women would be immediate and severe.

Research carried out in the states of Orissa, Rajasthan, Haryana and Madhya Pradesh, following the decision of the Supreme Court, indicated that the norm to disqualify candidates led to the desertion of wives and families, seeking of abortions with the associated related health risks, giving away of children for adoption and initiation of new marriages by male elected members. Women bore the brunt of the disqualification clause.

For the breach of the two-child norm several states have put together a package of punitive measures including exclusion from elections, exclusion from ration cards, kerosene and other below the poverty line (BPL) incentives, denial of education in government schools to the third child and withdrawal of welfare programmes for Dalits and tribals. This two-child norm became effectively a two-boy norm and, despite the prohibition in the law, sex selections and determinations were done extensively in the country. As a result, the sex-ratio is skewed to such an extent that there were hospitals in Delhi reporting no female births for month after month and there were villages in India with no girls to attend schools. A terrible crisis is in the making.

The Human Rights Law Network (HRLN) has collaborated with many NGOs and academics to host the people's tribunal on India's coercive population policies and the two-child norm in 2004. Testimonies of victims and experts were taken. These proceedings are documented in an HRLN publication titled "Coercion versus Empowerment". Then the government at the Centre changed and the United Progressive Alliance (UPA) came to power. It must be said that the prime minister took a positive stand against the two-child norm and the crisis passed. The states dominated by the Bharatiya Janata Party continued to pursue this policy to varying degrees but with the central government withdrawing from the two-child norm the air was out of the tyres so to speak.

It was around this time that the Uttar Pradesh and Bihar Health Watch brought HRLN a case regarding the barbaric practices in the government's sterilisation camps where women were treated worse than animals. The Supreme Court's final order -- which came rather quickly and which directed the enforcement of the extensive government guidelines that were largely ignored -- came as a happy surprise. The Supreme Court directed the government to appoint qualified and experienced doctors to do sterilisations, carry out prescribed checks before doing any operation, obtain informed consent, ensure that the specified equipment were available, maintain proper records and statistics, hold enquiries in cases of malpractice and punish accordingly, bring into effect an insurance policy and pay compensation in appropriate cases.

Then the Voluntary Health Association of Punjab with the assistance of HRLN filed a writ petition in the Supreme Court seeking guidelines to plug the loopholes in the implementation of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. After holding a series of national consultations, detailed proposed guidelines were submitted to the Supreme Court. The matter is pending there.

In the meanwhile, despite the propaganda of the UPA, the situation of women on the maternal mortality and the morbidity front continues to deteriorate. The prime minister grandly announced the national rural health mission (NRHM) while simultaneously following a policy of privatisation of health care. Public health services intro-

duced and expanded the user fee system to such an extent that the poor today have to pay for their hospital bed, most of the medication, hospital food and bandages, injections, drips and diagnostic tests. Very often they have had to pay just to enter the hospital. So treacherous has been the central government and indeed all the state governments that it can be safely said that the right to health care declared by the Supreme Court in *Paschim Banga Khet Majdoor Samity Vs State of West Bengal* (1996 4 SCC 37) and *Consumer Education and Research Centre Vs Union of India* (1995 3 SCC 42), is illusory and unattainable and exists, as we Indians say, only on paper. And despite the victories that HRLN advocates have had in the courts, I would not hesitate to say that the judiciary has overwhelmingly and universally let down the people of India on the enforcement of the fundamental right to free public health care.

Hundreds of cases were reported throughout the country in which poor women, many of them in labour, were turned away from reputed government hospitals because they could not pay. For example, HRLN filed a case of Sushila Kumari, a Dalit woman, when we read in the newspapers that she was refused entry into a government hospital at Banda in the state of Uttar Pradesh and delivered her baby on the pavement. A writ petition was filed in the Allahabad High Court for punishment of the hospital officials and for compensation. I saw the little child a few months later and if there ever was a child of God, this was it! One would need all of the Almighty's protection to live after being born in circumstances as the poor are in this country and sadly most of the women affected are Dalits, tribals and minorities.

Closer to our office, our team worked for Shanti Devi, a woman who carried a dead fetus in her womb for days while she went from one government hospital to another in the capital city of Delhi and was turned away and treated with disrespect even as it was obvious to the hospital doctors that she was suffering from septicemia and likely to die. This is the brutal country. Globalisation has destroyed all morality and humaneness. Health care has become a thriving business, and the government ministers are more interested in handing over government land and facilities to private hospitals for commercial gain rather than looking after the health needs of the working people. I have no doubt -- realising that 80 percent of the poor get their health services from the private sector because the public sector has become bankrupt -- that the working people will one day rise in an insurrection against capitalism and all it represents. Nowhere do they suffer more as they do in the denial of health facilities by the State. It may well be one of the main reasons for revolution in this country.

At a later stage, came the intervention in the child marriage cases, which have showed steep decline in social values after Independence. Pioneering work against child marriages by socio-reform religious movements such as the Brahmo Samaj and Arya Samaj in 1860 and by Ishwar Chandra Vidyasagar and Raja Ram Mohan Roy played an important role in influencing the prohibition of husbands having intercourse with a wife who is below 10 years of age. In 1886, Behramji Malbari, a Parsi reformist succeeded in getting the British to ban Hindu Infant Marriage. In 1927, the minimum marriageable age was proclaimed to be 12 and 14 years for girls and boys respectively. The Child Marriage Restraint Act came into force in 1929, as a result of the consistent efforts of an eminent social reformer, Harvilas Sharda, after whom the 'Sharda Act' was named and the minimum marriageable age was raised to 18 (girls) and 21 (boys) respectively. Social reformers like Dayanand Saraswati and Mahatma Gandhi

did subsequent work in this field. Despite the fact that the first voice against this evil practice was raised nearly one-and-a-half centuries back, child marriages are still being practiced in India today.

The writ petition filed in the Supreme Court by HRLN on behalf of the Forum for Fact Finding, Documentation and Advocacy pleaded, and this is an accepted fact, that child marriages were being "celebrated" on a very large-scale particularly during festivals such as Ram Navami, Akshaya Tritiya, Karma Jayanti, Basant Panchami and Teej. More alarming was that officials justified the continuation of this evil practice on the basis of customs and traditions. In the petition numerous instances are cited where policemen, district officials and even ministers have attended child marriage celebrations where hundreds of "couples" are married off together in which these officials have been photographed blessing them.

With more than half the girls in this country marrying before they become adults it is no wonder that about 10 percent of all births are by adolescent girls. These adolescents contribute to the very high figures of maternal mortality and morbidity, the high rates of anemia, fetal wastage, miscarriage, still-births, and propensity to spontaneous abortions. These girls are denied their right to education.

This case is now pending in the Supreme Court and orders have been made for the Collectors and the Superintendents of Police in the districts to ensure that child marriages do not take place. There has been a noticeable drop in public celebrations but it is possible that child marriages have merely gone underground. In this regard, India seems to be far behind its neighbour Sri Lanka that has succeeded through expanded education, nutrition, and legislation to increase the age of marriage substantially.

The abortion cases brought to the courts highlight the terrible situation in which the abortion situation lies in the country. Eighteen percent of women in India die during child birth as safe abortion facilities are not available. Ninety percent of the six million induced abortions are illegally provided in unregistered clinics or by uncertified medical staff. The general attitude of men in Indian society, which is also reflected in the approach of the state is that they could not care less if women bled to death.

Niketa Mehta's case showed the obsolescence of the Medical Termination of Pregnancy (MTP) Act, 1971. Though its provisions are fairly liberal upto the twentieth week of pregnancies, after that abortions are permitted only if they are "immediately necessary to save the life of the pregnant woman". This cut off period was introduced in 1971 presumably because it was considered unsafe for the pregnant woman given the technology available for the performance of abortion in those days. Now, of course, the technology has vastly improved. The Indian law makes no exception for foetal abnormality or for the mental distress and trauma of the pregnant woman. This is in sharp contrast to other statutes prevailing in Europe. Niketa Mehta was therefore not permitted to abort the fetus, and the Bombay High Court made a terrible order. In the meanwhile, Niketa miscarried and the Supreme Court is to hear this case soon.

Nothing undermines the reproductive rights of women more than hunger, malnutrition and starvation. Professor Utsa Patnaik in her book "The Republic of Hunger" (Three Essays Collective, March 2007) concluded that during the years 1998 to 2003, per capita food grains absorption had fallen sharply to levels "not been seen for the last half century." Between 1990 and 2007, the annual absorption of food grains per

head came down "from 177 kg to 155 kg ... levels last seen in the initial years of World War II." She concluded that large sections of rural India "have been already reduced to the nutritional status of Sub-Saharan Africa." Inspecting the national sample survey (NSS) data on calorie intake corresponding to food consumed, she concluded that by the year 2000, 70 percent "of the rural population was below the norm of 2004 calories per day," meaning that "seven-tenths of the rural population was in poverty in 1999-2000."

To combat maternal mortality and morbidity arising due to malnutrition, the central government introduced the national maternity benefit scheme (NMBS) providing Rs. 500 to every BPL woman several weeks before delivery ostensibly so as to enable the woman to buy some food before delivery. The payments were restricted to the first two pregnancies. In 2007 or thereabouts the central government introduced the Janani Suraksha Yojana (JSY) to encourage institutional delivery. A seemingly impressive array of incentives was supposed to be paid to doctors, staff and to pregnant women if the deliveries were done at the institutional facilities. The vast majority of Indian women, however, preferred to have their babies at home and resist institutional delivery. A cursory enquiry revealed that this was because roads are bad, transportation is not available, institutional facilities are often like horror chambers and, most importantly, the staff in these facilities treat women with extreme indignity.

Without seeking to address the real concerns of women, the UPA Government embarked on an ambitious scheme to promote institutional delivery and to penalise women who had their babies at home. The government discontinued the NMBS wrongly linking it up with the JSY and took the stand, when challenged in the Supreme Court, that all that the government had done was to replace the NMBS with a more beneficial scheme. It was then highlighted to the Supreme Court that the Schemes operate in different fields. Whereas the NMBS is meant to provide nutrition before childbirth irrespective of where the delivery takes place, the JSY is meant merely to promote institutional delivery. Ultimately, after the intervention of the Supreme Court, orders were made directing the government to continue with both the programmes. Thus, the NMBS was saved. It must be said, however, that the implementation of this programme is extremely poor throughout the country and very few BPL women are given the pitiable amounts for the purchase of food.

HRLN has since conducted a series of cases in various High Courts and in the Supreme Court of India on the violence unleashed against women when they chose to exercise their right of choice. It has come to our attention that the young women were savagely attacked all across the country when they fell in love with boys outside their community, caste or religions. Many were killed in what are known as "honour killings." The most barbaric of these were the "acid attacks" where men threw acid on women, particularly on their faces, after being rejected. This left the women permanently scarred physically and emotionally. Prosecution of these offences were generally done under the causing "grievous hurt" section of the Indian Penal Code. It is only recent that the Karnataka High Court has held that the offence is an "attempt to murder", which carries the life sentence. This issue is now pending in the Supreme Court.

All in all, our limited experience in the Courts has taught us that there is tremendous potential for carrying out public interest litigation work on reproductive rights issues. The situation is so horrific and women are treated so terribly that even the most con-

servative judge cannot help but make an order to help the petitioner. It would, of course, help enormously if the Supreme Court were to, in an appropriate case, make a holistic order conceptually dealing with reproductive rights and situating them within the ambit of Article 21 -- the Right to Life. We would then have a new branch of constitutional law emerging in the country. In the meanwhile, innovative work can be done to bring practical relief to women particularly in the rural areas.

An array of fascinating writ petitions can also be done. For example, blood and emergency obstetric care facilities are not available in most community health centres (CHC) and many hospitals. Additionally, the CHCs and the public health centres (PHC) rarely have safe drinking water, and doctors, particularly gynecologists, anaesthetics, and other medical staff transferred to rural areas hang on to their posts in the city and refuse to serve in villages. The conditions in hospitals are visibly below standard. They are overcrowded, dirty, and devoid of basic equipment, hence need substantial upgrading. The traditional birth attendants and their vast body of traditional knowledge are being excluded completely in the national rural health mission. The misuse of drugs such as Oxytocin and its intra-muscular use for inducing labour is widespread, and non-availability of C-section facilities in CHCs is routine. The auxiliary nurse midwife system needs to be expanded and they desperately need training. The Indian public health standards must be enforced so that the norms for antenatal care, counseling, childbirth and postnatal care are realised. Additionally, user fees need to be abolished.

All in all, the struggle for a good quality and free public health system along the lines of that which exists in Cuba, is what we ultimately aspire for. Globalisation and the immorality it brings with it, is fundamentally antithetical to such a dream. The forces of globalisation in the field of health care can be summed up in three words "subsidiaries are bad". This new order of capitalism is therefore, oriented to making the poor pay for the services they need. In a country where 70 percent of the population is below a dollar a day, paying for health services is well nigh impossible. "Either you buy or you die" says the health minister. This is why the people die. At the same time, this principle of the supremacy of market forces, works admirably for the upper-middle classes. Magnificent hospitals are built in the cities and patients from all across the world come to India for professional medical services. For the rich who can afford to pay this works well. This is why we see grand hospitals for the rich and a broken down system for the poor. And our bureaucrats and judges who never visit public facilities haven't the foggiest idea how the people live.

*Colin Gonsalves is Founder Director of HRLN

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PART I

Introduction and Context Setting

UNDERSTANDING AND CONTEXTUALISING REPRODUCTIVE RIGHTS

This book has been put together with the intent of bringing under one heading Indian cases relating to Reproductive Rights so that there is a reality check on what is the judicial understanding on reproductive rights. Before we venture into the judicial responses and analyse whether the cases effect the issue in a negative manner or a positive one, some space needs to be devoted to understanding the concept of reproductive rights and its development, especially internationally.

There are various definitions of reproductive rights, in fact a number of international instruments and organisations use different terminology to address reproductive rights. We will refer to the definition used by the International Conference on Population and Development (ICPD) programme of action¹:

'Reproductive rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.'

One look at this definition enables the reader to understand that by asserting and implementing this one right, a number of violations specifically relating to women will get addressed automatically. For example, in an Indian setting if a woman has the space to decide whether she wants to marry or not, if she wants to marry who she wants to marry, whether she wants to have children or not, whether she wants to have children as a result of marriage or not, how many children does she want to have, when does she want to have those children, what will be the spacing between them, she will have to be empowered enough in her family to be able to freely decide on all these aspects. Even though, in the Indian setting this looks quite difficult to achieve, to begin with, at this stage where women are dying in the process of childbirth, the emphasis is on making the State accountable for the same.

It will be observed that the definition stated above is gender neutral, it refers to couples and individuals. Then why does it become a women's human rights issue? Simply

1. Programme of Action of the International Conference on Population and Development: Consensus document adopted by states participating in the International Conference on Population and Development

because, even though both the male and the female participate in procreation and at the moment, procreation is not possible without either, it is the female who has the biological responsibility to ensure the complete development of the foetus. The foetus grows on the body of the mother and takes its nourishment from her. The child after birth is dependent on the mother for its growth. Further, pregnancy has a larger and more lasting effect on the woman who is pregnant in comparison to her partner.

Having said that, if the woman then does not even have the space to decide, choose what takes place with her body, then this becomes an issue of women's human rights. Further, where the State refuses or is negligent in providing adequate and standardised health services especially in relation to access to information about contraceptive services and access to contraceptive services, safe and legal abortion services, safe, legal and hygienic delivery services, readiness to deal with emergencies during child birth then clearly the State is discriminating on the basis of sex.

Let us also, in brief, examine the history of development of the concept of reproductive rights internationally. Reproductive rights have been founded in the broader frame work of health rights. It can be argued that the infringement of reproductive rights goes beyond health and is even more a discrimination issue.

INTERNATIONAL DEVELOPMENTS ON REPRODUCTIVE RIGHTS

1946; Constitution of WHO²:

The WHO was established in 1946, which gives the definition of health in the most comprehensive manner:

"Health is a state of complete physical, mental and social well-being and not merely absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition." Though the expression 'sex' or 'gender' is not categorically mentioned here, which shows the early phase of Human Rights development, did not conceive women rights as separate Human Rights. •

1948; UDHR³:

Everyone has a right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, and housing and medical care and necessary social services and essentially, motherhood and childhood are entitled to special care and assistance. It sees right to health from a lens of 'standard of living', but it can be said the first reference to the right to health in any Human Rights document. It talks in plain and general terms and is not specific on reproductive health and rights. It also highlights other rights interrelated to the enjoyment of the right to health.

2. World Health Organisation

3. Universal Declaration of Human Rights

PART I

1966; ICESCR⁴:

This is the most important document on the issue of reproductive health and reproductive rights as it sees reproductive health and reproductive rights with an economic, social and cultural perspective.

The State parties to the present covenant recognize the right of everyone to enjoyment of the highest attainable standard of physical and mental health. The steps taken by the State parties to present covenant to achieve the full realization of their right shall include those necessary for the reduction of the still birth rate. Special protection should be accorded to mothers during a reasonable period before and after childbirth.

1968; The Proclamation of Tehran

According to this declaration, planning the size of family is an individual's or couples concern and not the State's. So, the liability to family and child protection is a concern of the international community and it enshrines the right to decide freely and responsibly the number and the spacing of their children as parents' basic human right. It restricts reproductive rights to the extent of family welfare and planning.

1978; Declaration of Alma-Ata:

This conference strongly reaffirms WHO's definition that health is a State of complete physical, mental and social well-being and not merely the absence of disease or infirmity, is a fundamental right that the attainment of the highest possible level of health is a most important worldwide social goal and for this attainment of the highest possible level of health, Governments have a responsibility for the health of their people, which can be fulfilled only by the provision of adequate health and social measures. It lays emphasis on the primary health services.

1979; CEDAW⁵:

Altogether, CEDAW conceptualises the reproductive health & rights with family planning. It keeps 'equality' in general and 'gender equality' in particular, in the core of all human rights. It envisages, elimination of discrimination against women in the field of health care, to ensure... access to health care services, including those related to family planning. The right to have access to adequate health care facilities, including information, counselling and services in family planning. For this, the State shall ensure, on a basis of equality of men and women... the Right to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights and State parties shall ensure ... access to specific educational information to help, to ensure the health and well-being of the families; including information and advice on family planning.

4. International Covenant on Economic, Social and Cultural Rights

5. Convention for the Elimination of Discrimination Against Women

1994; International Conference on Population and Development:

Here, a shift from reproductive health and rights to family welfare and planning can be seen, which culminated in ICPD, Cairo. It acknowledges that in no case should abortion be promoted as a method of family planning.... The women should have access to quality services for the management of post abortion complications. It also proposes review of laws containing punitive measures against women who have undergone an illegal abortion. It defines the following terms as:

Reproductive health:

“..is a State of complete physical, mental and social well being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex- life and that they have the capacity to reproduce and the freedom to decide if, when and how to do so.

Reproductive health-care:

“..is the constellation of methods, techniques and services that contribute to reproductive health and well being by preventing and solving reproductive health problem. It also includes sexual health, the purpose of which is to provide enhancement of life and personal relations and not merely counselling and care related to reproduction and sexually transmitted diseases.”

Reproductive rights:

“Embrace certain Human Rights that are already recognized in national laws, international human right documents and other international documents. The rights rest on the recognition of the basic right of all couples individuals to decide freely and responsibly the number, spacing and timing of sexual and reproductive health.” This declaration is both corrective and preventive in approach.

1995; Beijing Platform for Action⁶:

In addition to the rights under ICPD, 1994, the Beijing Platform for Action prescribes human rights for women which include: Right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health free of coercion, discrimination and violence.

1999; ICPD plus⁷:

It declares, where, abortion is not illegal, health system should train and equip health service providers and should take other measures to ensure that such abortion is safe and accessible.

6. Beijing Declaration and Platform for Action, United Nations Fourth World Conference on Women: Consensus document adopted by nations participating in the Beijing Conference

7. Parmanand Katara v. Union of India (1989) 3 S.C.R 997; Paschim Banga Khet Mazdoor Samity v. State of West Bengal A.I.R. 1996 S.C. 2426,

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General recommendations of CEDAW committee:

On Articles 12 and 14: State parties implement comprehensive national strategies to promote women's health, ensuring a full range of high quality and affordable health care, including sexual and reproductive health services. The State parties should not permit the forms of coercion, such as non-consensual sterilization. The State parties have a duty to ensure women's right to safe motherhood and emergency obstetric services and that a woman's decision whether to have children or not be limited to spouse, parent, partner and government.... States parties ensure measures are taken to prevent coercion in relation to fertility and reproduction.

General comments on ICESCR:

The notion of "the highest attainable standard of health" in Article 12.1 takes in to account both the individual's biological and socio-economic pre-conditions and States available resources. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services, and conditions necessary for the realization of the highest attainable standard of health;

Article 12.2(a) may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services; including access to family planning, pre and post- natal care, emergency obstetric services and access to information.

State should make strategies to formulate policies to provide access to a full range of high quality and affordable health care. Including sexual and reproductive services; Further, it explains the remedies available on the violation of victims' economic, social, and cultural rights. Any person or group of persons, victim of violation of reproductive right should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction and guarantee of non-repetition.

IDENTIFYING REPRODUCTIVE RIGHTS WITHIN THE INDIAN LEGAL SYSTEM

INDIAN LAWS AFFECTING REPRODUCTIVE RIGHTS

The concept of reproductive rights as a specific right is nowhere to be found in the Indian legislations. Since all the laws in India have to meet the Constitutional validity, the basis of any law has to be seen within the rights and freedoms enumerated within The Constitution of India.

Under **The Constitution of India, 1950** part III provides for the chapter on Fundamental Rights. Within this part are Articles 14 and 21. Article 14 provides for equality before law and equal protection of law for all and article 21 provides for the right to life and personal liberty. Over the years, through judicial interpretation a number of rights have been held to be included within the right to life. Of utmost relevance here is the right to health. A number of judgments, which have been referred to in Part II of this book have been decided on the basis of the right to health. But as has been stated earlier, there is no mention of women's health rights generally or reproductive rights specifically in these cases. In a number of pending cases that have been mentioned further in this book, it is for this very reason that the argument of access to health services gains visibility as apart from violation of the Standards set by the Government of India, they also become violations of judgments relating to right and access to health care and services.

Apart from the Constitution of India, the following laws either wholly or in some parts affect reproductive rights:

The Indian Penal Code, 1908: The IPC basically lays down what acts, omissions etc constitute a criminal offence in India and the punishments that will be applicable to a particular offence, both of which differ as per the gravity and degree of offence. This code lays down the law on sexual assault and rape⁸, offences of the causing of mis-carriage, of injuries to unborn children, of the exposure of infants and of the conceal-

8. Sections 375-376

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ment of birth⁹. It is this particular chapter which is the law on abortions and the Medical Termination of Pregnancy Act, 1971 is the exception.

The Medical Termination of Pregnancy Act, 1971: In India, legality of an abortion is determined by two legislations, one is the Medical Termination of Pregnancy Act, 1971 and the second is the Indian Penal Code, 1860. The Medical Termination of Pregnancy Act, 1971 (hereinafter known as the 'MTP Act') was basically enacted as illegal and unsafe abortions were resulting in an escalated maternal mortality rate in the country. Before the enactment of this legislation, abortion in any form was illegal and an offence under the penal code. Both the pregnant woman and the abortionist were liable to be prosecuted.

The new law was enacted for liberalizing the provisions relating to abortion for three main reasons as stated in the Statement of Objects and Reasons of the Act: as a health measure: when there is danger to the life or risk to physical or mental health of the woman, on humanitarian grounds: such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc and eugenic grounds, where there is substantial risk that the child, if born, would suffer from deformities and diseases. This law lays down the reasons for a pregnancy to be terminated, the pre conditions for the same, the person who is qualified to do so and the place where a pregnancy can be terminated and the exceptions to the same. Briefly, the following points can help us understand better the provisions related to MTP:

Length of pregnancy: upto 12 weeks on the opinion formed by one registered medical practitioner (Ist Trimester) or upto 20 weeks on the opinion formed by 2 registered medical practitioners (IInd trimester). Reasons for termination: on medical opinion formed in good faith that the continuance of the pregnancy would involve a risk

- to the life of the pregnant woman or
- or grave injury to her physical or mental health or
- there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped

It is further explained that where the pregnancy is the result of a rape, the anguish caused by the pregnancy would be considered as grave injury to her mental health and similarly a pregnancy as a result of contraceptive failure would also come under this provision. This provision goes on to say that no pregnancy can be terminated without the consent of the woman. In a case where the woman is either below 18 years of age or is mentally unsound, then the consent of her guardian has to be taken. Section 5 lays down the exception to this clause by providing that termination of pregnancy can take place at any stage by one registered medical practitioner where on opinion formed in good faith that the termination of the pregnancy is necessary to

9. Sections 312 - 318

immediately save the life of the pregnant woman. The provisions of the Indian Penal Code, 1860, lay down the general law with regard to abortion and the MTP Act is the exception to that general law. It is worth noting that the MTP Act is worded in such a manner that the decision to terminate a pregnancy is based on medical grounds and not on the choice of the woman. Therefore even though in comparison to a number of countries where abortion laws are very strict, India is in a much better position, the spirit behind the law is not based on the desired perspective.

The Maternity Benefit Act, 1961: This Act lays down the mandatory provisions with regard to maternity leave for working women, whether in the organised or unorganised sector. It further provides for continuation of employment and prohibition from dismissal in case of availing maternity leave. This law also provides for maternity leave in case of miscarriage or medical termination of pregnancy and tubectomy operation. Further this law provides for nursing breaks to be given to women who have returned from maternity leave to be able to feed their child within the day.

The Prohibition of Child Marriage Act, 2006¹⁰: This law has been amended and overhauled recently in an attempt to make its compliance a lot more rigid and strict. Especially in the Indian context where marriage is of prime importance in society and a number of times right since birth, preparation for the girl's marriage begins, it is of utmost importance that a legislation which clearly lays down the minimum age at marriage for both the girl and the boy is enforced. Added to that is the harmful traditional practice of child marriage in this country which makes such a legislation even more important. By delaying the age at marriage, both the persons who are party to the marriage have an opportunity to think and choose for themselves and it is not only a community decision but also a personal choice.

The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex-Selection) Act, 1994¹¹: This law had been enacted and then amended to deal with the misuse of available technology resulting in a skewed child sex ratio. The PCPNDT Act prohibits the use of any technique, scientific or otherwise for the purposes of selecting the sex of the foetus before conception and regulates the use of technologies which have the capability of determining the sex of the foetus in a pregnant woman. This law depends heavily on strict documentation by the centres providing any of the above facilities as this is the only way to nab the offenders under this law. On being convicted, this law also provides for the penalties applicable to the various kinds of offenders and also lays a presumption in favour of the woman so that the pregnant woman does not get prosecuted in the entire process. The aspect to be noted is that this law does not speak about MTP or abortion in any of its provisions, very clearly establishing that once the act of either determining or selecting the sex of the foetus

10. This law replaced the earlier legislation: The Child Marriage Restraint Act, 1929

11. This Act was earlier known as The Pre-natal Diagnostic Techniques (Regulation and Prevention of misuse) Act, 1994 and was considerably amended in 2003 to expand its scope as per existing technologies.

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takes place, an offence under this law has occurred and the guilty parties are liable to be penalised, irrespective of the next step taken with regards to the foetus.

The Consumer Protection Act, 1986: The Consumer Protection Act becomes important in the light of medical services having been brought under the purview of this Act¹². When we view this issue also from the lens of violation of the access to safe, reliable and hygienic health services, this law comes into play. The concept of compensation for negligence by the medical fraternity is addressed here.

Codified and uncodified Personal Laws¹³: Personal laws which govern the aspects of marriage, divorce, succession etc become relevant due to the lack of the concept of choice in the wording and spirit of these laws. There have a number of cases where the existence or non existence of a child has made all the difference in the way the case went. As will be seen further in this book, refusal to reproduce has been interpreted as cruelty and therefore a ground for divorce by the Courts.

The Protection of Women from Domestic Violence Act, 2005: This law becomes relevant in the light of the fact that for the first time sexual violence occurring within the four walls of the house has been acknowledged as a specific form of violence which needs redressal. It is also for the first time that instances of taunting for not bearing a child or for not bearing a male child which women across this country face day in and day out have also been acknowledged as specific forms of domestic violence.

POLICIES AND PROGRAMMES AFFECTING REPRODUCTIVE RIGHTS

There have been a number of initiatives taken by the Government of India to deal with the health system in the country. With specific reference to reproductive rights time and again policies like the National Population Policy and programmes like the Mother and Child Health (MCH) or Reproductive and Child Health (RCH) I and II have been devised.

Of the most relevance currently is the National Rural Health Mission (NRHM)¹⁴, which is the flagship programme of the Government and has been taken up not just like any other programme, but in a MISSION MODE. In 2005 when the NRHM was launched, even though there was a lot of apprehension about the viability and life of the programme considering past experiences, Health rights organisations were willing to be part of this mission since, for the first time an overall development of the health services had been envisaged in this document and the feasibility of the same looked very

12. Section 2 (o)

13. The Hindu Marriage Act, 1955; The Hindu Succession Act, 1956; The Indian Divorce Act, 1869; The Indian Christian Marriage Act, 1872; The Indian Succession Act, 1925; The Parsi Marriage and Divorce Act, 1936; The Muslim Personal Law (Shariat Application) Act, 1937 and The Muslim Women (Protection of Rights on Divorce) Act, 1986

14. For complete detail please see
www.nrhm.nic.in

promising. This was more so owing to the fact that the NRHM brought in a bottom up approach. Instead of expecting the people to reach the health services, it claimed to bring the health services to the people. Instead of bringing in outsiders, it claimed to train and develop health service providers from within the local community.

Further, the vision and mission document of the NRHM clearly brought out the phases of developments and targets that it would achieve, in a sense instilling the trust back in the system. This was in 2005. Today in 2009, the situation is as grim as it had been then. Cynicism is also setting in as this programme had raised a lot of hopes about there finally being access to quality health services. But the implementation of the programme has left a lot to be desired and the glaring lack of perspective and corruption in the system has come to the forefront.

The main reason for this book to be titled as 'Claiming Dignity' also rests in the fact that numerous cases of violation of right to privacy and freedom from degrading treatment have come up where women who attempt to access any of the services guaranteed by the NRHM have met with verbal and physical violence at the hands of the hospital staff. The details of the NRHM have not been included in here for the reason that it is the violation of those principles and standards that has been highlighted in this book especially in the chapter relating to pending cases.

PART II

**Identifying specific issues under the broader
concern of Reproductive Rights and the Judicial
Response on the same**

SPECIFIC ISSUES UNDER REPRODUCTIVE RIGHTS

The brief definition and understanding of Reproductive Rights had been set in Part I of this book. In this part we will examine the various specific issues that come under the broader frame work of reproductive rights and we will then examine judicial pronouncements, if any, on these issues.

MATERNAL MORTALITY AND MORBIDITY

Maternal mortality is defined as the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management, but not from accidental or incidental causes.

As per the United Nation agencies estimates, around 117,000 maternal deaths occur in India each year, which make up almost one quarter of the maternal deaths that occur annually worldwide. Official figures in India differ visibly as on a number of occasions deaths are not recorded, or the cause of death is attributed to an immediate circumstance without paying any heed to the actual cause as is also the case with recording of starvation deaths in India.

Maternal morbidity is a condition where the woman as a result of pregnancy and related issues has a debilitating injury to her person which considerably affects her routine life. It has been seen that almost all cases of mortality and morbidity were preventable and only required the right intervention at the right time.

Within the broader purview of maternal mortality and morbidity comes the issue of unsafe abortions. Around 7 to 8% of maternal mortality and morbidity cases occur due to lack of access to safe and legal abortion services. This is also linked to the lack of information and access to standard contraceptive methods which can to a large extent bring down the rates of abortions both, safe and unsafe, legal and illegal in India.

Other factors which have a huge bearing on accessing legal abortion services are the sheer lack of awareness about abortion upto an extent being legal. Most women think that if they seek an abortion, it will have to be a clandestine affair since it is against the law in India. Coupled with this is the notion that women who seek an abortion are committing a sin, which stems from the whole debate of when life begins, consequently these forces contribute to women putting their lives at risk.

Another aspect, which will be discussed in detail with the case, is of the limit upto when a medical termination of pregnancy can be conducted.

The next aspect that has a direct bearing on this issue is sex selection and sex determination. Due to the prevalence of son preference in India, the misuse of technologies like ultrasound etc is very high. These technologies, which otherwise, in relation to a pregnancy, provide a useful insight into the growth and development of the foetus end up being used only to determine the sex of the foetus. With the availability of new technologies, it is now also possible to select the sex of the foetus before conception. Like you can now choose the colour of the child's eye, hair and skin you can also choose the sex of the child that will be born.

This has resulted in a skewed child sex ratio. The emphasis of a major number of interventions that are taking place to correct the sex ratio are being addressed towards sex selective abortions and not towards offences under the PCPNDT Act, which further makes the access towards safe and legal abortion services difficult.

The last aspect that I include within the realm of maternal mortality and morbidity is of child marriage. This is one of the direct causes of maternal death and lifelong illnesses. The introduction of sexual activity, which in most cases, is unprotected at a very early age, results in girls becoming pregnant when their bodies have not even completely developed to deal with the changes due to puberty. As is the situation in all the above aspects the girl or the woman has no say whatsoever in these activities and only becomes a body given a certain role to perform. In a typical traditional, conservative set up, the women will eat last and will eat little, so the nutrition that is required for their own development and for the development of the foetus is lacking, resulting in the girls becoming anemic, which has in many cases had dire consequences resulting in maternal mortality.

COERCIVE POPULATION POLICIES

Under the agenda of the controlling the so called increasing population of the country a number of measures without any regard to the human rights, privacy and dignity of the individuals targeted. Human beings have been reduced to only numbers in this process of target based approaches. It is not about the individual anymore, but just another number being added.

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The two main aspects under this heading which have received considerably judicial notice are sterilisation operations and the two child norm. It will be observed in the cases annexed that the judicial view with regards to compensation in cases of failed sterilisations is consistently changing. The emphasis on whether doctor was negligent or not is of prime importance. In the PIL that was filed on the flagrant violation of Government Guidelines for Male and Female Sterilisations resulted in, for the first time in the public health system, the introduction of Insurance cover.

RIGHT TO CHOICE

The other aspects of reproductive rights like the Right to choice and non-interference with the same have not been dealt with in detail here. To mention briefly there have been a number of individual cases where a young couple marries against the wishes of the elders and family and then are brought to the court usually by the father of the girl under a writ of habeas corpus. In some cases the couple is given social recognition and in others they are considered as outcasts from the family.

Another aspect is of the growing instances of the use of acid against women. A compelling case is of Haseena Hussain on whom acid was poured by her ex employer for her refusal to rejoin his company. The trial court in this case held the accused guilty of only grievous hurt, while this constituted a clear attempt to murder. The trial court judge was also of the view that if Haseena would have accepted the proposal, all this would not have taken place. While deciding on the sentence, the trial court judge give weightage to the fact that the accused Joseph Rodrigues was a young man and had his parents to look after and therefore a lenient view was taken. In the High Court things moved only after the counsel for Haseena demonstrated the extent of physical damage inflicted on Haseena by the way of photographs. Presently Joseph Rodrigues has filed an appeal in the Supreme Court which is pending adjudication.

This case was one of the numerous cases that had been documented by organisations in Karnataka under the banner of Campaign and Struggle Against Acid Attacks on Women. A PIL was also filed in the Karnataka High Court with regards to the setting up of a compensation board and the restriction on the availability of acid. The same resulted in a committee being formed which then gave recommendations for the same. A bill on Offences against women by use of Acids has also been drafted mainly to include this kind of crime as a specific offence under the IPC and to increase the punishment for the same.

REPRODUCTIVE RIGHTS AND VULNERABILITY

Another perspective that needs to be highlighted separately is of vulnerable groups and their reproductive rights. Dalit women, women affected by HIV/AIDS, disabled

women, while speaking of reproductive rights in general, the special circumstances, needs and issues faced by these women need to be taken into consideration otherwise any steps taken would not be applicable for the marginal and vulnerable sectors of women.

A number of cases have been seen where access to treatment has been refused based mainly due to the caste of the women, that she is a Dalit or because she is HIV positive. A specific case in a district in UP called Banda where a Dalit woman who was in labour was thrown out of the hospital as she was a Dalit and she was forced to deliver her child on the road outside the hospital in full public view. In this case the High Court initiated criminal proceedings against the concerned doctors on duty and directed the State to compensate the woman for flagrant violation of her fundamental rights.

Similarly a case of Gita Bai in Madhya Pradesh, whose HIV positive status made the hospital staff shun her and none of the preventive methods for prevention of transmission from mother to child were given. This case has been brought before the Human Rights Commission of MP and an enquiry is on going.

BREIF NOTE ON THE CASES

People's Union for Civil Liberties Vs Union of India and Ors: The foundation of this case lies in the numerous starvation deaths that were taking place while the government granaries were overflowing with food which had now started rotting. While focusing on the public distribution system, this case has also highlighted the malnutrition amongst pregnant and lactating mothers. This Public Interest Petition is pending in the Supreme Court of India. The order dated 22.11.2007 is very important for the present purpose. This order clearly lays down that the 2 schemes which provide nutritional and monetary assistance to pregnant and lactating mothers cannot be done away with and must continue parallel. Even though this order had reinforced women's entitlements at the ground level, women continue to pay a heavy price to ensure these entitlements are implemented. However what is also of a major concern is that at the end of the order, the Supreme Court has also observed that the Government should consider whether these benefits should be extended to any number of pregnancies and also whether these benefits should be given to mothers who are under age, since their marriage is in violation of The Prohibition of Child Marriage Act.

State of Punjab Vs Shiv Ram and Ors: In this case, the couple decided that they did not want anymore children and therefore, Respondent no. 2 (wife) decided to undergo a sterilization operation. It was the case of the Respondents that they were not informed about the precautions to be taken after an operation of this kind. Unprotected intercourse resulted in Respondent no. 2 being pregnant. The couple

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refused to medically terminate the pregnancy as they considered abortion a sin. The couple gave birth to a female child. The trial court and the appellate court held the Doctor concerned to be negligent and directed the State to pay a compensation of Rs. 50,000. In the Supreme Court, the State agreed to pay the amount but requested the Court to resolve the issue of liability in such cases, while also claiming that medically there are chances of failure in sterilization cases. The Supreme Court after examining various medical authorities on Sterilization operations and their failure rate held that there was no negligence on the part of the concerned doctor. Further the Supreme Court emphasised the need for devising a welfare fund or insurance scheme to cover such cases.

Similarly the issue of failed sterilisation operations has been dealt with in **Ram kali Vs State of Haryana** by the Supreme Court. In this case the Petitioner had filed a suit for claiming damages due to the birth of a female child inspite of having undergone a sterilization operation. The suit had been filed by the Petitioner as a pauper. On leading evidence it was clearly revealed that the Petitioner had not been informed of the chances of failure of the operation and the precautions to be taken after the operation. There were no records of a follow up examination of the Petitioner as a result of the operation, nor any evidence of proper counseling having been carried out. The Court held that the Petitioner was entitled to damages and that a case of negligence on the part of the doctor was made out. The negligence was based on the fact that all the information about the operation and its possible outcomes and precautions were not provided to the Petitioner.

Further in **State of MP Vs Sundari Bai** a similar case of failed sterilization operation was dealt with. In this case due to the physical condition of the Respondent, the 'ligation' method of sterilization was used instead of the usual tying of fallopian tubes. It was held by the Madhya Pradesh High Court that no case of negligence on the part of the doctor was made out. This case was differentiated from the Santra judgment where negligence on the part of the doctor was evident.

In **Smt Jyoti Kewat Vs State of MP and Anr** also the issue of failed sterilization was dealt with. In this case, the husband had undergone a vasectomy operation after the couple had two children and decided that they did not want anymore children. Around two years later, the Petitioner found herself to be pregnant and she was being ostracized and branded characterless as her husband had undergone a vasectomy operation, therefore it was clear that this was not his child. The doctors informed her that the pregnancy was due to a failed operation and prescribed medicines for her husband. But the Petitioner was pregnant again and this time gave birth to another child. It was held that the husband of the Petitioner had not been given proper post operative counseling and only the signature on a declaration stating that he is aware that the operation may fail is not sufficient.

Ramakant Rai and Anr Vs UOI: This was a case filed in public interest on the fla-

grant violations of the Government Guidelines on Male and Female Sterilizations. The Petitioners had documented the state of sterilization camps being held by the Government in Uttar Pradesh and Bihar. These operations were being carried out without any heed being paid to basic standards of health and hygiene. In some instances women were being sterilized by using bicycle pumps. The same instruments were being used to sterilize women one after another and then women were left like cattle without any concern of their privacy. The Supreme Court passed detailed guidelines and for the first time the introduction of insurance cover in the public health system.

In **State of Haryana & Ors Vs Smt. Santra** the Supreme Court had held the doctors to be negligent as in the sterilization operation the right fallopian tube of the Respondent was tied, but the left one was left untouched, meaning thereby that the operation had not been completed and the Respondent was informed that the sterilization operation was successful.

Rajesh Kumar Srivastava Vs A. P. Verma and Ors: This case had been filed in the Supreme Court, in contempt of an earlier judgment passed by the Supreme Court. The Petitioner was directed to file the same in the Allahabad High Court as the matter concerned the State of Uttar Pradesh. The brief facts are that an organisation would conduct faith healing camps claiming to cure all kinds of ailments except for leprosy by chanting 'Om Namah Shivay'. The weekly congregation was attended by thousands of devotees and each one was expected to register by paying a cost of Rs. 30. The Supreme Court held that 'faith healing' is not a part of right to health and violative of the Constitution of India where practiced in derogation of the right to health of the patients. This is not in contradiction with the constitutional right to practice and profess one's religion.

Murari Mohan Koley Vs The State and Anr: A good case as an example of litigation in individual cases of medical negligence. In this case the Court has refused to quash the criminal proceedings initiated against a government doctor in a case of alleged negligence in conducting MTP resulting in death of patient. The Court has also dealt with the aspect of protection under good faith granted to a medical practitioner under the MTP Act.

Kumari Mahima Vs State and Anr: A case of sexual assault resulting in pregnancy. The survivor sought permission from the district court for termination of the pregnancy and preservation of the foetus as evidence. District court held that the Petitioner is free to terminate her pregnancy but refused to grant an order for preservation of the foetus and directions for conducting a DNA test on the same as liable proof of sexual assault by the accused person. The High Court criticized the stance taken by the District Court and gave directions for the police and concerned hospital authorities to take immediate steps as per the MTP Act and further take steps to preserve the foetus and conduct a DNA test on the same.

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D. K. Joshi Vs State of UP and Ors: The appellant filed a writ petition before the High Court of Allahabad in public interest praying for writ of mandamus directing the respondents to initiate action against persons who are unqualified and unregistered but carrying on medical profession unauthorisedly in the district of Agra, Uttar Pradesh. The High Court dismissed the petition before hearing it on merits by directing the Chief Medical Officer to complete the enquiry being conducted in accordance with law. The Petitioner approached the Supreme Court in appeal and even though the Petitioner had sought directions only for the city of Agra. However the Supreme Court passed directions for the entire State of UP, making it an illegal act for any person to carry out medical duties unless they are registered or qualified. This judgement ensures the implementation of the right to health of all persons.

Vinod Soni and Anr Vs UOI: In this case the PCPNDT Act was challenged by a couple in Mumbai on the grounds that they already had a son and wanted to choose the sex of the next child as they were planning to have a 'balanced' family. The plea of infringement of Article 21 of the Constitution of India, i.e. the right to life and personal liberty was taken before the Bombay High Court. The case was dismissed at the first hearing itself by the High Court without even issuing notices to the Respondent State.

Mr Vijay Sharma and Anr Vs UOI: In this case that came up before the Bombay High Court, the provisions of the PCPNDT Act were challenged. This time the argument was of violation of Article 14 of the Constitution of India i.e. the right to equality.

CEHAT and Ors Vs Union of India: This petition was filed in public interest by the Petitioners for the complete non-implementation of the PNDT Act (as it was then). It was during the hearing of this petition that the PCPNDT Act in its amended form was enacted. Detailed guidelines were given by the Supreme Court for the implementation of this Act in its true letter and spirit. The Supreme Court has also left this petition open for revival in case of further non implementation of the Act.

Dr. Varsha Gautam Vs State of UP: In this case the First Information Report filed against the Petitioner, on the basis of a sting operation having been conducted against her for violating the provisions of the PCPNDT Act and agreeing to commit offences under the said Act and then committing the same, was sought to be quashed. The Court has interpreted Section 28 of the PCPNDT Act which lays down that the cognizance on an offence under this Act can only be taken by a Magistrate when the complainant is the Appropriate Authority. Further the provision relating to prohibition of sex selection has been elucidated in this judgment.

Dr. Manish C. Dave Vs State of Gujarat and Anr: overruled by Suo Motu Vs State of Gujarat: In this case the decision taken by the Single Judge in the case of Dr. Manish Dave had been referred to a larger bench of the High Court. The larger bench decided on the Section 28 of the PCPNDT Act, on whether the complaint should con-

tain specific allegations as per the provisions of this Act, whether irregularity in Form F would constitute an offence under this Act or would it be considered as a mere procedural lapse. The Court in its decision overruled the interpretation made by the Single Judge which was in contravention to the intent behind the PCPNDT Act and would have resulted in creating further loopholes in the implementation of the Act.

Municipal Corporation of Delhi Vs Female workers (Muster roll) & Anr: This was a petition filed in public interest for the inclusion of women on muster rolls working as contract labour for the MCD into the benefits applicable under the Maternity Benefits Act.

Corporate Channels India (P) Ltd Vs UOI: This case highlights the sheer lack of standards that becomes acceptable for personal gains in implementing any health related policy or programme.

S. Amudha Vs Chairman, Neyveli Lignite Corporation: In this case pregnancy being termed as 'temporary unfitness' was challenged and was held to be unconstitutional.

Javed and Ors Vs State of Haryana and Ors: A well known case where the Supreme Court of India had upheld the two child norm. A stance which remains unchallenged till date. The two child norm in the Panchayati raj elections has also been challenged in **Bharatbhai Dhanjibhai Modi Vs Collector and Ors, B.K. Parthasarathi Vs Govt of AP and Ors, Sunil Kumar Rana Vs State of Haryana and Zile Singh Vs State of Haryana:** They were challenged in Gujarat, Andhra Pradesh and Haryana respectively.

Nikhil Dattar and Anr Vs State of Maharashtra: In this case the 20 week limit for conducting a legal MTP was challenged. The main argument was that at the time of enactment of the MTP Act, the restriction was placed on the basis of the technologies available at that time. In the present context constant monitoring of the growth of the foetus is possible and there are a number of fatal complications which are visible only after the 20th or 24th week of pregnancy. The High Court denied this relief. The case is presently in the Supreme Court in appeal.

Suo Motu Writ Petition on the reports published in various Marathi Newspapers about the untimely death of many children due to malnutrition within two months v State of Maharashtra: Directions given to address malnutrition deaths leading to increased infant mortality rate in Maharashtra.

Samira Kohli Vs Dr. Prabha Manchanda and Anr: The aspect of medical negligence and consent has been dealt with at length in this case. When a patient gives consent for medical treatment, does that consent also include permission for removal of a body part.

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V. Krishnan Vs Inspector of Police: This is a case where the IPC provisions concerning causing miscarriage had been used. There are a number of cases where these provisions have been referred to, but this specific case has also been referred here for the reasoning based on religion used here. Even though the case is a favourable one as it discussed in detail the need of consent for a 16 year old from her guardian under the MTP Act.

Social Jurist Vs State: This case has brought to the forefront the reality that the medical profession has now become the business of providing medical services. If you cannot afford the service then you will not be entitled to it. Detailed guidelines on the functioning of private hospitals especially with regards to the low income persons were set out.

Anil Kumar Vs State of Haryana: This case highlights the plight of the staff that have been appointed under the various health programmes including the National Rural Health Mission.

Samar Ghosh Vs Jaya Ghosh: This case deals in detail with the concept of cruelty in a marriage, finally coming to the conclusion that refusal by any spouse to have children would amount to cruelty and would be a clear ground for divorce. From the perspective of reproductive rights of women, this judgment does not for even a moment consider that in most marriages the woman does not have a say over these decisions. This judgment has kept the position of the man and the woman in a marriage at par, which in most cases, unfortunately is not the reality.

PENDING CASES¹⁵

1. Forum for Fact Finding and Documentation Vs Union of India Writ Petition (Civil) No. 212 of 2003: This case was filed in public interest for the implementation of the then Child Marriage Restraint Act. It is during the pendency of this petition that the new law on prohibition of child marriages was enacted.

2. Voluntary Health Association of Punjab Vs Union of India Writ Petition (Civil) No. 349 of 2006: This petition in public interest had been filed for the implementation of the PCPNDT Act. This has been filed in the Supreme Court and is pending adjudication. Recently an application for banning of foreign websites which advertise and sell sex selection kits has been additionally moved in this case.

3. Snehalata Singh & Salenta & Others Vs State of Uttar Pradesh & Others Writ Petition No.: 14588/2009: This petition was filed on 17/03/2009 at Allahabad High Court. The petition seeks reimbursement for the plaintiff's medical expenses, as well

15. There is a possibility that some of the pending cases have been missed out due to information about them not being available

as compensation for physical suffering relating to a pregnancy related injury (obstetric fistula). This was a direct result of the poor quality of health care provided at a public health facility at the time of delivery and the prolonged suffering caused by the delayed diagnosis of her condition and the repeated denial of treatment. This case is emblematic of the treatment provided to pregnant women in health centers and hospitals run by the Government of Uttar Pradesh. This PIL also aims to address systemic problems in the health system and to this end seeks writ relief to ensure that basic service guarantees for maternal health care are fully implemented by the state government.

4. Sree Adhikar Sangthan Vs Union of India & Others Writ Petition No.: 5144/2008: Geeta Devi, resident of Dhankamai in Fatehpur, Uttar Pradesh was refused medical assistance on the 17th January 2009, from 3 different medical institutions, before she was forced to give birth to her newborn child in a rickshaw on a public road. Her newborn child died, as a consequence of lack of medical assistance. The High Court has issued notices to Priti Sachan, Vineeta Sachan (senior staff nurse of Hardo community centre and Dr. Upendra Kaiw of district Mahila hospital, Fatehpur Hospital).

5. Stree Adhikar Sangthan Vs UOI Writ Petition No. 6723/2009: This PIL is connected to Writ Petition No.: 5144/2008 (above mentioned) as the same Community Centre also denied the victim of this PIL medical assistance. This PIL seeks justice for a woman: Anita alias Kelli who was refused medical assistance during the delivery of her baby, because she could not afford to pay Rs 500 demanded by hospital staff, at the Community Health Centre, Fatehpur, Uttar Pradesh on 18th January 2009. After being ousted out of the Community Centre, Anita was forced to deliver her baby outside the gate of the Community Centre, on a public road in full view of passers by. The new born having been exposed to the harsh winter weather of January died on the spot. SLIC is representing the Petitioner and filed the PIL on 04/02/09 at Allahabad High Court. A court hearing was held on 06/02/09 and the court issued notices to the respondents.

6. Sandesh Bansal Vs Union of India & Ors Writ Petition No.: 9061/2008: This PIL was filed in July 2008 it seeks legal remedies for the high rates of maternal mortalities in the State of Madhya Pradesh (M.P) which stands above the national average at 379. It draws attention to the serious gaps and lapses of the State government and its agencies in implementing the National Rural Health Mission (NRHM) 2005-2012 in addition to the M.P State Programme Implementation Plan (PIP) 2006 - 2012. This PIL has witnessed a number of key advancements in ensuring maternal health care is provided.

7. Laxmi Mandal Vs NCT Delhi : Writ Petition No.: 8853/2009: This PIL holds important significance because this violation took place in India's capital city: New Delhi and clearly illustrates the urgent need for an accountable hospital referral

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system to be implemented. The PIL focuses on the treatment of Shanti Devi, who lives below the poverty line, and is of a Scheduled Caste. She was tossed like a football to 4 different hospitals while she carried a 32 week dead fetus in her stomach; due to her poverty status and her inability to pay hospital fees she was refused vital medical care on the 19th November 2008. The case was heard at Delhi High Court on 6/1/09, where the court ordered Shanti Devi to be admitted to Deen Dyal Upday Hospital where she spent 18 days, free of cost. This PIL seeks a number of legal orders to be awarded: which include but are not limited to i) compensation for the medical negligence and suffering which Shanti Devi was forced to endure ii) disciplinary action against the staff for negligently treating Shanti Devi iii) to ensure the respondents immediately abide by the service guarantees set out in the National Rural Health Mission 2005-2012 for all pregnant women and lactating mothers including but not restricted to, early registration of pregnancies, minimum of four antenatal checkups and associated services including provision of folic acid supplementation, minimum laboratory investigations. iv) for an order directing the Respondents to strictly implement the Government directions regarding the provisions of free beds and free treatment to all the persons who are below poverty line and to ensure that all such persons are given professional and humane treatment according to acceptable medical standards.

8. Kalyani Meena Vs Union of India & Ors Writ Petition No.: 5511/2008: This PIL has been filed by SLIC on the 21/02/2008, in order to bring legal remedies for women and children who are living below the poverty line in Jharkhand, and who are subsequently being denied health care, with particular reference to reproductive health care. Jharkhand's MMR stands at 371 which is above the national average. Jharkhand is a tribal area and historically such areas have been neglected in the delivery of medical resources and facilities in India. E.g. there are only 16 urban health centres in the state, and there is a vast lack of medically trained personnel available to facilitate the communities' needs. The PIL seeks health authorities at the sub, primary and community centre level to fulfill the entitlements as set under the NRHM 2005 - 2012, and the accompanying Service Guarantees.

9. Center for Youth and Social Action Vs The State Of Nagaland & Others Writ Petition No.: 62/2008: This PIL aims to address government violations in providing acceptable and accessible health care to treat malaria which is a disease which contributes to maternal mortality. High rates of mortality and morbidity due to drug resistant malaria are highly prevalent in the northeastern state of Nagaland. It is a major public health concern, particularly for pregnant women, where malaria results in anemia, abortions and stillbirths. According to the government's District Wise Health Profile (2003-2004) a survey by Health & Family Welfare Department, for Nagaland, Nagaland has the highest MMR in India at 800, which rises to 3,300 in districts such as Kiphire.

10. S.P. Shukla & Ors Vs Union of India, Writ Petition 64/2009: This petition is concerned with the closure of 3 long standing public sector vaccine production units based in Himachal Pradesh and in the State of Tamil Nadu, which will have dire implications on the population, particularly pregnant and lactating women. The production units are being closed arbitrarily, are malafide and this action is against public interest. The petition challenges very important issues which directly impact and affect public health and bio security of the State, particularly of vulnerable groups such as women and children. Lack of essential vaccines required during pre/post maternal health care, will place pregnant and lactating women at high risk to maternal mortality or morbidity. The Indian Government had, till recently, a strong policy implemented for self-reliance and self-sufficiency in vaccine technology and production until 2005. But now the State is purposefully closing the public's production units to facilitate and promote privatization of vaccine: research, manufacture and production.

11. Nikhil Dattar Vs Union of India & Ors Writ Petition No. 1422/2009: which seeks an amendment of the Medical Termination Pregnancy (MTP) Act, to be extended from 20 weeks (as permitted the Act) to 24 weeks+ in which a legal abortion is permitted. This PIL is an appeal of the judgment of the Mumbai High Court in August 2008 and the Supreme Court has admitted the petition for a review of this 20 week period. This PIL will have huge impacts for women and girls across India. Currently it is estimated that 18% of all maternal deaths in India are as a result of unsafe and illegal abortions.

WAY FORWARD

In conclusion, the end of this compilation marks the beginning of a very long journey. This is also evident from the fact that most of the cases that have been cited here have affected reproductive rights only as a by product and there is a dire need to introduce the reproductive rights language and perspective with the Judiciary and lawyers. It is evident from the judgments that even though in some cases they have benefited the women, but the reasoning has been entirely negative.

The need for consistently bringing up this argument and language in the courts of India is felt now, more than ever. The NRHM has been extended uptill 2015 with none of the goals that were to be achieved having been met. In this context it becomes even more necessary to increase the accountability of the Government by knocking at the Courts doors.

While developing strategies to ensure the non-infringement of the right to reproductive health, it has to be understood that moving the Courts is one of the strategies and inmost instances is not the end result. However, it is emphasized

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that litigation strategies have a powerful impact in creating accountability and transparency in any given system and therefore must be used. Further, welfare legislations like the Right to Information Act must be utilised in ensuring the right to access health services at all levels.

Finally, what will make us win this battle is being united even though we may have our own differences of opinion. Unless we strike this issue with all our strength and information we will not be able to make a meaningful dent in the system.

PART III

TEXT OF CASES

People's Union for Civil Liberties¹⁶
Vs
Union of India & Ors.

JUDGMENT

Dr. ARIJIT PASAYAT, J.

1. By this order two IAs. No. 37 of 2004 and No. 54 of 2005 stand disposed of IA No. 37 of 2004 is an application by the Union of India for permission to modify the National Maternity Benefit Scheme (in short 'NMBS') and to introduce a new scheme called the Janani Suraksha Yojana (in short 'JSY'). IA No. 54 of 2005 is an application by the petitioner questioning legality of the discontinuation of the benefit under the NMBS due to introduction of JSY. By order dated 27.04.2004 this Court directed as follows:

“No Scheme...in particular....National Maternity Benefit Scheme shall be discontinued or restricted in any way without prior approval of the Court.”

2. Again by order dated 09.05.2005 this Court directed as follows:

“By IA 37, permission is sought to modify The National Maternity Benefit Scheme (NMBS) and to introduce a new scheme namely Janani Suraksha Yojana (JSY). Whereas in IA 54, the prayer is that the Scheme should not be modified by reducing, abridging or qualifying in any way the social assistance entitlements created under the original scheme of NMBS for expecting BPL mothers, including cash entitlements of Rs.500/- provided therein. We have requested learned Additional Solicitor General to place on record further material in the form of affidavit to effectively implement the new Scheme sought to be introduced. The further material shall include the approximate distance of Public Health Centre from the residential complexes and the facility of transportation etc. The Commissioner shall also examine the matter in depth and file a report. The response to the application may be filed within eight weeks. Meanwhile, the existing National Maternity Benefit Scheme will continue.”

16. Interim applications in WRIT PETITION (C) NO. 196 OF 2001, also available at www.hrln.org

3. The government set a numerical ceiling of 57.5 lakh beneficiaries as the annual target for NMBS. However, the number of beneficiaries under JSY in 2006-07 was only 26.2 lakh i.e. 45.5% and in the year 2005-06 this was as low as 5.7 lakh i.e. 10%. While there has been an improvement in the last one year, the coverage under this scheme is still very below the target number of women to be covered by the NMBS.

4. According to the Union of India the JSY was introduced to put a premium on the willingness of poor women to go in the institutional delivery instead of home delivery. But it was recognized that in States with lower institutional delivery rates, one of the reasons for low performance have been lesser availabilities of facilities in the Health Centres, which act as disincentive for the poor illiterate women to seek the services.

5. Pursuant to the order of this Court dated 09.05.2005 the Commissioner had prepared a report.

6. After discussions with the Commissioner appointed by this Court, senior officials, the Central Government took a decision to modify the JSY Scheme to continue the benefits of NMBS and also to improve upon such benefits for non institutional delivery, where the women chooses to deliver her baby at home. In this connection, a letter dated 13.07.2006 was written to the Commissioner by the Secretary health and Family Welfare under the amended JSY. The Low performing States and High Performing States were defined as follows:

“4.1 The scheme focuses on the poor pregnant woman with special dispensation for states having low institutional delivery rates namely the States of Uttar Pradesh, Uttranchal, Bihar, Jharkhand, Madhya Pradesh, Chhattisgarh, Assam, Rajasthan, Orissa and Jammu and Kashmir. While these states have been named as Low Performing States (LPS), the remaining states have been named as High Performing States (HPS).”

7. The table below gives details of the number of beneficiaries under JSY (all these would have received the Rs.500/- under NMBS irrespective of place of delivery) vis-à-vis the annual targets set by the Government of India for NMBS.

Percentage of Eligible Beneficiaries Covered Under NMBS

| State/UT | No. of Women eligible for NMBS | No. of Beneficiaries in 2006-07 | Percentage of Eligible Beneficiaries covered |
|----------------|--------------------------------|---------------------------------|--|
| Andhra Pradesh | 296033 | 457000 | 154.4 |
| Rajasthan | 280123 | 387648 | 138.4 |
| J & K | 50494 | 57798 | 114.5 |
| Assam | 122894 | 183231 | 100.2 |

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| | | | |
|-------------------|---------|---------|------|
| Orissa | 264249 | 227204 | 86.0 |
| Madhya Pradesh | 472840 | 401184 | 84.8 |
| Mizorum | 4429 | 3330 | 75.2 |
| Chattisgarh | 148876 | 74778 | 50.2 |
| Uttaranchal | 37117 | 18614 | 50.1 |
| West engal | 425520 | 199000 | 46.8 |
| Tamil Nadu | 301676 | 136091 | 45.1 |
| Karanataka | 289339 | 81152 | 28.0 |
| A & N Islands | 2295 | 600 | 26.1 |
| Kerala | 107602 | 27683 | 25. |
| Bihar | 732891 | 171352 | 23.4 |
| Puducherry | 6446 | 1315 | 20.4 |
| Gujarat | 212845 | 42373* | 20.0 |
| Punjab | 41297 | 8276 | 20.0 |
| Maharashtra | 529777 | 97390 | 18.4 |
| Tripura | 20601 | 3203 | 15.5 |
| Manipur | 11112 | 1684 | 15.2 |
| Goa | 3188 | 483 | 15.1 |
| Lakshadweep | 333 | 42 | 12.6 |
| Sikkim | 4598 | 446 | 9.7 |
| Meghalaya | 22768 | 2031 | 8.9 |
| Himachal Pradesh | 29222 | 2508 | 8.6 |
| Uttar Pradesh | 1073341 | 71456 | 6.7 |
| Haryana | 92856 | 3294 | 3.5 |
| D & N Haveli | 3850 | 76 | 2.0 |
| Chandigarh | 2108 | 0 | 0.0 |
| Delhi | 42447 | 20 | 0.0 |
| Arunachal Pradesh | 10399 | NR | NR |
| Daman And Diu | 632 | NR | NR |
| Jharkhand | 208592 | NR | NR |
| Nagaland | 12763 | NR | NR |
| Total India | 5925554 | 2618889 | 44.2 |

8. The scheme as the details above go to show has virtually not taken off in many states. Delhi has given the benefit under the NMBS to only 20 women in 2006-07, while in Chandigarh the number of beneficiaries is 0. in Sikkim Meghalaya, Himachal Pradesh, Uttar Pradesh, Haryana and Dadar and Nagar Haveli has less than even 10% of the eligible beneficiaries have been covered under the NMBS. Except for the states of Andhra Pradesh, Jammu & Kashmir, Rajisthan, Madhya Pradesh, Assam, Orissa and Mizoram where more than 75% of the eligible beneficiaries seem to have been reached out to, the performance of this scheme has been very poor in all the other states.

Indicate below are percentage of Home delivery figures

| State/UT | % Home delivery reported out of JSY beneficiaries (2006-07) | % Home delivery in the State (NFHS 3) |
|----------------|---|---------------------------------------|
| Assam | 4.4 | 77 |
| Madhya Pradesh | 0.9 | 70 |
| Haryana | 0.0 | 61 |
| Rajasthan | 13.5 | 68 |
| Manipur | 0.0 | 51 |
| Delhi | 0.0 | 39 |
| Meghalaya | 41.4 | 70 |
| Orissa | 33.3 | 61 |
| Chhattisgarh | 59.2 | 84 |
| Sikkim | 44.8 | 51 |
| Tamil Nadu | 5.7 | 10 |
| Bihar | 75.9 | 78 |
| Karnataka | 37.6 | 33 |
| Kerala | 5.2 | 0 |
| Mizorum | 44.1 | 35 |
| Tripura | 60.5 | 51 |
| Uttar Pradesh | 90.2 | 78 |
| Uttaranchal | 96.9 | 64 |
| Punjab | 82.9 | 47 |
| Maharashtra | 86.0 | 34 |
| Goa | 67.9 | 7 |

9. In the States of Madhya Pradesh, Haryana, Manipur and Delhi there are almost no JSY beneficiaries who had a home delivery. This indicates that in these States the scheme's focus continues to be only on institutional deliveries and not all deliveries. Even in the States of Assam, Rajasthan, Meghalaya, Orissa and Chhattisgarh the JSY has been disproportionately given to only those who have had institutional deliveries.

10. At this juncture, the financial performance needs to be noted.

11. The Janati Suraksha Yojana is a centrally-sponsored scheme with the centre providing 100% of the funds. Some states e.g Andhra Pradesh make their own contribution thereby increasing the amount of cash assistance for institutional deliveries. Tamil Nadu has introduced a separate scheme for providing mothers with Rs.1000/- per month for six months i.e. three months prior to the delivery and three months after. Given below are the details of allocation and utilization of the funds provided by the Central Government.

12. Out of the funds provided for JSY for 2006-07, about 71.2% of the funds allocated have been utilized in the year 2006-07.

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Utilization of Funds allocated by JSY

| State/UT | Funds released in 2006-07 | Expenditure reported by State | % Utilization |
|------------------------|------------------------------|----------------------------------|---------------|
| Andaman Nicobar Island | | 10.00 | 1.99 |
| 19.9 | | | |
| Andhra Pradesh | 4073.20 | 4550.00 | 111.7 |
| Arunachal Pradesh | 26.2 | 0.31 | 1.2 |
| Assam | 1300.00 | 1331.32 | 102.4 |
| Bihar | 610.00 | 190.00 | 31.1 |
| Chandigarh | 5.23 | 0.00 | 0.00 |
| Chattisgarh | 513.00 | 516.55 | 100.7 |
| D & N Haveli | 9.17 | 0.73 | 8.0 |
| Daman & Diu | 5.23 | 0.00 | 0.0 |
| Delhi | 65.49 | 0.20 | 0.3 |
| Goa | 7.86 | 3.38 | 43.0 |
| Gujarat | 851.85 | 185.56 | 21.8 |
| Haryana | 350.00 | 39.11 | 11.2 |
| Himachal Pradesh | 100.00 | 20.66 | 20.7 |
| J & K | 138.33 | 123.84 | 89.5 |
| Jharkhand | 392.89 | 64.67 | 16.5 |
| Karnataka | 916.00 | 594.02 | |
| Kerala | 511.94 | 284.45 | 55.6 |
| Lakshdweep | 4.83 | 0.31 | 7.1 |
| Madhya Pradesh | 4261.00 | 2482.00 | 58.2 |
| Maharashtra | 785.79 | 209.07 | 26.6 |
| Manipur | 78.57 | 13.45 | 17.1 |
| Meghalaya | 39.29 | 42.75 | 108.8 |
| Mizorum | 78.57 | 37.27 | 47.4 |
| Nagaland | 65.49 | 0.00 | 0.00 |
| Orissa | 1600.00 | 1571.31 | 98.2 |
| Pondichery | 19.64 | 6.10 | 31.1 |
| Punjab | 145.37 | 56.84 | 39.1 |
| Rajasthan | 4085.00 | 3056.35 | 74.8 |
| Sikkim | 13.1 | 7.46 | 56.9 |
| Tami Nadu | 1827.00 | 1441.00 | 78.9 |
| Tripura | 117.86 | 43.70 | 37.1 |
| Uttar Pradesh | 1375.00 | 436.80 | 31.8 |
| Uttaranchal | 79.56 | 56.06 | 70.5 |
| West Bengal | 1678.99 | 1233.67 | 73.5 |
| Total | 26141.00 | 18600.93 | 71.2 |

13. Looking at the State-wise break-up it is seen that states like Delhi, Nagaland and Arunachal Pradesh, and union territories of Chandigarh and Daman & Diu have not at all utilized the funds allocated to them for the purpose of JSY. Among other states,

Manipur, Jharkhand and Haryana utilized less than 20% of the funds released to them. Only 10 states spent more than 70% of the funds allocated to them under JSY.

14. At the time of hearing of the applications, learned counsel for the petitioner and the Union of India highlighted various aspects. Considering the submissions and the material data placed on record we direct as follows:-

- a) The Union Of India and all the State Governments and the Union Territories shall (i) continue with the NMBS and (ii) ensure that all BPL pregnant women get cash assistance 8-12 weeks prior to the delivery.
- b) The amount shall be Rs.500/- per birth irrespective of number of children and the age of the women.
- c) The Union of India, State governments and the Union Territories shall file affidavits within 8 weeks from today indicating the total number of births in the State, number of eligible BPL women who have received the benefits, number of BPL women who had home/ non-institutional deliveries and have received the benefit, number of BPL women who had institutional deliveries and have received the benefit.
- d) The total number of resources allocated and utilized for the period 2000-2006.
- e) All concerned governments are directed to regularly advertise the revised scheme so that the intended beneficiaries can become aware of the scheme.
- f) The Central Government shall ensure that the money earmarked for the scheme is not utilized for any other purpose. The mere insistence on utilization certificate may not yield the expected result.
- g) It shall be the duty of all concerned to ensure that the benefits of the scheme reach the intended beneficiaries. In case it is noticed that there is any diversion of the funds allocated for the scheme, such stringent action as is called for shall be taken against the erring officials responsible for diversion of the funds.

15. At this juncture it would be necessary to take note of certain connected issues which have relevance. It seems from the scheme that irrespective of number of children, the beneficiaries are given the benefit. This in a way goes against the concept of family planning which is intended to curb the population growth. Further the age of the mother is a relevant factor because women below a particular age are prohibited from legally getting married. The Union of India shall consider this aspect while considering the desirability of the continuation of the scheme in the present form. After considering the aforesaid aspects and if need be, necessary amendments may be made.

16. The IAs are accordingly disposed of.

New Delhi
November 20, 2007

State of Punjab¹⁷
Vs
Shiv Ram and Ors.

Hon'ble Judges:

R.C. Lahoti, C.J., C.K. Thakker and P.K. Balasubramanyan, JJ.

JUDGMENT

R.C. Lahoti, C.J.

1. The plaintiffs-respondents, respectively husband and wife, filed a suit against the State of Punjab, the appellant before us and a lady surgeon who was in the State Government's employment at the relevant time, for recovery of damages to the tune of Rs. 3,00,000/- on account of a female child having been born to them in spite of the wife-respondent No. 2 having undergone a tubectomy operation performed by the lady surgeon. According to the plaintiffs-respondents, they already had a son and two daughters from the wed-lock lasting over 17 years. In response to a publicity campaign carried out by the Family Welfare Department of the appellant-State, respondent No. 2 with the consent of respondent No. 1, underwent a sterilization operation on 1.8.1984. A certificate in this regard bearing mark of identification No. 505, duly signed by the lady surgeon who performed the said surgery, was issued to her. She was given a cash award of Rs. 150/- as an incentive for the operation. On 4.10.1991, respondent No. 2 gave birth to a female child. After serving a notice under Section 80 of the Code of Civil Procedure, a suit for recovery of damages was filed on 15.5.92 attributing the birth of the child to carelessness and negligence of the lady surgeon. The plaint alleged inter alia that the respondents considered abortion to be a sin and that is why after knowing of the conception they did not opt for abortion.
2. The State was impleaded as defendant No. 1 and the lady surgeon who performed the surgery was impleaded as defendant No. 2.

The defendants filed a joint written statement. It was submitted that there was no negligence or carelessness in the performance of the surgery. It is stated in authori-

17. Full text available at AIR2005SC3280

tative text books of medical science that pregnancy occurring after sterilization may be attributable to natural failure. It was also submitted that the plaintiffs having learnt of the unwanted pregnancy, should have sought medical opinion and opted for medical termination of pregnancy within 20 weeks which is permissible and legal.

3. The parties went to trial. The plaintiff No. 1, that is the husband, deposed on oath to substantiate the plaint averments. The wife, plaintiff No. 2, did not appear in the witness box. On behalf of the defendants, one Dr. Sham Lal Thukral, Medical Officer, Civil Hospital, Bhatinda appeared to depose that medical science recognises failure of sterilization operations to the extent of 0.3% to 3% and the consequences of such failure can promptly be taken care of by the pregnant woman by undergoing abortion. The deponent produced five extracts (marked as Exhibits D2 to D6) from different textbooks of gynaecology in support of his statement. Original books were produced for the perusal of the court and returned. The trial court and the first appellate court have not doubted the correctness of the expert medical opinion as expressed in the textbooks cited before the Court. However, the two courts have proceeded on the reasoning that on the birth of a child to a woman who was allured into undergoing sterilization operation by the State in pursuance of its Family Planning Schemes, the State was liable to compensate for the consequences of the operation having failed. The suit was decreed for Rs. 50,000/- with interest and costs. The decree for compensation passed by the trial court has been upheld by the first appellate court. The second appeal preferred by the State has been summarily dismissed.

4. At the very outset, the learned Additional Advocate General appearing for the State of Punjab submitted that the appellant-State was not very serious about denying the payment of Rs. 50,000/- to the plaintiffs-respondents as they are poor persons, but the State was certainly interested in having the legal issue resolved. He further submitted that the filing of such suits in the civil court or complaints before the Consumer Fora, are on an increase and decrees are being passed against the State without any basis in law and, therefore, the position of law needs to be clarified and settled.

.....

8. The learned Advocate General has brought to our notice a number of textbooks on gynaecology. We refer to some of them.

In Jeffcoate's Principles of Gynaecology, revised by V.R. Tindall, MSc.,MD,FRCSE, FRCOG, Professor of Obstetrics and Gynaecology, University of Manchester (Fifth Edition) published by Butterworth Heinemann, the following technique of female sterilization are stated:

“Female Sterilization Techniques

1. Radiotherapy

A menopausal dose of external beam irradiation to the ovaries is only attractive in so far that they sterilize without involving the woman in an operation. Their disadvantages (as stated at pages 93 and 528) are such that they are rarely used except in older women who are seriously ill.

2. Removal of the ovaries

This sterilizes (provided an accessory ovary is not overlooked) but is very rarely indicated as it often results in severe climacteric symptoms.

3. Removal of the uterus

This is effective but involves an unnecessarily major operation and destroys menstrual as well as reproductive function. Its chief place is in those cases where the need for sterilization is associated with disease in the uterus or cervix. But, to preclude further childbearing, it is commonly carried out as part of another operation. Examples are vaginal hysterectomy as part of the cure of prolapse, and caesarean hysterectomy. The latter is sometimes advocated, in preference to caesarean section and tubal ligation, on the grounds that it prevents future uterine disease as well as conception. Those women who have ethical objections to tubal ligation may well prefer to have a 'scarred uterus' removed. Except in special circumstances, however, caesarean hysterectomy is not justified as a sterilization procedure.

As an elective sterilization procedure for non-pregnant women, some gynaecologists advocate hysterectomy (preferably vaginal) in preference to tubal resection. This is because it removes the possibility of the future development of uterine disease such as carcinoma of the cervix and eliminates the chance of the woman suffering menstrual and other upsets which sometimes follow less radical procedures. Hysterectomy, however, carries a much higher immediate morbidity rate than does surgical tubal resection and can be followed by other disturbances and regrets at loss of menstrual function - an outward sign of femininity."

4. Resection of fallopian tubes

Provided the pelvic organs are healthy, one of the best methods is to remove 1-2 cm of the middle of each tube and to bury the ligated ends separately under the peritoneum. Sometimes the cornua of the uterus are excised, together with the adjacent portions of the tubes. Excision of the whole of both tubes is not so safe because it leaves the ovum free to wander into a possible uterine fistula and fimbriectomy should never be performed. Retention of the abdominal ostia is an advantage for it tends to ensure that ova become trapped in the occluded tubes.

Of the more simple operations on the fallopian tubes the best is the Pomeroy procedure in which a loop of tube is excised and the cut ends secured with a ligature. This method has the advantage of avoiding troublesome haemorrhage which can attend the techniques described above, requires only limited access, is speedy, and fails in

not more than 0.3 per cent of cases. The technique of crushing and ligation of the tubes without excising any part of them (Madlener operation) is very unreliable, the failure rate being 3.0 per cent; it is rarely practised now.

Whatever technique be used for dividing the tubes, it is important to ligature their cut ends with plain catgut. This is much more likely to result in firm closure than is the use of unabsorbable material, or even chromic gut. Most failures are due to neglect of this medicolegally very important point.

Resection of the tubes is usually carried out abdominally and is particularly easy to perform 2-4 days after delivery when the uterus is an abdominal organ and the tubes readily accessible. It can then, if necessary, be carried out under local analgesia. Tubal resection (preferably using the Pomeroy technique) can also be performed vaginally either during the course of another operation or as the route of choice. As a method of choice it is not new as is sometimes suggested; it was regularly carried out in the 1920s."

Dealing with reliability of the sterilization procedures performed and commonly employed by the gynaecologists, the text book states (at p.621):-

Reliability

The only sterilization procedures in the female which are both satisfactory and reliable are: resection or destruction of a portion of both fallopian tubes; and hysterectomy. No method, however, is absolutely reliable and pregnancy is reported after subtotal and total hysterectomy, and even after hysterectomy with bilateral salpingectomy. The explanation of these extremely rare cases is a persisting communication between the ovary or tube and the vaginal vault.

Even when tubal occlusion operations are competently performed and all technical precautions are taken, intrauterine pregnancy occurs subsequently in 0.3 per cent of cases. This is because an ovum gains access to spermatozoa through a recanalized inner segment of the tube.

There is clinical impression that tubal resection operations are more likely to fail when they are carried out at the time of caesarean section than at any other time. The fact that they occasionally fail at any time has led many gynaecologists to replace the term 'sterilization' by "tubal ligation" or "tubal resection" in talking to the patient and in all records. This has real merit from the medicolegal standpoint."

[underlining by us]

9. In ***Shaw's Textbook of Gynaecology*** Edited by V. Padubidri & Shirish N. Daftar, Eleventh Edition, after describing several methods of female sterilization, the textbook states that the most popular technique adopted in Mini-lapartomy sterilization is Pomeroy method in which the fallopian tube is identified on each side, brought out

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through the incision, and the middle portion is formed into a loop which is tied at the base with catgut and excised. The failure rate is only 0.4% and it is mainly due to spontaneous recanalization. The operation is simple, requires a short hospitalization, does not require any sophisticated and expensive equipment like a laparoscope, and can be performed in a primary health centre by a doctor trained in this procedure. In Madlener method, a loop of the tube is crushed and ligated with a non-absorbable suture. Failure rate is of 7% and occurrence of an ectopic pregnancy are unacceptable though it is a simple procedure to perform. There are other methods, less popular on account of their indications, which are also stated. Dealing with the topic of complications and sequelae of sterilization, the textbook states:

“Failure rate of sterilization varies from 0.4% in Pomeroy’s technique, 0.3-0.6% by laparoscopic method to 7% by Madlener method. Pregnancy occurs either because of faulty technique or due to spontaneous recanalization.”

10. In ***‘The Essentials of Contraceptive Technology’***, written by four doctors and published by Center for Communication Programs, The Johns Hopkins School of Public Health in July, 1997, certain questions and answers are stated. Questions 5 and 6 and their answers, which are relevant for our purpose, read as under:

“5. Will female sterilization stop working after a time? Does a woman who had a sterilization procedure ever have to worry about getting pregnant again?”

Generally, no. Female sterilization should be considered permanent. Failure rates are probably higher than previously thought however. A major new US study found that the risk of pregnancy within 10 years after sterilization is about 1.8 per 100 women - about 1 in every 55 women. The risk of sterilization failure is greater for younger women because they are more fertile than older women. Also, some methods of blocking the tubes work better than others. Methods that cut away part of each tube work better than spring clips or bipolar electrocoagulation (electric current). Effectiveness also depends on the skill of the provider.

The same US study found that 1 of every 3 pregnancies after sterilization was ectopic. If a woman who has had sterilization ever thinks that she is pregnant or has an ectopic pregnancy, she should seek help right away.

[underlining by us]

6. Pregnancy after female sterilization is rare but why does it happen at all?

The most common reason is that the woman was already pregnant at the time of sterilization. Pregnancy also can occur if the provider confused another structure in the body with the fallopian tubes and blocked or cut the wrong place. In other case pregnancy results because clips on the tubes come open, because the ends of the tubes grow back together, or because abnormal openings develop in the tube, allowing sperm and egg to meet.”

In newsletter “**alert**” September, 2000 issue, Prof.(Dr.) Gopinath N. Shenoy writes:

“Female sterilization can be done by many methods/techniques, which are accepted by the medical professionals all over the world. It is also an accepted fact that none of these methods/techniques are cent percent ‘failure free’. This ‘failure rate’ may vary from method to method. A doctor is justified in choosing one method to the exclusion of the others and he cannot be faulted for his choice if his choice is based on reasonable application of mind and is not ‘palpably’ wrong. A doctor has discretionary powers to choose the method/technique of sterilization he desires to adopt.”

[emphasis supplied]

In “**The New England Journal of Medicine**” (Vol.336:762-767) (March 13, 1997; Number 11) , owned, published and copyrighted by Massachusetts Medical Society, the result of a research carried out by a team of doctors has been published and widely circulated. 10,685 women enrolled and eligible for long term follow up and willing to cooperate and providing information were studied. The relevant part of the result of the study reads as under:

“The median age of women at the time of sterilization was 30 years (range, 18 to 44; mean [+ SD],31+6). Most women were white and had been pregnant at least twice (Table 1). In all, 143 women (1.3 percent) reported pregnancies that were classified as true failure of sterilization. For 66.4 percent of these pregnancies, the classification was based on a review of medical reports by the investigators. The remainder were classified on the basis of the woman’s history alone.”

11. In *Medico-legal Aspects in Obstetrics and Gynaecology*, edited by three doctors, Chapter 18, deals with *Medico-legal Problems in Sterilization Operations*. It is stated therein that there are several methods of female sterilization of which one that will suit the patient and the surgeon/gynaecologist should be selected. In India, Pomeroy’s method is widely practised. Other methods include Madlener’s, Irving’s, Uchida’s methods and so on. The text further states that failure is one of the undesirable outcome of sterilization. The overall incidence of failure in tubectomy is 0.4 per 100 women per year. The text describes the following events wherefrom sterilization failure usually results:

- i. Spontaneous recanalisation or fistula formation is perhaps the most common cause of failure. Though these are generally non-negligent causes of failure, it is very difficult to convince the patient if they are not informed beforehand about the possibility.
- ii. Undetected pregnancy at the time of sterilization is an indefensible offence. To avoid such incidence, tests to detect pregnancy should be done before sterilization operation is undertaken.
- iii. Imperfect occlusion of the tube is a technical loophole which may result in an

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unwanted pregnancy. The chance is particularly high in laparoscopic methods. If a gynaecologist fails to place ring on any one of the tube due to improper visualization, he or she must inform the patient and her husband, and some other contraceptive method should be advised.

- iv. Occlusion of the wrong structure(s), e.g. round ligament is a common, indefensible error which may particularly happen if the surgeon is inexperienced. This is more frequent in laparoscopic methods where even confirmation of the structure by biopsy is difficult, in case of doubt.

12. It is thus clear that there are several alternative methods of female sterilization operation which are recognized by medical science of today. Some of them are more popular because of being less complicated, requiring minimal body invasion and least confinement in the hospital. However, none is foolproof and no prevalent method of sterilization guarantees 100% success. The causes for failure can well be attributable to the natural functioning of the human body and not necessarily attributable to any failure on the part of the surgeon. Authoritative Text Books on Gynaecology and empirical researches which have been carried out recognize the failure rate of 0.3% to 7% depending on the technique chosen out of the several recognized and accepted ones. The technique which may be foolproof is removal of uterus itself but that is not considered advisable. It may be resorted to only when such procedure is considered necessary to be performed for purposes other than merely family planning.

... ..

18. The cause of failure of sterilization operation may be obtained from laparoscopic inspection of the uterine tubes, or by x-ray examination, or by pathological examination of the materials removed at a subsequent operation of re-sterilisation. The discrepancy between operation notes and the result of x-ray films in respect of the number of rings or clips or nylon sutures used for occlusion of the tubes, will lead to logical inference of negligence on the part of the gynaecologist in case of failure of sterilisation operation. (See: Law of Medical Negligence and Compensation by R.K. Bag, Second Edition, p.139)

19. Mrs. K. Sarada Devi, the learned counsel appearing for the plaintiffs-respondents placed reliance on a 2-Judge Bench decision of this Court in State of Haryana and Ors. v. Smt. Santra, wherein this Court has upheld the decree awarding damages for medical negligence on account of the lady having given birth to an unwanted child on account of failure of sterilization operation. The case is clearly distinguishable and cannot be said to be laying down any law of universal application. The finding of fact arrived at therein was that the lady had offered herself for complete sterilization and not for partial operation and, therefore, both her fallopian tubes should have been operated upon. It was found as a matter of fact that only the right fallopian tube was operated upon and the left fallopian tube was left untouched. She was issued a certificate that her operation was successful and she was assured that she would not

conceive a child in future. It was in these circumstances, that a case of medical negligence was found and a decree for compensation in tort was held justified. The case thus proceeds on its own facts.

20. The methods of sterilization so far known to medical science which are most popular and prevalent are not 100% safe and secure. In spite of the operation having been successfully performed and without any negligence on the part of the surgeon, the sterilized woman can become pregnant due to natural causes. Once the woman misses the menstrual cycle, it is expected of the couple to visit the doctor and seek medical advice. A reference to the provisions of the Medical Termination of Pregnancy Act, 1971 is apposite. Section 3 thereof permits termination of pregnancy by a registered medical practitioner, notwithstanding anything contained in the Indian Penal Code, 1860 in certain circumstances and within a period of 20 weeks of the length of pregnancy. Explanation II appended to sub-section (2) of Section 3 provides -

“Explanation II. — Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.”

And that provides, under the law, a valid and legal ground for termination of pregnancy. If the woman has suffered an unwanted pregnancy, it can be terminated and this is legal and permissible under the Medical Termination of Pregnancy Act, 1971.

21. The cause of action for claiming compensation in cases of failed sterilization operation arises on account of negligence of the surgeon and not on account of child birth. Failure due to natural causes would not provide any ground for claim. It is for the woman who has conceived the child to go or not to go for medical termination of pregnancy. Having gathered the knowledge of conception in spite of having undergone sterilization operation, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed.

22. For the foregoing reasons, we are of the opinion that the judgments and the decrees passed by the High Court and courts below cannot be sustained. The trial court has proceeded to pass a decree of damages in favour of the plaintiffs-respondents solely on the ground that in spite of the plaintiff-respondent No. 2 having undergone a sterilization operation, she became pregnant. No finding has been arrived at that will hold the operating surgeon or its employer - the State, liable for damages either in contract or in tort. The error committed by the trial court, though pointed out to the first appellate court and the High Court, has been overlooked. The appeal has, therefore, to be allowed and the judgment and decree under appeal have to be set aside.

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23. We have decided the question of law and held that the decree awarding the damages was totally uncalled for and had no foundation in law, and therefore, has to be set aside. The present case is an occasion, which we would like to utilize for the purpose of making certain observations on three related topics noted hereunder.

(1) Jacob Mathew's case: a post script

24. In Jacob Mathew this Court dealt with the liability of a medical practitioner in criminal law. Of course, the decision also discussed in detail the law of medical negligence in general and indicated the parameters of fixing liability. The distinction between the concept of negligence in civil law and negligence in criminal law was highlighted. The present case deals with the law of negligence in tort. The basis of liability of a professional in tort is negligence. Unless that negligence is established, the primary liability cannot be fastened on the medical practitioner. Unless the primary liability is established, vicarious liability on the State cannot be imposed. Both in criminal jurisprudence and in civil jurisprudence, doctors are liable for consequences of negligence. In Jacob Mathew even while dealing with criminal negligence, this Court has indicated the caution needed in approaching a case of medical negligence having regard to the complexity of the human body which is subjected to treatment and the uncertainty involved in medical procedures. A doctor, in essence, needs to be inventive and has to take snap decisions especially in the course of performing surgery when some unexpected problems crop up or complication sets in. If the medical profession, as a whole, is hemmed in by threat of action, criminal and civil, the consequence will be loss to the patients. No doctor would take a risk, a justifiable risk in the circumstances of a given case, and try to save his patient from a complicated disease or in the face of an unexpected problem that confronts him during the treatment or the surgery. It is in this background that this Court has cautioned that the setting in motion of the criminal law against the medical profession should be done cautiously and on the basis of reasonably sure grounds. In criminal prosecutions or claims in tort, the burden always rests with the prosecution or the claimant. No doubt, in a given case, a doctor may be obliged to explain his conduct depending on the evidence adduced by the prosecution or by the claimant. That position does not change merely because of the caution advocated in Jacob Mathew in fixing liability for negligence, on doctors.

(2) How the medical profession ought to respond

25. Medical profession is one of the oldest professions of the world and is the most humanitarian one. There is no better service than to serve the suffering, wounded and the sick. Inherent in the concept of any profession is a code of conduct, containing the basic ethics that underline the moral values that govern professional practice and is aimed at upholding its dignity. Medical Ethics underpins the values at the heart of the practitioner-client relationship. In the recent times, professionals are developing a tendency to forget that the self-regulation which is at the heart of their profession

is a privilege and not a right and a profession obtains this privilege in return for an implicit contract with society to provide good, competent and accountable service to the public. It must always be kept in mind that doctor's is a noble profession and the aim must be to serve humanity, otherwise this dignified profession will lose its true worth.

26. Medical profession has long subscribed to a body of ethical statements developed primarily for the benefit of the patient. The oldest expression of this basic principle comes from Hippocrates, an early Greek Physician, born in 460 B.C. who came to be known as the "Father of Medicine" and had devoted his entire life to the advancement of medical science. He formulated a code of conduct in the form of the Hippocratic Oath, as he realized that knowledge and skill were not enough for a physician without a code of standards and ideals. He coined an oath of integrity for physicians, a code of standards and ideals to which they must swear to adhere in the practice of their profession. This continues till date to be the oath administered to doctors when they join the profession:

"I swear by Apollo the physician, by Esculapius, Hygeia, and Panacea, and I take to witness all the gods, all the goddesses, to keep according to my ability and my judgement, the following Oath.

To consider dear to me as my parents him who taught me this art; to live in common with him and if necessary to share my goods with him; to look upon his children as my own brothers, to teach them this art if they so desire without fee or written promise; to impart to my sons and the sons of the master who taught me and the disciples who have enrolled themselves and have agreed to the rules of the profession, but to these alone the precepts and the instruction. I will prescribe regimens for the good of my patients according to my ability and my judgement and never do harm to anyone. To please no one will I prescribe a deadly drug nor give advice which may cause his death. Nor will I give a woman a pessary to procure abortion. But I will preserve the purity of my life and my art. I will not cut for stone, even for patients in whom the disease is manifest; I will leave this operation to be performed by practitioners, specialists in this art. In every house where I come I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction and especially from the pleasures of love with women or with men, be they free or slaves. All that may come to my knowledge in the exercise of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal. If I keep this oath faithfully, may I enjoy my life and practice my art, respected by all men and in all times; but if I swerve from it or violate it, may the reverse be my lot."

27. Many versions of Hippocratic Oath are prevalent. "Light From Many Lamps" a book edited by Lilian Eichler Watson contains a little different phraseology of that oath but certainly a beautiful commentary on the significance of the Hippocratic Oath. We

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would like to reproduce the oath and the commentary hereunder: (pages 181-182);

“I do solemnly swear by that which I hold most sacred:

That I will be loyal to the profession of medicine and just and generous to its members;

That I will lead my life and practice my art in uprightness and honor;

That into whatsoever house I shall enter, it shall be for the good of the sick to the utmost of my power, I holding myself aloof from wrong, from corruption, and from the temptation of others to vice;

That I will exercise my art solely for the cure of my patients, and will give no drug, perform no operation for a criminal purpose, even if solicited, far less suggest it;

That whatsoever I shall see or hear of the lives of men which is not fitting to be spoken, I will keep inviolably secret.

These things I do promise, and in proportion as I am faithful to this my oath may happiness and good repute be ever mine - the opposite if I shall be forsworn.”

[F.N.: The Hippocratic Collection, containing the best of the ancient Greek medical writings, was put together by Aristotle and has survived through the centuries. The “Hippocratic Oath” is one of the last and most inspiring passages in this Collection. There are a number of versions of the famous Oath; but the form given here is the one commonly used today; and is an adaptation of a translation from the original Greek.]

“The medical profession is and always has been one of the most ethical of all professions; and this is due at least in part to the centuries-old influence of the Hippocratic Oath. This famous Oath has kept alive the high standards and ideals set by Hippocrates, and forms the basis of modern medical ethics.

Written more than twenty centuries ago, the Hippocratic Oath has inspired generations of doctors ... and continues to do so even now. The Oath is still administered by medical schools to graduating classes; and thousands of physicians have framed copies on their walls along with their diplomas. Conscientious practitioners continue to live up to the principles and ideals set down for their profession so long ago by the “Father of Medicine.”

Though it was written specifically for physicians, the Hippocratic Oath sets an enduring pattern of honor, integrity, and devotion to duty for all people, in all professions.” And certainly to surgeons.”

28. Many people argue that the original Hippocratic Oath is inappropriate in a society that has seen drastic socio-economic, political and moral changes, since the time of Hippocrates. Certain parts of the original oath such as teaching the master’s sons the secrets of medicine without fees and the promise not to bring a knife to another’s body but to leave it to ‘practitioners of the craft’ have been rendered obsolete as the modernisation of education has led to the teaching of medical science in institutions

of higher learning, and specialisation in medicine has led to physicians who specialise in a variety of fields including surgery. Similarly, the legalisation on abortion and physician- assisted suicide in certain parts of the world, has made it awkward for some medical practitioners there to carry on in the tradition of the original oath.

29. This has led to the modification of the oath to something better suited for our times. One of the most widely used versions is The Declaration of Geneva which was adopted by the General Assembly of the World Medical Association at Geneva in 1948. Written with the medical crimes committed in Nazi Germany in view, it is a 'declaration of physicians' dedication to the humanitarian goals of medicine.' It is also perhaps the only one to mention treating people equally, without regard as to race, religion, social standing and political affiliations:

"I solemnly pledge myself to the service of humanity. I will give to my teachers the respect and gratitude which is their due. I will practice my profession with conscience and dignity. The health of my patient will be my first consideration. I will respect the secrets which are confided in me. I will maintain by all means in my power the honour and noble traditions of the medical profession. My colleagues will be my brothers and sisters. I will not permit consideration of religion, nationality, race or social standing to intervene between my duty and my patient. I will maintain the utmost respect for human life even under threat. I will not use my medical knowledge contrary to the laws of humanity. I make these promises solemnly, freely and upon my honour."

30. In recent times the self regulatory standards in the profession have shown a decline and this can be attributed to the overwhelming impact of commercialization of the sector. There are reports against doctors of exploitative medical practices, misuse of diagnostic procedures, brokering deals for sale of human organs, etc. It cannot be denied that black sheep have entered the profession and that the profession has been unable to isolate them effectively. The need for external regulation to supplement professional self-regulation is constantly growing. The high costs and investments involved in the delivery of medical care have made it an entrepreneurial activity wherein the professionals look to reaping maximum returns on such investment. Medical practice has always had a place of honour in society; currently the balance between service and business is shifting disturbingly towards business and this calls for improved and effective regulation, whether internal or external. There is need for introspection by doctors - individually and collectively. They must rise to the occasion and enforce discipline and high standards in the profession by assuming an active role.

(3) Need for devising a welfare fund or insurance scheme

31. Failure of many a sterilization operation, though successfully performed, is attributable to causes other than medical negligence as we have already discussed herein-above. And, yet the doctors are being faced with claim for damages. Some of the

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claims have been decreed by the courts without arriving at any finding providing a foundation in law for upholding such a claim. The state is also being called upon to honour such decrees on the principle of vicarious liability when the surgeon has performed a surgery in discharge of his duty. Mostly such surgeries are performed on a large scale and as a part of family welfare programmes of the Government. Obviously, such programmes are in public interest. Such like decrees act as a disincentive and have deterrent effect on the surgeons performing sterilization operations. The State, flooded with such decrees is also inclined not to pursue family planning camps on large scale though in public interest.

32. In *Javed and Ors. v. State of Haryana and Ors.* popularly known as 'Two-Child Norm' case, this Court had an occasion to deal with the problem of increasing population, the danger which it poses for the progress of the nation and equitable distribution of its resources and upheld the validity of the Haryana legislation imposing a disqualification on persons having more than two children from contesting for an elective office. The fact cannot be lost sight of that while educated persons in the society belonging to the middle-class and the upper class do voluntarily opt for family planning and are careful enough to take precautions or remedial steps to guard against the consequences of failure of sterilization, the illiterate and the ignorant and those belonging to the lower economic strata of society face the real problem. To popularize family planning programmes in such sections of society, the State Government should provide some solace to them if they, on account of their illiteracy, ignorance or carelessness, are unable to avoid the consequences of a failed sterilization operation. Towards this end, the State Governments should think of devising and making provisions for a welfare fund or taking up with the insurance companies, a proposal for devising an appropriate insurance policy or an insurance scheme, which would provide coverage for such claims where a child is born to woman who has undergone a successful sterilization operation, as in the present case.

Conclusion

33. The appeal is allowed. The judgment and decree passed by the trial court and upheld by the first appellate court and the High Court are set aside. The suit filed by the plaintiffs- respondents is dismissed. However, as we have already stated, in view of the concession given by the learned Additional Advocate General appearing for the appellant State, the amount of Rs. 50,000/- if already paid to the plaintiff-respondent shall not be liable to be refunded by way of restitution.

34. No order as to costs.

Rajesh Kumar Srivastava¹⁸

Vs

A.P. Verma and Ors.

Hon'ble Judges:

Sunil Ambwani, J.

ORDER

Sunil Ambwani, J.

1. The proceedings in this contempt petition were initiated, to enforce and to monitor the orders passed by Hon'ble Supreme Court in D. K. Joshi v. State of U.P., (2000) 5 SCC 80, by which the Supreme Court had taken notice of the distressing situation of public health in the State of U.P. and inaction of the State Government to stop the menace of the unqualified and unregistered medical practitioners proliferating all over the State. The Supreme Court had directed to Secretary, Health and Family Welfare Department, State of U.P. to take all necessary steps to stop the unqualified and unregistered medical practitioners in carrying on the medical profession and the District Magistrates and the Chief Medical Officers were directed to identify within a time limit to be fixed by the Secretary, Health and Family Welfare Department, all the unqualified and unregistered medical practitioners and to initiate legal action against these persons immediately. The Secretary was required to give publicity to the names of such persons. All the District Magistrates and Chief Medical officers were required to monitor the action taken against such persons.

.....

4 Brief facts giving rise to this application are as follows:

The applicant Smt. Santosh Saxena claims to be an active social and political worker of the town. She has identified herself as a President of Samajwadi Women Allahabad and also President of Mahila Manoranjan Club, Batuk Krishna Banerjee Marg,

18. Full text available at AIR2005All1175

Allahabad. She has brought to the notice of this Hon'ble Court, that one Sri Ajay Pratap Singh son of Sri Lal Mahendra Singh, resident of Kotwa Kot, Hanumanganj, Tehsil Handia, Allahabad, along with his followers and alleged disciples have established an organization known as 'Lal Mahendra Shiva Shakti Sewa Sansthan, Kotwa Kot, Allahabad'. This organization is holding weekly congregation on every Thursday at 'Samaya Mai Mandir Park' opposite the Laxmi Talkies, Allahabad between 8.00A.M. to 10.00 P.M. The congregation is attended by thousands of disease afflicted persons. Each prospective patient is required to obtain a card on a charge of Rs. 30/-, (one such card has been annexed as Annexure No. 1 to the application). On the back of the card, it is proclaimed that the society has remedies for all kinds of diseases except Leprosy. The persons are required to continuously chant 'Om Namoh Shivai' and this treatment is required to continue for at least 15 weeks. The patient is advised to walk on a machine every day and to give up all kinds of intoxication. For the deaf and mute, the treatment is provided between 6.00 to 7.00 PM. The card declares that such congregation is held in five districts namely Allahabad (on Thursday), Kanpur (Saturday) Lucknow (Sunday), Faizabad (Monday) and Varanasi (Tuesday) at the given addresses.

5. The applicant submits that no permission has been taken from the Allahabad Development Authority to utilise the park, the people who assemble in the park ease and defecate around the park and the entire area becomes nauseative. Sri Ajay Pratap Singh is involved in theft of power by taking unauthorised connection from the main line. He proclaims himself to be a doctor and the persons attending the congregation as patients. He uses a loud speaker which runs throughout the day creating deafening noise. The office of the Senior Superintendent of Police is only about fifty meters away from the park. A number of complaints were made by the residents of the locality to the authorities, but no action has been taken. The card published by the society reveals that the samiti claims remedy for all sorts of ailments, be it leprosy, cancer, tuberculosis or coronary disease. The curatory process is wholly magical. No known therapy is adopted or administered.

.....

10. I have heard Sri Ravi Kant, Senior Advocate assisted by Sri M. K. Pandey for the applicant; Sri Vipin Kumar Saxena for Sri Ajay Pratap Singh and the Samiti, and Sri R. B. Pradhan, learned Standing Counsel for State respondents.

11. Before proceeding to consider the question, I find that Sri Ajay Pratap Singh has not given any information about himself in spite of repeated adjournments. He has not given his educational qualification or religious achievements, or the background except his name, parentage and address. There is absolutely nothing on record to find out whether Sri Ajay Pratap has any educational qualifications at all, or any religious knowledge, distinction or training. He only claims himself to be a devotee of Lord Shiva. He has not brought on record any permission or authority to hold the congre-

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gation in a public park managed by Allahabad Development Authority. He has not taken any permission from the District authorities to hold congregations regularly or the U.P. Power Corporation to extract the electrical energy from the main lines, to install tents and using of public address system with loud speakers, throughout the day on every Thursday. Although he has denied that he is not using the yellow card which has been annexed to the affidavit of applicant Smt. Santosh Saxena, the card annexed along with his counter affidavit is substantially the same except that the words 'Rog' has been substituted by the word 'Kast'. He has not annexed the certificate of registration of the society and the bye laws to show that the society has been registered for purely religious and charitable purpose.

12. The report of Dr. M. N. Misra, Deputy Chief Medical Officer, Allahabad, Dr. (Major) V. P. Singh, Medical Officer, Allahabad shows that on 11-10-2004 about 300 persons had assembled and were chanting 'Om Namoh Shivai' at Samai Mai Park opposite to Laxmi Cinema, Katra, Allahabad. They verified and found that each person had taken a token of Rs. 30/- for registration and that a public address system was used with the help of generator. The camp was attended by several officers of Bank and Railway employees. They refused to give their identity or to give anything in writing. They, however, admitted that they are attending the camps every Thursday and there was marked improvement in the ailments with which they were suffering. Sri Ajai Pratap Singh denied, issuing any prescription and treatment to any patient by any method. He refused to give anything in writing. He categorically claimed that persons attending the camp every Thursday definitely get respite from various ailments. He also admitted that the only power behind the success of the camp is 'Om Namoh Shivai'. The inspecting party did not find any medicine or pathy being prescribed amongst the people.

13. From the averment made in the affidavits, and the report I find that Lal Mahendra Sewa Shakti Samiti, Kotwa Kote, Allahabad through Sri Ajai Pratap Singh son of Sri Lal Mahendra Singh unauthorizedly occupy the entire public park every Thursday, and use loud speaker without any permission from the Allahabad Development Authority and the District Magistrate, Allahabad. He draws unauthorized power from the U.P. Power Corporation and claims to have cure for all kinds of ailments only by chanting of "Om Namoh Shivai". He practices 'Faith Healing' at a public place after charging Rs. 30/- from each person. The inspecting party consisting of the senior medical officers of the district found that each of the persons had admitted that they had marked improvement in their ailments and Sri Ajay Pratap Singh also admitted that the persons assembled got respite from various ailments. It is as such established on record and admitted that the society through Sri Ajai Pratap Singh is practicing 'Faith Healing' at a public park and claim to have cure of various diseases on the chanting of mantra 'Om Namoh Shivai', for which they are charging from every person attending the camp and that this activity goes on various other places namely at Allahabad, Kanpur, Lucknow, Faizabad and Varanasi.

14. With the aforesaid findings I come back on the question whether the 'Faith Healing' amounts to unauthorized medical practice i.e. quackery and is permissible under our constitutional and legislative scheme, and whether such a practice is violative of the right to health guaranteed to the citizens of the Country.

15. Article 25 of Constitution of India gives fundamental right of freedom of conscience, and free profession, practice and propagation of religion. This right is, however, subject to public order, morality and health and to the other provisions of Part-III of Constitution of India. Clause (2) of Article 25 provides that nothing in the Article shall affect the operation of any existing law and prevent the State from time to time from making any law, as provided in Sub-Clause (a) and (b) of Clause 2. Article 25 is quoted as below;

"Article 25 (1) Subject to public order, morality and health and two other provisions of this part all persons are equally entitled to freedom of conscience of right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law-

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus....."

16. Article 47 in Part IV, Article 38, Article 39 (i), Article 41 and Article 48 (a) as well as the fundamental rights in Article 21 deal with the substantive and potent content of right to life which includes right to live with human dignity and which also includes right to good health. In *Consumer Education and Research Centre v. Union of India*, (1995) 3 SCC 42 : AIR 1995 SC 922, *Paschim Banga Khet Mazdoor Samiti v. State of West Bengal*, (1996) 4 SCC 37 ; AIR 1996 SC 2426, *Murali S. Deora v. Union of India*, (2001) 8 SCC 765 : AIR 2002 SC 40; *Parmanand Katara v. Union of India*, (1989) 4 SCC 286 : AIR 1989 SC 2039; *M. C. Mehta v. Union of India*, (1999) 6 SCC 9. Supreme Court has by a dynamic interpretation of Article 21 expanded the meaning of right to life, to include right to health. This right to health can be guaranteed only if the State provides for adequate measures for treatment and takes care of its citizen by protecting them from persons practicing and professing unauthorized medical practices.

17. The Indian Medical Council Act 1956, the Indian Medicine Central Council Act 1970, The U.P. Indian Medicine Act 1939, the Homoeopathic Central Council Act 1993, the Dentists Act, 1948 provide for a statutory scheme of educational qualifications, standards of education, award of degrees and registration of medical practitioners in their respective fields. There are several other acts protecting public health namely Drug and magical Remedies (Objectionable Advertisements) Act 1954, Drugs

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and Cosmetics Act 1940, Pharmacy Act 1948, Narcotic Drugs and Psychotropics Substances Act 1985, Medical Termination of Pregnancy Act 1971, Transplantation of Human Organs Act 1994, Mental Health Act, 1987, Environmental Protection Act 1994 and the Persons with Disabilities (Equal Opportunities and Full Participation) Act 1995. The scheme of these Acts is to regulate the medical practice in various disciplines. Where a branch of medicine is neither established nor has proved its methods in curing and healing the persons professing such medicine are not authorized to practice such branch of medicines in public. There is a common feeling with where medicines are not prescribed or where no particular form of treatment is preached or practiced, such practice or form to cure ailments is not required to be regulated, and that there cannot be any law which may restrict such persons from using these methods and practices, and that every person has a right to cure himself, which the person may decide for himself. It is also commonly believed that faith in the Almighty by whatever name or form of belief is the cure to all ailments, and that no law can stop the persons, who have fundamental right to choose, practice and profess the religion in adopting such methods.

18. The Court is not concerned in this application to decide whether a person has right to choose any form and method for himself and to have any belief or faith in curing his ailments. The question to be considered is whether the persons professing such form and method which include 'Faith Healing' can practice and preach such forms or methods for curing ailments, in a public place after charging a fees or taking consideration for such practices.

19. The fundamental right to profess practice and propagate religion, guaranteed under Article 25 of Constitution of India is subject to public order, morality and health. Where health of the citizens is involved the right of such practice to profess, practice and propagate religion gets controlled and is subservient to the powers of the State to regulate such practice. No person has a right to make a claim of curing the ailments and to improve health on the basis of his right to freedom of religion. Every form and method of curing and healing must have established procedures, which must be proved by known and accepted methods, and verified and approved by experts in the field of medicines. It is only when a particular form, method or pathy is accepted by the experts in the field of medicine that it can be permitted to be practiced in public. The right to health included in Article 21 of Constitution of India does not come in conflict or overlap with the right to propagate and profess religion. These two are separate and distinct rights. Where the right to health is regulated by validly enacted legislation the right to cure the ailment through religious practices including 'Faith Healing', cannot be claimed as a fundamental right. The freedom of conscience supplemented by freedom of unhampered expression of free conviction to practice rituals and ceremonies are part of religion or subject to public order, morality and health. There is no conflict between the two. The faith in any religion to practice rituals and observance of such religion is not to be confused with right to conscience and to practice and propagate the religion. The claim to cure ailments falls in the domain

of right to health. A person has no right to induce others to believe in his faith in religion to cure others from ailments.

20. In the present case the Society and Sri Ajay Pratap Singh have an individual right to believe, that the chanting of 'Om Namoh Shivai' is a cure for all ailments but they have no right to impose by professing and practicing on others to believe and to propagate the same belief in a public place by charging fees by way of consideration or contribution to any temple or to the society. Such an activity exclusively falls within the domain of the right to health, which is protected and regulated by the legislations. These legislations do not come in conflict with the right of the petitioner to believe that his faith in 'Om Namoh Shivai' cures all ailments. For example a person may be suffering from serious ailments like cancer, thalessemia or HIV infection, which may ultimately lead to suffering and death. If such a person is made to believe on the faith of a person in his religion that such belief is cure to all ailments and on such conviction the persons suffering from ailments, does not take any treatment and suffers, or dies the person professing such faith commits a crime which has no defence in his faith, or any right to his religion.

21. The Court, therefore, find that the propagation, practice and profession of 'Faith Healing' in public on charging consideration is violative to the Constitutional and Legislative scheme, and that such 'Faith Healing' based on a person's faith in the religious practises, in public for consideration is not permitted and is violative of the legislations detailed as above. In the present case the Lal Mahendra Sewa Shakti Samiti Kotwa Kote, Allahabad through its members and Sri Ajay Pratap Singh has no right to hold congregation in public parks, charge consideration and to profess and practice in public that the chanting of 'Om Namoh Shivai' is cure to all ailments. Such a practice is illegal, and violative of law as well as the right of citizen including those innocent persons suffering from various ailments, who participate in such congregation guaranteed under Article 21 of Constitution of India and which the State and the Court are obliged to protect.

22. The application is consequently allowed. The Lal Mahendra Sewa Shakti Samiti Kotwa Kot, Allahabad through any of its members including Sri Ajay Pratap Singh son of Sri Lal Mahendra Singh, resident of Kotwa Kot, Hanumanganj, Tehsil Handia, District Allahabad is restrained from practicing and professing 'Faith Healing' using public parks, illegally extracting energy from main lines, using loud speakers, charging consideration, either by themselves or through their followers and disciples, at any place. The respondents shall strictly enforce these orders.

Murari Mohan Koley¹⁹
Vs
The State and Anr.

Hon'ble Judges:

Pradip Kumar Biswas, J.

JUDGMENT

Pradip Kumar Biswas, J.

1. This is an application under Section 401 read with Section 482 of the Code of Criminal Procedure filed at the instance of Sri Murari Mohan Koley, petitioner herein, praying for setting aside of an order dated 11.09.2002 passed by Sri P. P. Roy, learned Sub Divisional Judicial Magistrate, Howrah, whereby he has taken cognizance of the offence under sections 314/201 of the Indian Penal Code and/or for quashing the impugned proceeding being G.R. Case No. 245 of 2001 dated 06.11.2001 under Section 314 of Indian Penal Code.

2. The short facts leading to the filing of this revisional application reads as under:

3. The petitioner herein, is an authorised Medical Practitioner as described under the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as the 'Act of 1971') and is a public servant and in charge of the Family Planning Department of Howrah General Hospital and also the Bed-in-Charge (Visiting Gynaecologist) and the petitioner is an MBBS (Cal), D.G.O. (Cal), M.D. Gynaecology, and Obstetrics (Cal) D.N.B. (Obstetrics) and Gynaecology, India. The aforesaid post also allows private practice.

4. It has also been alleged that 'Life Care' Nurisng Home located at 185, G.T. Road, Howrah is an authorised place as described under the Medical Termination of Pregnancy Act, 1971 in short Act of 1971.

19. Full text available on(2004)3CALLT609(HC)

5. It has been contended further by the petitioner that in the instant case, it has been alleged by the prosecution by way of filing a written complaint before the Inspector in Charge, Shibpur Police Station by one Sujit Mondal alleging that he has a daughter aged about 6 months and incidentally his wife Jhuma Mondal again conceived and on 26.09.2001 he got her examined by Dr. Murari Mohan Koley and as per his advice he got her admitted in "Life Care" Nursing Home on 15.10.2001 at 4.30 P.M. for abortion and there was an agreement for payment of Rs. 1000/-.

6. It was further alleged that about 6.30 P.M. on the same date Dr. Koley told him that the condition of the patient is serious and he shall have to keep the patient in the Nursing Home for further five days and he shall have to pay a further sum of Rs. 5000/- and in the meantime the condition of the patient become more deteriorated due to profuse bleeding and Dr. Koley shifted his responsibility advising him to get her admitted immediately in the Howrah General Hospital and without taking money from him requested Howrah General Hospital to get her admitted. Accordingly at about 7 P.M., Jhuma Mondal was admitted in Howrah General Hospital and at about 9.30 P.M. the patient has died.

7. It was further alleged that Dr. Koley, though a Doctor of a Government Hospital and in spite of repeated requests for admitting her in the Howrah General Hospital, he got her admitted in "Life Care" Nursing Home and without doing full treatment, referred the patient to the hospital and in this connection, it has further been alleged that the total mismanagement and the greed of the doctor for money, forced his wife towards death and utter negligence of the doctor caused loss of life of his wife, Jhuma.

8. It was further alleged by the petitioner that as per Post Mortem Report, two injuries were found on the two sides of the Uterus of Jhuma and the Post Mortem was held on 17.10.2001 at Medical College and Hospital, Kolkata and one U.D. case was started by Howrah Police being Howrah Police Station Case No. 345 dated 16.10.2001 and the Police started Shibpur P.S. Case No. 245 of 2001 dated 06.11.2001 under Section 314 of the Indian Penal Code against the present petitioner on the basis of the complaint filed by Sujit Mondal, O.P. No. 2.

9. It has also been contended on behalf of the petitioner that he had no negligence in the connected matter and he was called to Life Care Nursing Home by Sujit Mondal and on seeing the precarious condition of the patient, he took her to Howrah General Hospital, transmitted blood to her and he along with a team of doctors took all measures to save the life of the patient, but unfortunately she died in the O.T. and in treating her he acted as a servant without charging a single farthing for her treatment.

10. It has further been alleged by the petitioner that earlier he filed another application under Section 401 read with Section 482 of the Code of Criminal Procedure whereby, prayer for quashing of the investigation in Shibpur P.S. Case No. 245/01 under Section 314 of the Indian Penal Code was prayed for and ultimately, the peti-

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tioner did not press the said application and in consequence thereof, the same was rejected by Justice Sujit Barman Roy (As His Lordship then was) as being 'not pressed' and thereafter the petitioner having granted bail by the Hon'ble High Court on 11.07.2002. Appeared before the Court of Sub Divisional Judicial Magistrate, Howrah on 16.07.2002 when he was granted bail by the learned Court below.

11. It has further been alleged that the police thereafter submitted charge sheet against the petitioner before the learned SDJM, Howrah under Section 314/201 of IPC and the learned Magistrate without applying his judicial mind, mechanically took the cognizance of the case and issued process against the petitioner under Section 314/201 of IPC.

12. Further, it has been contended by the petitioner that for prosecuting him no sanction whatsoever has been obtained and in view of sections 3, 4 and 8 of the Medical Termination of Pregnancy Act, 1971, the petitioner cannot be prosecuted and held liable under Section 314/201 of IPC.

13. Accordingly, being aggrieved by and dissatisfied with the order passed by the learned SDJM, on 11.09.2002 whereby cognizance was taken against him and thereafter process were issued under Section 314/ 201 of IPC against the present petitioner, the petitioner has come up before this Court once again for the reliefs, as mentioned at the outset.

14. This prayer, however, has been opposed by the Opposite Party No. 2 as also by the State of West Bengal alleging mainly that the criminal proceeding can only be quashed at the initial stage, if on the face of the complaint or the FIR, as the case may be, no offence is constituted and the test is that taking the allegations and the complaint, as they are, without adding anything or subtracting anything, if no offence is made out, then the High Court will be justified in quashing the proceedings in exercise of its powers under Section 482 and at that stage, the High Court will not embark upon any sort of enquiry with a view to ascertain the truthfulness or otherwise of the allegation and the claim, that has been made by the petitioner in the instant case, may be availed of by them before the trial Judge at its appropriate stage.

15. I have heard the learned advocates appearing for the parties at length.

16. The main grievance of the petitioner in this proceeding is that after coming into force the 'Act of 1971', the provisions of IPC relating to miscarriage became subservient to the Act because of non-obstante clause in Section 3 of the aforesaid Act of 1971 and as such the continuation of the proceeding would be regarded as an abuse of the process of the Court and as such it should be quashed. Secondly, it has also been contended that this petitioner being a public servant removable only by a Governor and the act complained of having been done in course of discharge of his official duties, no cognizance should have been taken by the Court without the valid

sanction and thirdly, in taking cognizance there was absolute non application of mind by the Court.

.....

18. Drawing my attention to the aforesaid provision of the Act together with Section 8 of the Act of 1971, it has been contended from the side of the petitioner that a registered practitioner who terminates the pregnancy in accordance with the provisions of the Act, is protected from any prosecution for the termination of such pregnancy and by provisions of Section 8 of the Act of 1971 he is also protected from any civil action for compensation for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act.

19. So, referring to the above, it has been contended on their behalf that the aforesaid provisions of the Act of 1971 taken together with the provisions of sections 88 of IPC and 92 of IPC protects the petitioner for the act done in good faith for the benefit of a person cannot be regarded as an offence. So, for such reason, the continuation of the proceeding against this petitioner would certainly be an abuse of the process of the Court and as such should be quashed.

20. In refuting the aforesaid contention, it has been contended on behalf of the opposite parties that in order to get this protection, the registered medical practitioner must establish that his action done in good faith, but this is not the appropriate stage when the Court is entitled to embark upon any sort of enquiry for ascertaining the fact whether or not the act was done in good faith or otherwise. So, it may be made available to them in course of trial upon proving the same on evidence but at this stage it is not at all available to them.

21. I have given my anxious consideration with regard to the submission made by the parties.

22. It has now become more than settled that in quashing the complaint or the FIR or the charge sheet, the Court has to exercise its power under Section 482 of CrPC with extreme circumspection.

23. In this connection, I may profitably use the dictum of the Apex Court in a decision reported in 1992 Supp. (1) SCC 335 in the case of State of Haryana v. Bhajan Lal wherein it was held by the Apex Court that "We also give a note of caution to the effect that the power of quashing a criminal proceeding should be executed very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice".

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24. So, applying the aforesaid decisions in the given situation and having due regard to the rival contentions made by the parties, I am rather prompted to hold that to get the protection of Sub-section (1) of Section 3 of Act of 1971, the petitioner as a medical practitioner has to prove that he has done the same in good faith which may also include the omissions, but this is not the appropriate stage where the Court should go on embarking upon by way of enquiry as to whether it was done in good faith or otherwise and it is required to be left to be decided by the trial Judge at its appropriate stage in the trial.

25. So, that being the position, quashing of the proceeding, as prayed for, on the first ground is of no avail to the petitioner.

26. Now, turning to the second grievance of the petitioner regarding question of obtaining sanction, it may be recorded that for prosecuting a public servant when the Act or action complained of has been performed by him in discharge of his official duties, a sanction is necessary, but it is now quite settled that such sanction may even be obtained at a latter stage of the proceeding and in view of the fact, it cannot be said with certainty that the proceeding would be regarded as void ab initio for not obtaining sanction.

27. So, on this ground also, the claim of the petitioner for quashing of the proceeding is not sustainable for the present.

28. Now, turning to the third claim of the petitioner with regard to the non-application of the mind of the concerned Judge in taking cognizance, it may be stated that the words "take cognizance" have not been defined in the Code itself, but it will certainly mean that when the Magistrate on receiving complaint and/or receiving a police report applies his mind for proceeding further in the concerned matter, then he is said to have taken cognizance of the offence. Examining the impugned order, in the light of the aforesaid settled position of law, it may be held with certainty that in the instant case no objection could be taken in respect of the impugned order passed by the learned Magistrate in the matter of taking cognizance and that being the position, I find no merit in the third claim of the petitioner.

29. Now, in view of what I have stated above, I hold with certainty that in the instant case neither the prayer for quashing as prayed for by the petitioner nor the prayer for setting aside of the order dated 11.09.2002 passed by the learned. SDJM, Howrah in taking cognizance of the offence under Section 314/201 of IPC in the connected matter against the petitioner could be entertained and allowed.

In consequence thereof, the revisional application fails.

Liberty is however, given to the petitioner to raise all his contentions before the trial Judge at its appropriate stage. Interim orders, if there be any, stand vacated.

Urgent xerox copies, if applied for, may be made available to the parties with utmost expedition.

Km. Mahima²⁰
Vs
State and Ors.

Hon'ble Judges:

J.D. Kapoor, J.

JUDGMENT

J.D. Kapoor, J.

1. The petitioner has been placed in a piquant situation by the Magistrate as well as by the learned Sessions Judge. She had filed a complaint under Sections 366A/376/506(2), IPC against respondent for having been raped. According to her she became pregnant on account of the act of rape. On her representation she was sent for medical examination. The pregnancy test which was conducted on 23rd June, 2003 was found to be positive, though the occurrence is said to be have taken place on 24th May, 2003.

2. In order to preserve her honour and her repugnance to have a child born out of rape she moved an application before the learned Magistrate for permission to terminate her pregnancy and for preservation of foetus and DNA test for the purpose of evidence that she was raped by the accused-respondent. The learned Magistrate dismissed the application but with the observation that there is no provision in the aforesaid Act for intervention by the Court as it is the prerogative of the aggrieved party to decide whether she wants to terminate the pregnancy or not. Aforesaid order was affirmed by the learned Additional Sessions Judge when the complainant filed a revision petition. It appears that both the Courts below lost sight of the fact that the complainant had primarily moved the application for preservation of foetus and conducting the DNA test as a piece of evidence against the respondent-accused.

3. So far as the termination of pregnancy by a woman is concerned, it is governed by Section 3 of the Medical Termination of Pregnancy Act, 1971. According to this any

²⁰. Full text available at

woman has the option to get the pregnancy terminated by a registered medical practitioner, if it does not exceed 12 weeks. If the duration of the pregnancy exceeds 12 weeks but does not exceed 20 weeks such a termination can be done by not less than two registered medical practitioners, who will give the opinion whether the continuance of the pregnancy would involve a risk to the life of the pregnant woman and grave injury to her physical and mental health. Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

4. To carry a child in her womb by a woman as a result of conception through an act of rape is not only extremely traumatic for her but humiliating, frightening and psychologically devastating and as a human being she becomes an object of scorn and ostracisation. By not allowing the petitioner from getting her foetus preserved for conducting DNA test as a proof of her having been raped by the accused both the Courts below were not justified. Since the accused was summoned on a complaint filed by the petitioner and not by way of a report lodged with the police, it was all the more essential for the Courts below to allow the petitioner to preserve her foetus for the purpose of conducting DNA test while getting her pregnancy terminated.

5. Merely by saying that the petitioner has independent right of getting her pregnancy terminated was not sufficient as her main object was not only to get her pregnancy terminated but also preserve the foetus for conducting DNA test. The time wasted in not giving such direction by the Courts below may cause a situation resulting in injury to the mental health of the complainant as the termination of the pregnancy exceeding 20 weeks may prove dangerous to her life as a consequence of which she would suffer the mental agony and torture of giving birth to a child of rape.

6. For the foregoing reasons both the orders passed by the Courts below are set aside being not in conformity with the provisions of law and suffering from inherent infirmity. In the result the petition is allowed with the direction to the SHO of the concerned police station or any other responsible police officer to accompany the complainant and present her before the Medical Superintendent, AIIMS on 1st September, 2003 to get her pregnancy terminated where Board of two medical practitioners would be constituted by the Medical Superintendent on that day itself. The Medical Board shall take the decision immediately for terminating the pregnancy and terminate the same in accordance with the provisions of Section 3 of the Medical Termination of Pregnancy Act, 1971 and shall preserve the foetus and conduct DNA test thereon and produce the report thereof before the learned Trial Court. In case it is not possible to terminate the pregnancy for any reason whatsoever, then the Medical Board shall conduct the DNA test by the prescribed medical modes as a proof of conception by the accused.

7. Petition is allowed and is disposed of in the aforesaid terms. Copy of the order be

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sent to the SHO of the concerned police station for compliance and be given Dasti to the petitioner and a copy be sent to the Medical Superintendent, AIIMS forthwith.

D.K. Joshi²¹
Vs
State of U.P. & Ors.

Hon'ble Judges:

S. Rajendra Babu and S.N. Phukan, JJ.

ORDER

S.N. Phukan, J.

1. The appellant filed a writ petition before the High Court of Allahabad in public interest praying for writ of mandamus directing the respondents to initiate action against persons who are unqualified and unregistered but carrying on medical profession unauthorisedly in the district of Agra, Uttar Pradesh. The High Court by the impugned judgment dismissed the petition in limine with the observation that the Chief Medical Officer, Agra would complete the inquiry which was pending in accordance with law. The present appeal is against the said order of the High Court.

.....

5. In the present appeal, directions have been prayed for only for district of Agra. In the reply affidavit, it has been stated that such unqualified/unregistered doctors after being warned have shifted to other neighbouring districts. We are, therefore, of the opinion that unless directions are issued in respect of the entire State of U.P. the problem cannot be solved. We set aside the impugned judgment and direct as follows:

6. The Secretary, Health and Family Welfare Department, State of U.P. shall take such steps as may be necessary to stop carrying on medical profession in the State of U.P. by persons who are unqualified unregistered and in addition shall take followings steps:

(i) All District Magistrates and the Chief Medical Officers of the State shall be

21. Full text available at(2000)5SCC80

directed to identify, within a time limit to be fixed by the Secretary, all unqualified/unregistered medical practitioners and to initiate legal actions against these persons immediately.

(ii) Direct all District Magistrates and the Chief Medical Officers to monitor all legal proceedings initiated against such persons;

(iii) The Secretary, Health and Family Welfare Department shall give due publicity of the names of such unqualified/unregistered medical practitioners so that people do not approach such persons for medical treatment.

(iv) The Secretary, Health and Family Welfare Department shall monitor the actions taken by all District Magistrates and all Chief Medical Officers of the State and issue necessary directions from time to time to these officers so that such unauthorised persons cannot pursue their medical profession in the State. 7. The appeal is allowed. No costs.

Smt. Ram Kali²²
Vs
State of Haryana and Ors.

Hon'ble Judges:

R.L. Anand, J.

JUDGMENT

R.L. Anand, J.

1. The unsuccessful plaintiff Smt. Ram Kali has filed the present regular second appeal and it has been directed against the judgment and decree dated 15th September, 1992 passed by the Additional District Judge, Kurukshetra who allowed the appeal of the defendants/State of Haryana and set aside the judgment and decree dated 27th February, 1989 passed by the learned Senior Sub-Judge, Kurukshetra, who granted a money decree for a sum of Rs. 50,000/- in favour of the plaintiff ad against the defendants, besides interest at the rate of 6% per annum from the date of the decree till payment. The suit was filed in forma pauperis.

2. The brief facts of the case are that Smt. Ram Kali filed a civil suit in forma pauperis and prayed for a decree for a sum of Rs. 1,00,000.00 by way of damages against the defendants. The case set up by the plaintiff (appellant herein) in the trial Court was that she was operated upon for sterilization at Civil Hospital, Shahabad Markanda, tehsil Thenesar on 30th January, 1985. In spite of the aforesaid operation, she gave birth to a female child on 18.12.1985. The case of the plaintiff/appellant was that she is a very poor lady and has been burdened with the expenses for bringing up the child, to perform her marriage etc. It was also the case of the plaintiff in the trial Court that she was given birth to a female child on account of the negligence and carelessness on the part of the doctor of the defendant-State and in these circumstance, the defendant-State is vicariously liable to pay compensation to her, along with interest at the rate of 18% from the ate of the operation.

.....

22. Full text available at 2003ACJ752

5. The parties led oral as well as documentary evidence in support of their case and, on the conclusion of the proceedings, the suit of the plaintiff was partly decreed and a money decree for the sum of Rs. 50,000/- in favour of the plaintiff against the defendant was granted, besides interest at the rate of 6% per annum from the date of the decree till payment. Since the suit was filed in forma pauperis, therefore, the trial Court also gave the direction that a sum of Rs. 6370.00, be realised for the plaintiff and to that extent the court-fee will be first charged on the decree. The suit of the plaintiff was decreed for the reasons given in para Nos.6 and 7 of the judgment dated 27th February, 1989, which are reproduced as under:

"6. These two issues are inter-connected and the same are being discussed together. Smt. Ram Kali plaintiff appearing as P.W.1 has stated on oath that she was operated upon for sterilization in the Shahabad hospital and was given certificate ex. P1 regarding the same. She has also stated that eleven months after the operation she had given birth to a female child in the village and that she had spent Rs. 4000/- on her birth for purchasing medicines and diet and that she will have to spend rupees one lac for bringing her up and on her marriage. She has deposed that she would have to incur the aforesaid expenditure because of wrong operation. She has also stated that she had sent notice Ex.P1 by registered post, the postal receipts of which are Ex.P3 to Ex. P5 and acknowledgement receipt is Ex.P6. In cross-examination she admitted that the operation was performed with her consent. She denied that the Medical Officer who performed the operation was not to blame. Reghunath PW2 is the husband of Smt. Ram Kali. He has also deposed to the operation performed on her wife and the birth of female child on 18.12.1985. He has also stated that he had spent Rs. 4000/- at the time of birth of the child and that a minimum amount of rupees one lac is required for bringing her up and expenses on her marriage. He also deposed that the child was born because of wrong operation. In cross-examination he stated that he did not know whether the doctor who performed the operation was negligent or not. On the other hand, the defendants have examined Dr. S.K. Wadhwa, DW1. He has stated that he is in service in the State of Haryana as Medical Officer since October, 1981 and has performed a large number of tubectomy operations and that failure rate of such operations varies from place to place and from person to person and that normal rate of failure is 0.6% to 4.9%. He has also stated that the woman undergoing operation in case of failure can get herself operated again and that in case of conception even after the operation she has the facility of medical termination of pregnancy on Government expense under the Medical Termination of Pregnancy Act, 1971. He has also stated that the Medical Officer usually does not tell the woman concerned before operation that it can result in failure although the motivator and the worker following that case inform her about the same. In cross-examination, he denied that cause of failure of tubectomy operation as the negligence of the Medical Officer. Dr. N.K. Gaur, DW2, has stated that he remained posted in the Civil Hospital, Shahabad, from 1981 to 1985 and during that period he had performed more than 10,000/- sterilization operations. He has also stated that he is a post-

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graduate. Smt, Ram Kali was operated upon by him on 30.1.1985. He has also stated that her motivator was Smt. Sita Devi A.N.M. He has further stated that the operation was performed by him carefully. He has stated that the reason of failure of the operation is not the negligence of the doctor but recanalisation of the bone. He has also stated that if proper care is not taken regarding sexual relations within three months of the operation, the operation can result in failure and that the rate of failure of the operations is 0.6% to 4.9%. In cross-examination he denied that the operation in question had failed because of his negligence. Smt. Sita Devi DW3 has deposed that Ram Kali plaintiff was known to her and that she had motivated her for operation and taken her for the purpose to Civil Hospital Shahabad. She has stated that she had informed Ram Kali for taking precautions before and after the operation and also that she should not have sexual intercourse with her husband for a period of three months after operation. She has also stated that about three months after the operation she was informed by Ram Kali that she did not have menses and that she had advised her to get herself checked up on the hospital. Smt. Ram Kali again examined herself in rebuttal and stated that Smt. Sita Devi had not informed her about any precautions to be observed regarding the operation, nor had she informed her that the operation could result in failure.

7. It is an admitted fact that the plaintiff was operated upon for sterilization on 30.1.1985. It is also an admitted fact that she gave birth to a female child on 18.12.1985 i.e. after about 10-1/2 months. It is thus clear that the plaintiff had become pregnant after the operation. The plea taken up by the plaintiff is that the operation had failed because of the negligence of the doctor, who had performed the same and that as a result birth of female child, she has been burdened with an expenditure of rupees one lac for bringing up the child, for her marriage and other expenses. In the written statement filed by the defendants, they have pleaded that the operation was done successfully, but added that such operation may fail for the reasons which are beyond the control of human beings. It has also been pleaded that the plaintiff could get the pregnancy terminated under the Medical Termination of Pregnancy Act, 1971. The plaintiff has admitted that she was operated upon with her consent. However, she has also stated that she was never informed that the operation could result in failure, nor was she informed about the pre-cautions to be taken by her after the operation. It is stated by Dr. N.K. Gaur DW2, who had conducted the operation, that in the text-book of gynecology it has been mentioned that cause of failure of an operation is recanalisation of a fallopian tube. No book by any renowned authority of Medical Science has been brought to my notice by either of the parties. In *Dr. Laksman Balkrishna Joshi v. Trimak Bapy Godbole and Anr*, A.I.R. 1969 Supreme Court 128, It has been observed by the Supreme Court that a person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose and that such a person when consulted by a person owes certain duties, viz a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of

that treatment. It is not disputed that Dr. N.K. Gaur DW2 is a qualified medical practitioner. However, the defendants have failed to produce any evidence to prove that before operating upon Smt. Ram Kali, she was informed that the operation could result in failure. It was necessary for the defendants not only to obtain consent of the plaintiff before operating upon her, but also to inform her in writing that the operation could fail and to operate upon her only if she accepted that condition. It appears from the evidence produced in this case that the plaintiff was not informed about the chances of failure of the operation, nor she was informed about the precautions to be taken by her after the operation. There is nothing on the file to show that after the operation any steps were taken by the defendants to verify that the operation had been done successfully. Keeping in view all the circumstances of the case, I am of the opinion that the result of failure of the operation was due to reasons within the control of human beings and that the defendants were also negligent because they had not informed the plaintiff about the chances of failure of such operation as well as the precautions to be taken after the operation. The plaintiff is, therefore, entitled to damages for the loss and injury which she has suffered because of the birth of female child even after the operation. She has claimed rupees one lac on that account. I am of the opinion that keeping in view the fact that the plaintiff is a villager, a sum of Rs. 50,000/- will be sufficient for the bringing up of the child and other expenditure to be incurred on her, including her marriage. In the result, I decide these two issues in favour of the plaintiff and hold that she is entitled to Rs. 50,000/- from the defendants on account of compensation and damages”.

6. Not satisfied with the judgment and decree of the trial Court, the defendants filed the first appeal before the Court of Additional District Judge, Kurukshetra, who for the following reasons given in para No. 9 of the judgment, set aside the judgment and decree of the trial Court and dismissed the suit of the plaintiff;

“9. After having gone through the follow up study of Laproscopic and Conventional Tubectomy Acceptors in Haryana State 1986-87, placed on record by the appellants it is revealed that the failure rate after laproscopic tubectomy operation is 2.1% and according to Shaw’s Test Book of Gynaecology, the failure rate is 4.9% to 6% which means that the acceptors lady can conceive even after operation of laproscopic tubectomy. While appearing in the witness box the respondent has not stated even a word that the doctor conducting the operation was negligent in any manner nor any reason has been assigned to the doctor with regard to his negligence in conducting the operation of the respondent. The only grouse of the respondent is that she was not advised to use precaution after the operation. For that, I would like to refer one of the most important book on the subject Laproscopy by Siddhartha D. Khandwala. In Chapter 6 at Page 60, the 3rd benefit of laproscopy sterilization enumerated as “it entails minimal disruption in the woman’s daily routine viz diet, work, sext, etc. “By reading this, it can be said with

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certainly that after the operation the acceptor lady is free to do her daily routine job and there is no abstinence with regard to diet, work sex. etc. Though it has come in the statement of Sita Devi (DW3) who was posted as Auxiliary Nurse Midwife that while motivating the respondent for operation she had advised Ram Kali to use precaution but I go a step further that even no advice had been given to Ram Kali. By going through the book, referred to above, I am of the opinion that there was no necessity of giving any particular advice to the respondent. It is pertinent to note here that family planning operation in our country is getting popular day by day and people in general know what the family planning is The trial Court had taken the view firstly that the respondent should have given in writing that the operation could fail and after obtaining her consent, the said operation should have been conducted. I totally differ with the approach of the learned trial Judge. The learned counsel for the respondent could not show me any administrative instructions issued by the State to the doctor to obtain such consent before conducting such like operations. I am also fortified by the findings given in population reports, in which reasons have been given for which woman can conceive after the operation and those are when rings break during insertion even when properly applied, do not block the tube, rings can slip off the tube, spontaneous recanalisation may also occurs. A plain reading of this shows that even if any one think out of these happens in a properly operated case, the negligence can not be attributed to the doctor conducting operation. It has come in the statement of Dr. Neeraj Gaur, D.W.2 that he had conducted more than ten thousand operations during his tenure and the operation of the respondent was conducted by him with all precautions and case. So, in this view of the matter in no way, we can fasten the liability of Dr. Neeraj Gaur for not conducting the operation efficiently.”

Thus, not satisfied with the judgment and decree of the first appellate Court, the present appeal by the unsuccessful plaintiff/appellant.

7. I have heard Shri Anil Khetarpal, learned counsel appearing on behalf of the appellant and Shri Vijay Dahiya, learned Assistant Advocate General on behalf of the respondent-State and, with their assistance, have gone through the record of this case.

8. It was vehemently argued by the learned counsel for the appellant that the first appellate Court fell in error in dismissing the suit of the plaintiff. He submits that it is established on record that the family planning operation was performed upon the plaintiff on 30th January, 1985 and she also gave birth to a female child on 18th December, 1985. The counsel submits that it was a case of sheer negligence on the part of the doctor. Had he taken necessary and proper care in the performance of the operation there would have been no loss and injury to the plaintiff when she delivered the unwanted child on 18th December, 1985. In support of his contention, the learned counsel for the appellant has relied upon a recent judgment of the Hon'ble Supreme

Court reported as State of Haryana and Ors. v. Santra (Smt.), (2000)5 Supreme Court Cases 182 and a judgment of this court reported as Punjab State v. Surinder Kaur, (2000-3)126 P.L.R. 411.

9. On the contrary, Mr. Vijay Dahiya, the learned counsel appearing on behalf of the respondents, submitted that the judgment of the first appellate Court is correct. The plaintiff was advised not to share the bed with her husband for a period of three months after operation and the advise of the doctor was not adhered to and, as result of which the plaintiff conceived the child. The plaintiff herself was negligent because she did not accept the advice of the doctor. Mr. Dahiya further submitted that the family planning operations are not 100% fully perfect. There is always some scope of error which is not attributed to the human factor. While doing such like operation, the doctor takes all precautionary measures according to his ability and in spite of that if any woman conceives a child that is the will of the God. Until and unless negligence is established and proved on the part of the doctor, the State cannot be burdened with any compensation. It was also argued by the learned counsel for the respondents that in the present case the operation of the plaintiff was performed by a competent doctor who had lot of experience in this filed. He had performed thousands of such like operations. In spite of that if the plaintiff had conceived the child negligence cannot be attributed on the part of the doctor. In support of his contention, the learned counsel has also invited my attention to the statement of Dr. N.K. Gaur who appeared as D.W.2.

10. After considering the rival contentions of the parties, I am of the opinion that the findings of the first Appellate Court cannot prevail for the simple reason that the case which has been advanced now by the learned counsel for the respondents was never put to the plaintiff when she appeared in the witness-box. There is not an iota of suggestion given to the plaintiff that at the time of the discharge the plaintiff was advised not to share the bed with her husband for a period of three months. On the contrary, the plaintiff who is an illiterate lady can always conceive an idea in her in that after performing the family planning operation upon her she is secured. A sense of security is involved when a woman or a male person undertakes such type of operation. No documentary evidence has been produced on the file to show that the plaintiff was advised not to share the bed with her husband for a period of three months. It is a common case of the parties that the plaintiff did conceive a child and the child was delivered on 18th December, 1985. The plaintiff is a poor lady. She has also filed a suit in forma pauperis. The coming of the unwanted child in the family will certainly add the burden of the family. In these circumstances, I am inclined to reverse the judgment of the first appellate Court. The Hon'ble Supreme Court in Smt. Santra's case (supra) has held that when birth of an unwanted child takes place, negligence can be attributed to the doctor. It was also observed by the Hon'ble Supreme Court that since it is the statutory liability of the parents to maintain the child under the Hindu Adoptions and Maintenance Act and Mohammedan Law, therefore, there is no bar on the part of the mother to claim damages. Learned counsel for the respondent

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has tried to distinguish this judgment by urging that in the cited case it was proved that the doctor had not stitched the left Fallopian tube. In the present case, there is no such evidence. Therefore, the plaintiff is not entitled to any decree. The submissions of the learned counsel for the respondent cannot be accepted. In the present case it was within the knowledge of the doctor who performed the operation to say that under what circumstances, the plaintiffs operation had failed. No cogent reasons are forthcoming. It was difficult for the plaintiff to say or proved as to what had happened inside her body or uterus at the time of the operation. The delivery of the child itself is a suggestion and proof of negligence on the part of the doctor who performed the operation. In *Surinder Kaur's* case (*supra*), this Court has held that the State and its functionaries are liable to pay damages. In this case, the doctor who operated upon the woman was performing his duties during the course of his employment and, therefore, it was observed by the High Court that the master is always responsible for the vicarious liability of the acts committed on the part of the employee.

11. Resultantly I allow this appeal, set aside the judgment and decree of the first appellate Court and grant a money decree for a sum of Rs. 50,000.00 in favour of the plaintiff and against the defendants with interest at the rate of 6% per annum from the date of the decree of the trial Court up to the date of payment. There would be no order as to costs in the present appeal. Directions are also given to the State to deduct a sum of Rs. 6,370/- and Rs,2832.00 on account of the court-fees payable by the plaintiff-appellant in the trial Court as well as in the High Court on the decretal amount.

Vinod Soni and Anr²³.
Vs
Union of India (UOI)

Hon'ble Judges:

V.G. Palshikar and V.C. Daga, JJ.

JUDGMENT

V.G. Palshikar, J.

1. By this petition, the petitioners who are married couple, seek to challenge the constitutional validity of Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994 (hereinafter referred to Sex Selection Act of 1994). The petition contains basically two challenges to the enactment. First, it violates Article 14 of the Constitution and second, that it violates Article 21 of the Constitution of India. At the time of argument, the learned counsel appearing for the petitioners submitted that he does not press his petition in so far as the challenge via Article 14 of the Constitution of India is concerned.

2. We are, therefore, required to consider the challenge that the provisions of Sex Selection Act of 1994 are violative of Article 21 of the Constitution of India. Article 21 reads thus:

“Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law.”

3. This provision of Article 21, according to the learned counsel has been gradually expanded to cover several facets of life pertaining to life itself and personal liberties which an individual has, as a matter of his fundamental right. Reliance was placed on several judgments of the Supreme Court of India to elaborate the submission regarding expansion of right to live and personal liberty embodied under Article 21. In our opinion, firstly we deal with protection of life and protection of personal liberty. In so

23. Full text available at 2005CriLJ3408, 2005(3)MhLj1131

far as protection of life is concerned, it must of necessity include the question of terminating a life. This enactment basically prohibits termination of life which has come into existence. It also prohibits sex selection at pre conception stage. The challenge put in nutshell is that the personal liberty of a citizen of India includes the liberty of choosing the sex of the offspring. Therefore he or she is entitled to undertake any such medicinal procedure which provides for determination or selection of sex, which may come into existence after conception. The submission is that the right to personal liberty extends to such selection being made in order to determine the nature of family which an individual can have in exercise of liberty guaranteed by Article 21. It inturn includes nature of sex of that family which he or she may eventually decided to have and/or developed.

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5. Then reliance is placed on a Supreme Court Judgment in AIR 1989 S.C. page 677 and two earlier decisions whereby the Supreme Court has explained Article 21 and the rights bestowed thereby include right to Food, clothing, decent environment, and even protection of cultural heritage. These rights even if further expanded to the extremes of the possible elasticity of the provisions of Article 21 cannot include right to selection of sex whether preconception or post conception.

6. The Article 21 is now said to govern and hold that it is a right of every child to full development. The enactment namely Sex Selection Act of 1994 is factually enacted to further this right under article 21, which gives to every child right to full development. A child conceived is therefore entitled to under Article 21, as held by the Supreme Court, to full development whatever be the sex of that child. The determination whether at pre conception stage or otherwise is the denial of a child, the right to expansion, or if it can be so expanded right to come into existence. Apart from that the present legislation is confined only to prohibit selection of sex of the child before or after conception. The tests which are available as of today and which can incidentally result in determination of the sex of the child are prohibited. The statement of objects and reasons makes this clear. The statement reads as under.

“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.”

Then para 4 reads thus:

“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.”

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7. It will thus be observed that the enactment proposes to control and ban the use of this selection technique both prior to conception as well as its misuse after conception and it does not totally ban these procedures or tests. If we notice provisions of section 4 of the Act it gives permission in when any of these tests can be administered. Sub section 2 says that no prenatal diagnostic techniques can be conducted except for the purposes of detection of any of the (1) chromosomal abnormalities, (2) genetic metabolic diseases, (3) hemoglobinopathies, (4) sex-linked genetic diseases, (5) congenital anomalies and (6) any other abnormalities or diseases as may be specified by the Central Supervisory Board. Thus, the enactment permits such tests if they are necessary to avoid abnormal child coming into existence.

8. Apart from that such cases are permitted as mentioned in sub clause 3 of section 4 where certain dangers to the pregnant woman are noticed. A perusal of those conditions which are five and which can be added to the four, existence on which is provided by the Act. It will therefore be seen that the enactment does not bring about total prohibition of any such tests. It intends to thus prohibit user and indiscriminate user of such tests to determine the sex at preconception stage or post conception stage. The right to life or personal liberty cannot be expanded to mean that the right of personal liberty includes the personal liberty to determine the sex of a child which may come into existence. The conception is a physical phenomena. It need not take place on copulation of every capable male and female. Even if both are competent and healthy to give birth to a child, conception need not necessarily follow. That being a factual medical position, claiming right to choose the sex of a child which is come into existence as a right to do or not to do something which cannot be called a right. The right to personal liberty cannot expand by any stretch of imagination to liberty to prohibit coming into existence of a female foetus or male foetus which shall be for the Nature to decide. To claim a right to determine the existence of such foetus or possibility of such foetus come into existence, is a claim of right which may never exist. Right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself to be a right. In our opinion, therefore, the petition does not make even a prima facie case for violation of Article 21 of the Constitution of India. Hence it is dismissed. In view of the fact that the petition itself is rejected, the application for intervention is also rejected.

Municipal Corporation of Delhi²⁴

Vs

Femal Workers (Muster Roll) & Anr.

Hon'ble Judges:

S.Saghir Ahmed and D.P. Wadhwa, JJ.

S. Saghir Ahmad, J.

1. Female workers (muster roll), engaged by the Municipal Corporation of Delhi (for short, 'the Corporation'), raised a demand for grant of maternity leave which was made available only to regular female workers but was denied to them on the ground that their services were not regularised and, therefore, they were not entitled to any maternity leave. Their case was espoused by the Delhi Municipal Workers Union (for short, 'the Union') and, consequently, the following question was referred by the Secretary (Labour), Delhi Administration to the Industrial Tribunal for adjudication:-

“Whether the female workers working on Muster Roll should be given any maternity benefit? If so, what directions are necessary in this regard?”

2. The Union filed a statement of claim in which it was stated that Municipal Corporation of Delhi employs a large number of persons including female workers on muster roll and they are made to work in that capacity for years together though they are recruited against the work of perennial nature. It was further stated that the nature of duties and responsibilities performed and undertaken by the muster roll employees are the same as those of the regular employees. The women employed on muster roll, which have been working with the Municipal Corporation of Delhi for years together, have to work very hard in construction projects and maintenance of roads including the work of digging trenches etc. but the Corporation does not grant any maternity benefit to female workers who are required to work even during the period of mature pregnancy or soon after the delivery of child. It was pleaded that the female workers required the same maternity benefits as were enjoyed by regular female workers under the Maternity Benefit Act, 1961. The denial of these benefits

24. Full text available at AIR2000SC1274

exhibits a negative attitude of the Corporation in respect of a humane problem.

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6. Not long ago, the place of a woman in rural areas has been traditionally her home; but the poor illiterate women forced by sheer poverty now come out to seek various jobs so as to overcome the economic hardship. They also take up jobs which involve hard physical labour. The female workers who are engaged by the Corporation on muster roll have to work at the site of construction and repairing of roads. Their services have also been utilised for digging of trenches. Since they are engaged on daily wages, they, in order to earn their daily bread, work even in advance stages of pregnancy and also soon after delivery, unmindful of the detriment to their health or to the health of the new-born. It is in this background that we have to look to our Constitution which, in its Preamble, promises social and economic justice. We may first look at the Fundamental Rights contained in Chapter III of the Constitution. Article 14 provides that the State shall not deny to any person equality before law or the equal protection of the laws within the territory of India.

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8. From Part III, we may shift to Part IV of the Constitution containing Directive Principles of State Policy. Article 38 provides that the State shall strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political shall inform all the institutions of the national life. Sub-clause (2) of this Article mandates that the State shall strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities.

9. Article 39 provides, inter alia, as under:

“39. Certain principles of policy to be followed by the State -The State shall, in particular, direct its policy towards securing-

- (a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
- (b) ...
- (c) ...
- (d) that there is equal pay for equal work for both men and women;
- (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
- (f)...”.

10. Articles 42 and 43 provides as under:

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“42 provision for just and humane conditions of work and maternity relief - The State shall make provision for securing just and humane conditions of work and for maternity relief.

43. Living wage, etc., for workers - The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas.”

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27. The provisions of the Act which have been set out above would indicate that they are wholly in consonance with the Directive Principles of State Policy, as set out in Article 39 and in other Articles specially Article 42. A woman employee at the time of advanced pregnancy cannot be compelled to undertake hard labour as it would be detrimental to her health and also to the health of the foetus. It is for this reason that it is provided in the Act that she would be entitled to maternity leave for certain periods prior to and after delivery. We have scanned the different provisions of the Act, but we do not find anything contained in the Act which entitles only regular women employees to the benefit of maternity leave and not to those who are engaged on casual basis or on muster roll on daily wage basis.

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33. A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Women who constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work; they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre or post-natal period.

34. Next it was contended that the benefits contemplated by the Maternity Benefit Act, 1961 can be extended only to working women in an ‘industry’ and not to the muster roll women employees of the Municipal Corporation. This is too stale an argument to

be heard. Learned counsel also forgets that Municipal Corporation was treated to be an 'industry' and, therefore, a reference was made to the Industrial Tribunal, which answered the reference against the Corporation, and it is this matter which is being agitated before us.

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36. Taking into consideration the enunciation of law assettled by this Court as also the High Courts in various decisions referred to above, the activity of the Delhi Municipal Corporation by which construction work is undertaken or roads are laid or repaired or trenches are dug would fall within the definition of "industry". The workmen or, for that matter, those employed on muster roll for carrying on these activities would, therefore, be "workmen" and the dispute between them and the Corporation would have to be tackled as an industrial dispute in the light of various statutory provisions of the Industrial Law, one of which is the Maternity Benefit Act, 1961. This is the domestic scenario. Internationally, the scenario is no tdifferent.

37. Delhi is the capital of India. No other City or Corporation would be more conscious than the City of Delhi that India is a signatory to various International covenants and treaties. The Universal Declaration of Human Rights, adopted by the United Nations on 10th of December, 1948, set in motion the universal thinking that human rights are supreme and ought to-be preserved at all costs. This was followed by a series of Conventions. On 18th of December, 1979, the United Nations adopted the "Convention on the Elimination of all forms of discrimination against women".

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38. These principles which are contained in Article 11, reproduced above, have to be read into the contract of service between Municipal Corporation of Delhi and the women employees (muster roll); and so read these employees immediately become entitled to all the benefits conceived under the Maternity Benefit Act, 1961. We conclude our discussion by providing that the direction issued by the Industrial Tribunal shall be complied with by the Municipal Corporation of Delhi by approaching the State Government as also the Central Government for issuing necessary Notification under the Proviso to Sub-section (1) of Section 2 of the Maternity Benefit Act, 1961, if it has not already been issued. In the meantime, the benefits under the Act shall be provided to the women (muster roll) employees of the Corporation who have been working with them on daily wages.

39. For the reasons stated above, the Special Leave Petition is dismissed.

**Corporate Channels
India (P) Ltd²⁵
Vs
Union of India**

Hon'ble Judges:

Y.K. Sabharwal and D.K. Jain, JJ.

JUDGMENT

D.K. Jain, J.

(1) Keeping in view the urgency of the matter, with the consent of counsel for the parties, we proceed to dispose of the writ petition at this stage itself.

(2) The petitioners, manufacturers of tubal rings, (one of the contraceptive devices used in female sterilisation), under the brand name "EVE'S", have filed this writ petition under Article 226 of the Constitution seeking a writ in the nature of mandamus directing respondent No.1 to consider their product for purchase and distribution to the public along with the product of other suppliers. They also seek a writ of prohibition restraining the said respondent from placing order for purchase of tubal rings which do not conform to standards specified by Bureau of Indian Standards (for short the BIS) and in particular restraining them from accepting against payment any supplies of Kli brand tubal rings from respondent No.2 under the second purchase order placed in October 1994, until the pre-procurement sampling and testing of their product is done by the Central Drug Laboratory (for short the CDL).

(3) The first petitioner is a Private Limited (company and the second petitioner is one of its shareholders. There are two respondents - Union of India through Department of Family Welfare, Ministry of Health and Family Welfare, New Delhi is the first respondent and one M/s Cabot Medical Corporation, USA through its local agents M/s Aravali International Pvt. Ltd., New Delhi is the second respondent.

25. Full text available on AIR1996Delhi375

(4) The grievance of the petitioners is that acting on the specific representations held out by respondent No.1 in February/March 1992, to the effect that it will purchase only those tubal rings which meet the standards laid by the BIS and preference would be given to indigenous products, they established an industrial unit, by investing large sum of money, for the purpose of manufacturing tubal rings for National Family Welfare Programme; went into production; their product was evaluated by the LIT, the notified CDL, and approved on 3 March 1994 as conforming to BIS Standard IS: 13009:1990, but respondent No.1 has now declined to consider their product for purchase and distribution and instead had been and are still insisting on purchasing Kli brand tubal rings from respondent No.2 in spite of the fact that as per the report of the CDL their product does not meet the BIS standards. It is averred that: respondent No.1 placed with respondent No.2, two orders for purchase of ten lakh pairs each of their Kli brand tubal rings for a total value of approximately Rs.5.8 crores in August - October, 1994; the first supply valued at approximately Rs-1.2 crores, received in October 1994, was tested at the CDL but failed the test; similarly the second supply, received in November 1994, also failed evaluation test conducted by the CDL; thereafter, the Drug Controller of India and some other officials visited USA; approved another laboratory there; got respondent No.2's product tested in that laboratory and gave clearance for acceptance of the tubal rings supplied by respondent No.2, notwithstanding the adverse report of CDL. It is alleged that the normal procedure prescribed for purchase of tubal rings was and is being flouted by respondent No.1 with a view to illegally benefit respondent No.2.

(5) The petitioners also claim that on the strength of the certificate issued by CDL and the inspection carried out on 14 February 1994 of their factory by a team constituted by the Drug Controller, they have made supplies of tubal rings to various State Governments but so far no complaint has been received.

(6) Thus, according to the petitioners the conduct of respondent No.1 in not considering the petitioners' product for purchase and giving preference to the product of respondent No.2: (i) is arbitrary, illegal and in violation of Articles 14, 19(l)(g) and 21 of the Constitution; (ii) the petitioners having altered their position relying on the representation that only those tubal rings would be purchased which meet the Indian standards IS: 13009:1990 and preference would be given to the indigenous products, put heavy investment and effort to set up their unit, on the principle of promissory estoppel, it is not open to respondent No.1 to resite from that position and they are now estopped from making purchases in contravention of the specific assurances; and (iii) if respondent No.1 is permitted to continue making purchases from respondent No.2, it would not only be in violation of the provisions of the Act, but will also ruin the local industry besides loss of precious foreign exchange to the Government.

(7) While issuing notice to show cause as to why rule nisi be not issued, as an interim measure, it was directed that for future orders, the product of the petitioner should also be considered. Thereafter it was also directed that if the goods supplied by

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respondent No.2 did not conform to IS: 13009: 1990 standard, the same shall not be distributed. The interim orders still continue.

(8) The petition is resisted by the respondents by filing affidavits in reply. In the counter filed on behalf of respondent No.1, while admitting that the BIS specifications under the provisions of the Act and the Rules made thereunder, have been adopted for quality assurance, it is, inter alia, contended that: (i) any change or modification in the his specifications is enforceable only if followed by a gazette notification; (ii) petitioners' product being a new drug, has not been subjected to clinical trials in accordance with the specifications prescribed under the Act and Rules made thereunder and, therefore, it is not possible to purchase their product; (iii) in the absence of clinical trials, the CDL, that is, the LIT did not follow the full procedure while certifying that petitioners product conforms to IS: 13009 and (iv) since the petitioners were not represented in the meetings held in February/March, 1992 and then in November 1992, there was no question of holding out assurance of any kind to them and in any case their internal discussions do not tantamount to assurance to the petitioner or any other person in this trade.

(9) In the counter-affidavit filed on behalf of respondent No.2 it is pleaded that: (i) the tubal rings manufactured by the petitioner company are not in conformity with IS: 13009 inasmuch as these have not been subjected to clinical trials; (ii) even under the existing Indian standards clinical trials are mandatory; (iii) the provision regarding clinical trial in clause 4.4 of the BIS guidelines has been wrongly deleted, presumably to avoid its repetition on the assumption that clinical trials were now required under the Drugs and Cosmetics Act, 1940 (for short the Act) and the Rules made thereunder; (iv) the Act and the Rules made thereunder do not make it mandatory that all samples are to be tested at CDL and mutual agreement could provide for re-testing in a reputed independent laboratory, which has been done in the case of respondent No.2 and (v) the alleged failing in the test results conducted by the CDL (IIT) was a deliberate attempt by the individuals concerned in LIT to unduly promote the product of the petitioners.

(10) We have heard learned counsel for the parties at length and have also perused the relevant records.

(11) As a means to control the rising population different methods of contraception are used under National Family Welfare Programme. These fall under two categories, i.e., terminal methods and spacing methods. Under the terminal methods, with which we are presently concerned, laproscopic sterilisation is one of the more popular means of female sterilisation in which a pair of rings are used to block the tubes which carry egg from the ovary to uterus, the site where the foetus grows. These rings have been named as tubal rings. The success of this operation depends mainly on the quality of the tubal rings used for this purpose. Any cracking/breakage/slippage of the rings would result in failure of the operation leading to pregnancy. Once inserted

these rings remain in the body of the woman for the rest of her life, thus increasing the necessity for using tubal rings conforming to requisite standards.

(12) The tubal rings have been in use in India for the last about 15 years in the National Family Welfare Programme. Before 1986-87 these were imported from abroad. Some time in the year 1986-87, steps were initiated by respondent No.1 to standardise the specifications for tubal rings, which culminated in the formulation of IS: 13009 in the year 1990 by BIS.

(13) Some of the specifications so enumerated, material for resolving the controversy in hand, are as follows:

3. MATERIAL

3.1 The tubal rings shall be made from silicone rubber of medical grade which shall pass the extractables test according to the method given in Ann.A.

4. REQUIREMENTS

4.1 The tubal rings shall be cut at right angle (maximum 5 angulation allowed) and shall be round without any fibrous protrusions at the outer and inner surfaces.

4.2 The silicone rubber tube of which the tubal ring is made shall not degrade by prolonged exposure to the biological environment or by procedure of sterilization; shall be sufficiently resistant to unintended influence by the body fluids and tissues and shall be biologically compatible without causing allergic, toxic or inflammatory reaction.

4.3 The tubal ring shall pass the implantation test as per the requirement of:5.1.

4.4 Tubal ring when loaded on the fallopian tube shall produce an acceptable level of efficacy and minimal incidence of adverse reactions. The tubal rings shall have undergone clinical trials approved by the Indian Council of Medical Research,

4.5 The tubal ring shall be radio opaque.

4.6 The tubal ring shall meet the requirements for stress properties as per 5.2 and 5.3 and when loaded on the fallopian tube shall have necessary memory for its inner diameter to compress the fallopian tube.”

(14) To review various aspects with regard to procurement of tubal rings, a joint meeting of the representatives of the Ministry of Health, the Drug Controller of India, the Indian Institute of Technology, Delhi and the manufacturers of tubal rings was organised some time in February/March 1992 and it appears from the minutes of the meeting, placed on record by the petitioners as Annexure P.7, that broad decisions taken were: (i) in view of the finalisation of the Indian standards, the Ministry will purchase only those tubal rings which meet Indian standards; (ii) preference will be given to indigenous products; (iii) as per the decision of the Technical Expert Committee of the Ministry of Health and Family Welfare, the requirement of clinical trial by the Indian

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Council of Medical Research (ICMR) be waived off if the product is found suitable on evaluation by the CDL, namely, the IIT, Delhi; (iv) irrespective of the source of products, from within India or abroad, tubal rings which meet Indian standards will only be procured for the National Family Welfare Programmes and (v) procedure for purchase was specified and was to be the same for all products whether from abroad or India.

(15) The device tubal rings was also notified as a drug under the Act, by notification dated 24 March 1993.

(16) Presumably in the light of the deliberations/guidelines, noticed above, the requirement of clinical trial, as stipulated in clause 4.4 of the his standards was dispensed with by virtue of a notification published in November 1994, whereby the above highlighted portion of clause 4.4 stood deleted.

(17) In order to decide whether and what relief can be granted to the petitioners the following questions would arise for consideration:

- I) Whether the tubal rings manufactured by the petitioners are to be subjected to clinical trials before they can be certified as conforming to Bis standard, IS: 13009?
- II) Whether as a matter of fact there was any representation or assurance held out by respondent No.1 to the petitioners as a result whereof they have altered their position by establishing the petitioner company?
- III) Assuming that there was a representation, whether the plea of promissory estoppel is available to the petitioners? And
- IV) Assuming that the petitioners are entitled to a mandamus, in what form can the mandamus be issued considering the special and sensitive nature of the product involved?

.....

(22) As regards the his standard IS:13009, as noted above, the said standard did initially provide that tubal rings shall have to undergo clinical trials approved by the Indian Council of Medical Research but this requirement of clinical trial, was subsequently waived off when clause 4.4 was amended vide notification published in November 1994. Thus, in any case, from November 1994 as per the his standard IS:13009: 1990 also the tubal ring is not required to be subjected to clinical trials before it is certified as conforming to the specified standard.

(23) We do not find any force in the arguments of learned counsel for respondent No.1 that unless the modifications in the BIS specifications are gazetted, these cannot be given effect to. Rule 125 of the said Rules provides that the standards for mechanical contraception shall be such as are laid down in Schedule R thereto. Annexure V to

Schedule R reads as under:

2. Standards for Contraceptive Tubal Ring (IS 13009: 1990 - Udc 615.472.6: 611.656) Contraceptive Devices Tubal Ring shall conform to the Indian Standards laid down from time to time by the Bureau of Indian Standards”,

(24) The expression “laid down from time to time” as appearing in the afore-quoted annexure, inserted by Gazette Notification dated 24 March 1993 w.e.f. 24.3.1993, signifies that the standard for contraceptive tubal ring has to conform to the Indian Standards laid down from time to time by the BIS and it is not necessary that each and every modification in the standards by BIS needs to be gazetted to make it enforceable.

(25) In our opinion, therefore, the contention urged on behalf of the respondents that even after the amendment of clause 4.4 of BIS Standard IS: 13009 in November 1994, the tubal rings manufactured or assembled in India have to undergo clinical trials, approved by Icmr, notwithstanding the fact that they have passed all the laboratory tests as per BIS standards, is untenable and the decision of respondent No.1 to reject petitioners’ product only on that count and to purchase the product of respondent No.2, which has also not undergone clinical trials at any stage, is not only unreasonable and irrational but also arbitrary.

.....

(27) From the above it is evident that being conscious of the amendment in clause 4.4 of the BIS standards, the experts recommended that the indigenous rings be subjected only to Post Marketing Surveillance (PMS), meaning thereby that the experts committee also felt that there was no need for clinical trials for the indigenously produced rings, as is sought to be now pleaded on behalf of respondent No.1. Had the requirement of clinical trials been mandatory either under the Act or the BIS standards, the expert Committee could not substitute it only with Post Marketing Surveillance.

.....

(31) Thus having come to the conclusion that neither under the Act or the Rules made thereunder nor under the BIS standards, presently in vogue, clinical trials is a prerequisite parameter, for grant of approval of tubal ring for use, the next question which requires consideration is whether a mandamus be straight away issued to respondent No.1 to accept the product of the petitioners on the strength of the approval granted by the Cdl (IIT) in March 1994. We feel that having regard to the nature of the device, it is neither possible nor desirable for us to make an evaluation of the product of the petitioners and of respondent No.2. In our view evaluation in technical matters, like the present one is required and should be done by the expert body, established under Section 6 of the Act, namely, the CDL. Accordingly we direct

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the Director, Department of Biomedical Engineering of the Indian Institute of Technology, New Delhi, nominated under Rule 3-A(5) of the Drugs and Cosmetics Rules, 1945 to carry out the functions of the Cdl, to test the tubal rings manufactured by the petitioners and respondent No.2, to evaluate as to whether they conform to the existing Bis standard IS: 13009. Both the parties will be at liberty to produce any fresh material in support of their claims, which would be taken into account by the Director while considering the matter. If the said authority comes to the conclusion that the samples submitted by the petitioners and respondent No.2 do conform to the said standard, respondent No.1 shall consider for purchase and distribution under the National Family Welfare Programme, the tubal rings manufactured/produced by both the parties. They will of course be at liberty to subject these supplies to post marketing surveillance as suggested by the Committee of experts in their meeting held on 15 December 1994.

(32) For the view we have taken above it is unnecessary to adjudicate upon the question as to whether there was any representation held out by respondent No.1 to the petitioners, as a result whereof they altered their position and if so, its effect:

(33) The writ petition is accordingly allowed with the aforementioned directions and the Rule is made absolute to that extent. Interim orders, directing respondent No.1 not to distribute the goods supplied by respondent No.2, if they do not conform to his standard IS: 13009: 1990, shall continue till the report in terms of this judgment is submitted by the Director, lit, and a decision thereon is taken by respondent No.1. There will, however, be no order as to costs.

S. Amudha²⁶
Vs
Chairman, Neyveli Lignite Corporation

Hon'ble Judges:

S. Mohan, O.C.J. and S.T. Ramalingam, J.

ORDER

S. Mohan, O.C.J.,

1. The short facts leading to the writ appeal are as follows :

The appellant herein is a B. Sc., Chemistry graduate of the University of Madras and she secured Second class in the annual examination. She got married to one Mr. Palanivelu in the year 1979. Presently she is the mother of two daughters and she was in the family way of four months at the time of filing the writ petition.

2. The appellant was entertained as a Junior Chemist on and from 1st January, 1986 on contract basis, and Babu Engineering Corporation was given the contract pertaining to chemical test of soil, clay, water, oil and metal within the precincts of the Neyveli Lignite Corporation Ltd., Neyveli. Though the work involving chemical test by the Chemist is necessarily throughout the year, the management of the Neyveli Lignite Corporation Ltd. extracted the work from the Chemist numbering about forty through Babu Engineering Corporation who paid at the rate of Rs. 10 per day to each Chemist and in that capacity, the appellant worked for about three years.

3. The appellant filed W.P. 3920 of 1988 against the respondent to regularise her services and to abolish the contract labour system and the said writ petition has been admitted by this Court.

.....

26. Full text available at (1991)ILLJ234Mad

6. The appellant was asked to fill up a pro forma in order to appoint her as Junior Chemist. In column No. 7, the appellant had categorically stated that she was having CARD (Centre of Applied Research and Development) for entry into the Centre for Applied Research and Development wing of the respondent. She had in fact worked as Junior Chemist from 1st January, 1986 to 28th December, 1988, and even today she is working as a casual contract labourer on a daily wage of Rs. 15. Her duty involved chemical test of articles and her name has also been registered in the local Employment Exchange.

7. The appellant was called for an interview for selection as Junior Chemist on 11th February, 1989. However, the interview did not take place and it was postponed. Therefore, by another communication dated 18th March, 1989 the appellant was asked to attend the interview to be held on 4th April, 1989. By a communication dated 14th April, 1989, she was asked to appear before the Medical Officer, on 19th May, 1989. On that date, about forty persons were medically examined. By another communication dated 29th May, 1989 she was asked to appear before the Industrial Medical Officer on 2nd June, 1989. Accordingly, she appeared. Though appointment orders were issued to all the thirty nine persons who were working along with the appellant under the contract labour system, the appellant alone was singled out. When the appellant approached the respondent she was informed that she was in the family way carrying a child of sixteen weeks. Thereupon, the appellant and her husband met Mr. Mani Iyer, Mr. Krishnan and others and the appellant was informed that the appointment order will be issued only after the appellant giving birth to the child and that too after a period of three months from the date of birth of the child.

8. On 4th June, 1989, the appellant issued a lawyer's notice detailing all facts. She informed the respondent Corporation that she had worked as Junior Chemist during her second pregnancy till the eve of giving birth to the child, that she was prepared to work in the same manner and that she will not claim any monetary benefits by reason of her pregnancy if the respondent Corporation objects to the same. For this, no reply was sent by the respondent. It is under these circumstances, the writ petition was filed alleging that her non-selection only on the ground that she was in the family way by sixteen weeks is violative of Arts. 14, 15 and 21 of the Constitution of India. At no point of time, the appellant was let known about this temporary unfitness. In so far as there is no stipulation when the application was made that a pregnant woman cannot be considered, that ground cannot prevail. The appellant would also be entitled to the benefits under the Maternity Benefit Act, 1961. When there is no physical hindrance while the appellant was working under the contract labour system, pregnancy cannot be a ground even to temporarily disqualify her.

.....

11. Mr. Prakash, learned Counsel for the appellant, would urge that such a Regulation based on pregnancy is violative of Art. 14 of the Constitution of India.

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Further, in so far as the Regulation does not classify the category of services, it could arbitrarily be applied and therefore it suffers from the vice of arbitrariness, as well. Looked at from the point of view of Art. 21 of the Constitution, the appellant has a right to life. Such a life does not mean a mechanical one, bases on personal freedom. In the case of a woman, certainly she has every freedom to have a child and the Constitutional right cannot be taken away by a regulation of this character. The right to beget children is a very valuable right. In *Air India v. Nargesh Meerza* (1981-II-LLJ-314) the right of an air hostess to get married has been recognised and if her services were to depend upon such a position, the rule Supreme Court of the United States of America in several decisions had recognised such a right. The learned Counsel cites the following decisions-*Criswold v. Connecticut* 381 U.S. 479 *Kisentadt v. Baird* 405 U.S. 438, *Cleveland Board of Education v. La Pillanes* 414 U.D. 632, *Turner v. Department of Employment (Security)* 423 U.S. 44 and *Skinner v. Oklahoma* 316 U.S. 535. Learned Counsel submitted that if the working of the appellant under a contract labour is not hazardous, the same could be so if she is obliged to work under the Corporation as well. Therefore, this cannot be a valid ground at all. Lastly it is submitted that the Maternity Benefit Act 1961 itself has not thought of medical unfitness for a pregnancy of 16 weeks old and the Regulation in question cannot exceed a parliamentary legislation and lay down a prescription which cannot be supported even from the medical point of view.

12. Mr. R. Krishnaswami, learned Counsel for the respondent, after referring to the Regulations states that this is one conceived in the interest of the employees themselves. Further, such a regulation requiring medical examination at the time of the first appointment is not peculiar. Such regulations are there in police organisation as well. Where the work is of a hazardous nature, it becomes necessary for the employer to lay down such a condition like this. In any event, as the counter affidavit states, this is only a temporary unfitness. After the delivery of the child, the appellant is entitled to join and her seniority will not any way be interface with. This position has been fully clarified in the counter affidavit filed in the writ appeal.

13. Having regard to the above submissions made on both sides, the only question that arises for our consideration is, whether the regulation in question in relation to medical examination of a female candidate is violative of any of the provisions of the Constitution and is therefore liable to be struck down. We will now straightway, extract the said regulation as under :-

“R. 21 : The duration of pregnancy, if any, should be recorded in case of female candidates. The woman in advanced stages of pregnancy should be deemed to be temporarily unfit. For this purpose pregnancy of four months and over may be taken as advanced stage of pregnancy.”

14. It is admitted that the appellant was interviewed and she was also selected. However, her selection was withheld on the only ground that she was in the family

ways by 16 weeks. The counter affidavit filed in the writ appeal in paragraphs 6 and 7 states as follows :-

“she was in the advanced stage of pregnancy as per rules in force of the respondent company and she was temporarily disqualified from joining duty immediately. She was also advised to report before the Medical Committee after six weeks of confinement. It is also submitted that the appellant is not likely to lose any benefit such as seniority, etc., and as the seniority would be reckoned based upon her position in the selection panel as recommended by the Committee. Orders were issued to 19 outside general candidates out of which the appellant’s position is 16 in order of merit as recommended by the selection committee. It is submitted that her position as 16 out of the 19 outside general candidates issued with the offer of appointment will hold good notwithstanding her joining later than the candidates whose places in the panel are below her. The notional seniority for the appellant would be maintained. The only loss that the appellant has to suffer is the loss of wages for the period during which she was not employed and this is inevitable because of the rules in force. She is not actually working during that period.

It is further submitted that the area of work where the appellant has to work as Junior Chemist will be either CARD (Centre for Applied Research) or Fertilizer, B & C factory. In all these areas, a Junior Chemist has to handle chemicals and has to be exposed to the different chemicals and gases which are likely to endanger the health of a pregnant lady. While a normal person can withstand these hazards, a lady carrying a baby is quite likely to be affected by exposure to these elements and which may endanger the life of the child or result in miscarriage. This statement is based upon the medical opinion.”

15. We may at once state that we are not in a position to accept what is stated in paragraph 7 of the counter because this was not the stand taken by the respondent before the learned single Judge and this is an ingenious attempt by the respondent to defeat the claim of the appellant. In this connection it should be remembered that the appellant was working as a contract labourer in the very post for which she was selected and the post has not been considered as the one involving health hazard. If the ground of ‘health hazard’ has not been pressed into service when the appellant was working under the contract labour, how could the same be projected at the time of her permanent appointment? We find great difficulty in accepting this argument, and therefore, the rejection of the claim of the appellant for the appointment on the ground of ‘health hazard’ is not sustainable. Regarding the argument that such ‘temporary unfitness’ is not anything peculiar to the respondent Corporation, but is also there in similar public sector Corporations like Bharat Heavy Electricals Ltd, and National Thermal Power Corporation, we would refer to a passage occurring at page 166 of Swamy’s Complete Manual on Establishment and Administration. The passage reads as under :

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“Employment of women candidates in state of pregnancy -

(a) For appointment against posts carrying hazardous nature of duties - Where a pregnant woman candidate is to be appointed against a post carrying hazardous nature of duties, e.g., in Police Organisations, etc., and she has to complete a period of training as a condition of service and who as a result of tests is found to be pregnant of twelve weeks standing or over shall be declared temporarily unfit and her appointment held in abeyance until the confinement is over.

She should be re-examined for a fitness certificate six weeks after the date of confinement, subject to the production of medical certificate of fitness from a registered medical practitioner. The vacancy against which the woman candidate was selected should be ‘kept reserved for her. If she is found fit, she may be appointed to the post kept reserved for her and allowed the benefit of seniority in accordance with para 4 of Annexure to MHA OM No. 9/11/55-R.S, dated the 22nd December, 1959.

(b) For appointments against posts which do not prescribe any elaborate training - It shall no longer be necessary to declare a woman candidate ‘compulsorily unfit’ if she is found to be pregnant during medical examination before appointment against posts which do not prescribe any elaborate training, i.e., she can be appointed straightway on the job.”

16. The question now is, whether there could be a prescription of this type in the light of the fundamental rights conferred under Art. 21 of the Constitution of India. That Article reads as follows

“Art. 21 No person shall be deprived of his life or personal liberty except according to procedure established by law.”

‘Life’ in this Article cannot be considered to be a mechanical one. It is attendant with all that is required to make the life blossom and all enjoyment within the permissible limits of law. Here is the case of a married woman. If she chooses to have a child, can the State or an authority like the respondent corporation impose itself and curtail this life or the personal freedom of the appellant? In this connection, we find the various American decisions relied on by the learned Counsel for the appellant throw a good deal of light.

17. In *Griswold v. Connecticut* (supra) it is observed as follows :-

“The present case, then concerns a relationship laying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their

manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot in light of the familiar principle, so often applied by this Court, that a Governmental purpose to control or prevent a activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily, broadly and thereby invade the are of protected freedoms. Would we allow the police to search the sacred precincts of marital bedrooms for tell tale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Right-older than our political parties, older than our schools system. Marriage is a coming together for better or for the worse hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes a harmony in living, not political faiths, a bilateral loyalty not commercial or social projects. Yet, it is an association for as noble a purpose as any involved in our prior decisions.”

In the same judgment, the Supreme Court of the United States observed as follows:

“The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it principles of more than one explicitly granted Constitutional rights. Of this whole ‘Private realm of family life’ it is difficult to imagine what is more private or more intimate than a husband and wife’s marital relations.”

Therefore, if the regulation in question tends to affect the ‘Private realm of family life’, we consider that the ratio of this judgment will squarely apply.

.....

23. In *Air India v. Nergesh Meerza* (1981-II-LLJ-314 at 335) the Supreme Court of India observed as follows :

“Coming now to the second limb of the provisions according to which the services of AHs (Air Hostesses) would stand terminated on first pregnancy, we find ourselves in complete agreement with the argument of Mr. Setalvad that this is a most unreasonable and arbitrary provision which shocks the conscience of the Court. The Regulation does not prohibit marriage after four years and if an A.H. after having fulfilled the first condition becomes pregnant, there is not reason why pregnancy should stand in the way of her continuing in service. The Corporation represented to us that the pregnancy leads to a number of complications and to medical disabilities which may stand in the efficient discharge of the duties by the A. Hs. It was said that even in the early stage of pregnancy

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some ladies are prone to get sick due to air pressure, nausea in long flight and such other technical factors. This, however, appears to be purely an artificial argument because once a married woman is allowed to continue in service then under the provisions of the Maternity Benefit Act, 1961 and the Maharashtra Maternity Rules, 1965 (these apply to both the Corporations as their Head Offices are at Bombay) she is entitled to certain benefits including maternity leave. In case, however, the Corporations feel that pregnancy from the very beginning may come in the way of discharge of the duties of some of the A. Hs. they could be given maternity leave for a period of 14 to 16 months and in the meanwhile there could be no difficulty in the Management making arrangements on a temporary or ad hoc basis by employing additional A. Hs. We are also unable to understand the argument of the Corporation that a woman after bearing children becomes weak in physique or in her constitution. There is neither any legal or medical authority for this bald proposition.”

The above observations came to be made by the Supreme Court while dealing with the right of an air hostess to get married.

24. One of us (Mohan, J.) while dealing with more or less a similar situation where a school teacher was dismissed on the ground of her marriage, held in *Sivanarul v. State of Tamil-Nadu* (1985-II-LLJ-133 at 139), as follows :

“The concept of marriage as viewed by Joseph Addison is as follows -

Marriage enlarges the scope of our happiness and of our miseries. A marriage of love is pleasant ... of interest, easy and where both meet, happy. A happy marriage has in it all the pleasures of friendship, all the enjoyments of sense and reason, and indeed all the sweets of life.”

George Elliot states as under :

“What greater thing is there for the human souls than to feel that they are joined for life. to strengthen each other in all labour, to rest on each other in all sorrow, to minister to each other in all pain, to be one with each other in silent, unspeakable memories at the moment of the last parting.”

No less than the Father of Nation, Mahatma Gandhi eloquently said;

“Marriage is a natural thing in life, and to consider it derogatory in any manner is wholly wrong. The idea is to look upon marriage as a sacrament and therefore, to lead a life of self restraint in the married state.”

To say that a teacher will lose her services on getting married is to forget the fact that the bloom or light of all life's happiness consists in marriage. It is nothing more than

a civilised way of living. To tie it merely to sex is not only obnoxious but is untrue. No wonder Channing Pittock said :- 'Marriage is the greatest educational institution on earth.

“18. What is the reason that is given in the resolution. It is stated that when a teacher takes maternity leave, the children’s education will be affected and that due to lack of funds, a substitute cannot be appointed. First of all, this is full of assumptions; in these modern days that one should necessarily beget a child is an assumption unwarranted. Secondly, it is not mere physical union but union between two spirits. As Fredrick William Robertson said;

“Marriage is not a union merely between two creatures. It is a union between two spirits, and the intention of their bond is to perfect the nature of both, by supplementing their deficiencies with the force of contract, giving to each sex these excellences of which it is naturally deficient; to the one, strength of character and firmness of moral will, to the other, sympathy, meekness, tenderness, and just so solemn and glorious as those end are for which the union was intended, just so terrible are the consequences if it be prevented and abused, for there is no earthly relationship which has no such power to ennoble and to exalt. There are two rocks in this world of ours, on which the soul must either anchor or be wrecked. The one is God and the other is the sex opposite.”

.....

26. An attempt was made to call the restriction as 'temporary unfitness' and that the she could join duty after the birth of the child. On this aspect of the matter, we have already extracted paragraphs 6 and 7 of the counter affidavit. This stand, to our mind, appears to be a ruse to get over a difficult situation. The maintaining of the original seniority and her obtaining the proper place is poor consolation indeed. As the respondent himself has categorically stated, she will have to suffer the loss of wages for the period during which she was not in employment. Who is to compensate her for the loss of money? Does it not mean deprivation of livelihood which is a fundamental right contemplated under Art. 21 of the Constitution? In these days of acute unemployment, to deprive a woman of her right to earn in spite of her selection is something which we cannot appreciate at all. To say that she is temporarily unfit is something which stands scrutiny from the medical point of view. It is not an uncommon sight in India to see a woman in advanced stages of pregnancy working in agricultural fields, on roads or even in mines where there is every risk. Yet, they dare work, compelled by poverty and by the dire necessity of life.

.....

28. The Regulation since so far as it does not classify the category of services, and it is made applicable to all services whether a stenographer or an assistant doing desk

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work, undoubtedly suffers from the vice of arbitrariness. Therefore, it is violative of Art. 14 of the Constitution as well.

29. To our mind, conclusion, we would only say that what this Regulation wants to perpetuate is: 'Bachelors, wives and old maid's children are always perfect'. Let it be remembered that where children are, there is the golden age. One begets children not merely to keep up the race, but to enlarge our hearts and make us unselfish and full of kindly sympathies and affections, to give our souls higher aims, to call out all our faculties to extend enterprise and exertion and to bring round our fireside bright faces, happy smiles, and loving, tender hearts. If this is sought to be deprived by the Regulation in question the same to be violative of the fundamental rights guaranteed under Art. 21, as well as Art. 14 of the Constitution?

30. In the result, the order of the learned Judge is set aside and the appeal will stand allowed with cost. Counsel's fee Rs. 1000.

Javed and Ors.²⁷
Vs
State of Haryana and Ors.

Hon'ble Judges:

R.C. Lahoti, Ashok Bhan and Arun Kumar, JJ.

JUDGMENT

R.C. Lahoti, J.

1. Leave granted in all the Special Leave Petitions.
2. In this batch of writ petitions and appeals the core issues is the vires of the provisions of Section 175(1)(q) and 177(1) of the Haryana Panchayati Raj Act, 1994 (Act No. 11 of 1994) (hereinafter referred to as the Act, for short). The relevant provisions are extracted and reproduced hereunder:-

175. (1) No person shall be a Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such who -

xxx xxx xxx

xxx xxx xxx

(q) has more than two living children :

Provided that a person having more than two children on or upto the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified;

"177(1) If any member of a Gram Panchayat, Panchayat Samiti or Zila Parishad -

27. Full text available at AIR2003SC3057

(a) who is elected, as such, was subject to any of the disqualifications mentioned in Section 175 at time of his election;

(b) during the term for which he had been elected, incurs any of the disqualifications mentioned in Section 175,

shall be disqualified from continuing to be a member and his office shall become vacant.

(2) In every case, the question whether a vacancy has arisen shall be decided by the Director. The Director may give its decision either on an application made to it by any person, or on its own motion. Until the Director decides that the vacancy, has arisen, the members shall not be disqualified under Sub-section (1) for continuing to be a member. Any person aggrieved by the decision of the Director may, within a period of fifteen days from the date of such decision, appeal to the Government and the orders passed by Government in such appeal shall be final :

Provided that no order shall be passed under this sub-section by the Director against any member without giving him a reasonable opportunity of being heard.”

3. Act No. 11 of 1994 was enacted with various objectives based on past experience and in view of the shortcomings noticed in the implementation of preceding laws and also to bring the legislation in conformity with Part IX of the Constitution of India relating to “The Panchayats’ added by the Seventy-third Amendment. One of the objectives set out in the Statement of Objects and Reasons is to disqualify person for election of Panchayats at each level, having more than 2 children after one year of the date of commencement of this Act, to popularize Family Welfare/Family Planning Programme (Vide Clause (m) of Para 4 of SOR).

4. Placed in plain words the provision disqualifies a person having more than two living children from holding the specified offices in Panchayats. The enforcement of disqualification is postponed for a period of one year from the date of the commencement of the Act. A person having more than two children upto the expiry of one year of the commencement of the Act is not disqualified. This postponement for one year takes care of any conception on or around the commencement of the Act, the normal period of gestation being nine months. If a woman has conceived at the commencement of the Act then any one of such couples would not be disqualified. Though not disqualified on the date of election if any person holding any of the said offices incurs a disqualification by giving birth to a child one year after the commencement of the Act he becomes subject to disqualification and is disabled from continuing to hold the office. The disability is incurred by the birth of a child which results in increasing the number of living children, including the additional child born one year after the commencement of the Act, to a figure more than two. If the factum is disputed the Director is entrusted with the duty of holding an enquiry and declaring the office vacant. The

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decision of the Director is subject to appeal to the Government. The Director has to afford a reasonable opportunity of being heard to the holder of office sought to be disqualified. These safeguards satisfy the requirements of natural justice.

5. Several persons (who are the writ petitioners or appellants in this batch of matters) have been disqualified or proceeded against for disqualifying either from contesting the elections for, or from continuing in, the office of Panchas/Sarpanchas in view of their having incurred the disqualification as provided by Section 175(1)(q) or Section 177(1) read with Section 175(1)(q) of the Act. The grounds for challenging the constitutional validity of the abovesaid provision are very many, couched differently in different writ petitions. We have heard all the learned counsel representing the different petitioners/appellants. As agreed to at the Bar, the grounds of challenge can be categorized into five :- (i) that the provision is arbitrary and hence violative of Article 14 of the Constitution; (ii) that the disqualification does not serve the purpose sought to be achieved by the legislation; (iii) that the provision is discriminatory; (iv) that the provision adversely affects the liberty of leading personal life in all its freedom and having as many children as one chooses to have and hence is violative of Article 21 of the Constitution; and (v) that the provision interferes with freedom of religion and hence violates Article 25 of the Constitution.

6. The State of Haryana has defended its legislation on all counts. We have also heard the learned Standing Counsel for the State. On notice, Sh. Soll J. Sorabji, the learned Attorney General for India, has appeared to assist the Court and he too has addressed the Court. We would deal with each of the submissions made.

Submissions (i), (ii) & (iii)

7. The first three submissions are based on Article 14 of the Constitution and, therefore, are taken up together for consideration.

Is the classification arbitrary?

8. It is well-settled that Article 14 forbids class legislation; it does not forbid reasonable classification for the purpose of legislation. To satisfy the constitutional test of permissibility, two conditions must be satisfied, namely (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that such (sic) has a rational relation to the object sought to be (sic) by the Statute in question. The basis for classification may rest on conditions which may be geographical or according to objects or occupation or the like. [See: Constitution Bench decision in **Budhan Choudhry and Ors. v. The State of Bihar**. The classification is well-defined and well-perceptible. Persons having more than two living children are clearly distinguishable from persons having not more than two living children. The two constitute two different classes and the classification is founded on an intelligible differentia clearly distinguishing one from the other. One of the objects sought to be achieved by the legislation is popularizing the family welfare/family planning programme. The disqualification enacted by

the provision seeks to achieve the objective by creating a disincentive. The classification does not suffer from any arbitrariness. The number of children, viz., two is based on legislative wisdom. It could have been more or less. The number is a matter of policy decision which is not open to judicial scrutiny.

The legislation does not serve its object?

9. It was submitted that the number of children which one has, whether two or three or more, does not affect the capacity, competence and quality of a person to serve on any office of a Panchayat and, therefore, the impugned disqualification has no nexus with the purpose sought to be achieved by the Act. There is no merit in the submission. We have already stated that one of the objects of the enactment is to popularize Family Welfare/Family Planning Programme. This is consistent with the National Population Policy.

10. Under Article 243G of the Constitution the Legislature of a State has been vested with the authority to make law endowing the Panchayats with such powers and authority which may be necessary to enable the Gram Panchayat to function as institutions of self-Government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein. Clause (b) of Article 243G provides that Gram Panchayats may be entrusted the powers to implement the schemes for economic development and social justice including those in relation to matters listed in the Eleventh Schedule. Entries 24 and 25 of the Eleventh Schedule read:

- 24. Family Welfare.
- 25. Women and child development.

In pursuance to the powers given to the State Legislature to enact laws the Haryana Legislature enacted the Haryana Panchayati Raj Act, 1994 (Haryana Act No. 11 of 1994). Section 21 enumerates the functions and duties of Gram Panchayat. Clause XIX (1) of Section 21 reads:

- “XIX. Public Health and Family Welfare-
- (1) Implementation of family welfare programme.”

The family welfare would include family planning as well. To carry out the purpose of the Act as well as the mandate of the Constitution the Legislature has made a provision for making a person ineligible to either contest for the post of Panch or Sarpanch having more than two living children. Such a provision would serve the purpose of the Act as mandated by the Constitution. It cannot be said that such a provision would not serve the purpose of the Act.

11. In our opinion, the impugned disqualification does have a nexus with the purpose sought to be achieved by the Act. Hence it is valid

The provision is discriminatory?

12. It was submitted that though the State of Haryana has introduced such a provision of disqualification by reference to elective offices in panchayats, a similar provision is not found to have been enacted for disqualifying aspirants or holders of elective or public offices in other institutions of local self-governance and also not in State Legislatures and Parliament. So also all the States, i.e., other than Haryana have not enacted similar laws, and therefore, it appears that people aspiring to participate in Panchayati Raj governance in the State of Haryana have been singled out and meted out hostile discrimination. The submission has been stated only to be rejected. Under the constitutional scheme there is a well-defined distribution of legislative powers contained in Part XI of the Constitution. The Parliament and every State Legislature has power to make laws with respect to any of the matters which fall within its field of legislation under Article 246 read with Seventh Schedule of the Constitution. A legislation by one of the States cannot be held to be discriminatory or suffering from the vice of hostile discrimination as against its citizens simply because the Parliament or the Legislatures of other States have not chosen to enact similar laws. Such a submission if accepted would be violative of the autonomy given to the Centre and the States within their respective fields under the constitutional scheme.

.....

15. Incidentally it may be noted that so far as the State of Haryana is concerned, in the Haryana Municipal Act, 1973 (Act No. 24 of 1973) Section 13A has been inserted to make a provision for similar disqualification for a person from being chosen or holding the office of a member of municipality.

16. A uniform policy may be devised by the Centre or by a State. However, there is no constitutional requirement that any such policy must be implemented in one-go. Policies are capable of being implemented in a phased manner. More so, when the policies have far-reaching implications and are dynamic in nature, their implementation in a phased manner is welcome for it receives gradual willing acceptance and invites lesser resistance.

.....

18. To make a beginning, the reforms may be introduced at the grass-root level so as to spiral up or may be introduced at the top so as to percolate down. Panchayats are grass-root level institutions of local self-governance. They have a wider base. There is nothing wrong in the State of Haryana having chosen to subscribe to the national movement of population control by enacting a legislation which would go a long way in ameliorating health, social and economic conditions of rural population, and thereby contribute to the development of the nation which in its turn would benefit the entire citizenry. We may quote from the National Population Policy 2000 (Government of India Publication, page 35):-

“Demonstration of support by elected leaders, opinion makers, and religious leaders with close involvement in the reproductive and child health programm greatly influences the behaviour and response patterns of individuals and communities. This serves to enthuse communities to be attentive towards the quality and converge of maternal and child health service,s including referral care.”.....”The involvement and enthusiastic participation of elected leaders will ensure dedicated involvement of administrators at district and sub-distinct levels. Demonstration of strong support to the small family norm, as well as personal example, by political, community, business, professional, and religious leaders, media and film stars, sports personalities and opinion makers, will enhance its acceptance throughout society.”

19. No fault can be found with the State of Haryana having enacted the legislation. It is for others to emulate.

20. We are clearly of the opinion that the impugned provision is neither arbitrary nor unreasonable nor discriminatory. The disqualification contained in Section 175(1)(q) of Haryana Act No. 11 of 1994 seeks to achieve a laudable purpose - socio-economic welfare and health care of the masses and is consistent with the national population policy. It is not violative of Article 14 of the Constitution.

Submission (iv) & (v) : the provision if it violates Article 21 or 25?

21. Before testing the validity of the impugned legislation from the viewpoint of Articles 21 and 25, in the light of the submissions made, we take up first the more basic issue - Whether it is at all permissible to test the validity of a law which enacts a disqualification operating in the field of elections on the touchstone of violation of fundamental rights?

22. Right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a Statute. At the most, in view of Part IX having been added in the Constitution, a right to contest election for an office in Panchayat may be said to be a constitutional right — a right originating in Constitution and given shape by statute. But even so it cannot be equated with a fundamental right. There is nothing wrong in the same Statute which confers the right to contest an election also to provide for the necessary qualifications without which a person cannot offer his candidature for an elective office and also to provide for disqualifications which would disable a person from contesting for, or holding, an elective statutory office.

.....

25. In our view, disqualification on the right to contest an election by having more than two living children does not contravene any fundamental right nor does it cross the limits of reasonability. Rather it is a disqualification conceptually devised in national interest.

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26. With this general statement of law which has application to Articles 21 and 25 both, we now proceed to test the sustainability of attack on constitutional validity of impugned legislation separated by reference to Article 21 and 25.

The disqualification if violates Article 21?

27. Placing strong reliance on **Mrs. Maneka Gandhi v. Union of India and Anr.**, and **Kasturu Lal Lakshmi Reddy and Ors. v. State of Jammu and Kashmir and Anr.**, it was forcefully urged that the fundamental right to life and personal liberty emanating from Article 21 of the Constitution should be allowed to stretch its span to its optimum so as to include in the compendious term of the Article all the varieties of rights which go to make up the personal liberty of man including the right to enjoy all the materialistic pleasures and to procreate as many children as one pleases.

28. At the very outset we are constrained to observe that the law laid down by this Court in the decisions relied on is either being misread or read divorced of the context. The test of reasonableness is not a wholly subjective test and its contours are fairly indicated by the Constitution. The requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights. The lofty ideals of social and economic justice, the advancement of the nation as a whole and the philosophy of distributive justice - economic, social and political - cannot be given a go-by in the name of run due stress on fundamental rights and individual liberty. Reasonableness and rationality, legally as well as philosophically, provide colour to the meaning of fundamental rights and these principles are deducible from those very decisions which have been relied on by the learned counsel for the petitioners.

29. It is necessary to have a look at the population scenario, of the world and of our own country.

30. India has the (dis)credit of being second only to China at the top in the list of the 10 most-populous countries of the world. As on 1.2.2000 the population of China was 1,277.6 million while the population of India as on 1.3.2001 was 1,027.0 million (Census of India, 2001, Series I, India - Paper I of 2001, page 29).

31. The torrential increase in the population of the country is one of the major hindrances in the pace of India's socio-economic progress. Everyday, about 50,000 persons are added to the already large base of its population. The Karunakaran Population Committee (1992-93) had proposed certain disincentives for those who do not follow the norms of the Development Model adopted by National Public Policy so as to bring down the fertility rate. It is a matter of regret that though the Constitution of India is committed to social and economic justice for all, yet India has entered the new millennium with the largest number of illiterates in the world and the largest number of people below the poverty line. The laudable goals spelt out in the Directive Principles of State Policy in the Constitution of India can best be achieved if the population explosion is checked effectively. Therefore, the population control assumes a

central importance for providing social and economic justice to the people of India (Usha Tandon, Reader, Faculty of Law, Delhi University, - Research Paper on Population Stabilisation, Delhi Law Review, Vol. XXIII 2001, pp. 125-131).

32. In the words of Bertand Russell, "Population explosion is more dangerous than Hydrogen Bomb." This explosive population over-growth is not confined to a particular country but it is a global phenomenon. India being the largest secular democracy has the population problem going side by side and directly impacting on its per capita income, and resulting in shortfall of food grains in spite of the green revolution, and has hampered improvement on the educational front and has caused swelling of unemployment numbers, creating a new class of pavement and slum-dwellers and leading to congestion in urban areas due to the migration of rural poor. (Paper by B.K. Raina in Population Policy and the Law, 1992, edited by B.P. Singh Sehgal, page 52).

33. In the beginning of this century, the world population crossed six billions, of which India alone accounts for one billion (17 per cent) in a land area of 2.5 per cent of the world area. The global annual increase of population is 80 millions. Out of this, India's growth share is over 18 millions (23 per cent), equivalent to the total population of Australia, which has two and a half times the land space of India. In other words, India is growing at the alarming rate of one Australia every year and will be the most densely populous country in the world, outbeating China, which ranks first, with a land area thrice this country's. China can withstand the growth for a few years more, but not India, with a constricted land space. Here, the per capita crop land is the lowest in the world, which is also shrinking fast. If this falls below the minimum sustained level, people can no longer feed themselves and shall become dependent on imported food, provided there are nations with exportable surpluses. Perhaps, this may lead to famine and abnormal conditions in some parts of the country. (Source - Population Challenge, Arcot Easwaran, The Hindu, dated 8.8.2003). It is emphasized that as the population grows rapidly there is a corresponding decrease in per capita water and food. Women in many places trek long distances in search of water which distances would increase every next year on account of excessive ground water withdrawals catering to the need of the increasing population, resulting in lowering the levels of water tables.

34. Arcot Easwaran has quoted the China example. China, the most populous country in the world, has been able to control its growth rate by adopting the 'carrot and stick' rule. Attractive incentives in the field of education and employment were provided to the couples following the 'one-child norm'. At the same time drastic disincentives were cast on the couples breaching 'one-child norm' which even included penal action. India being a democratic country has so far not chosen to go beyond casting minimal disincentives and has not embarked upon penalizing procreation of children beyond a particular limit. However, it has to be remembered that complacency in controlling population in the name of democracy is too heavy a price to pay, allowing the nation to drift towards disaster.

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35. The growing population of India had alarmed the Indian leadership even before India achieved independence. In 1940 the sub-Committee on Population, appointed by the National Planning Committee set up by the President of the Indian National Congress (Pandit Jawaharlal Nehru), considered 'family planning and a limitation of children' essential for the interests of social economy, family happiness and national planning. The committee recommended the establishment of birth control clinics and other necessary measures such as raising the age at marriage and a eugenic sterilization programme. A committee on population set up by the National Development Council in 1991, in the wake of the census result, also proposed the formulation of a national policy. (Source - Seminar, March 2002, page 25)

36. Every successive Five Year Plan has given prominence to a population policy. In the first draft of the First Five Year Plan (1951-56) the Planning Commission recognized that population policy was essential to planning and that family planning was a step forward for improvement in health, particularly that of mothers and children. The Second Five Year Plan (1956-61) emphasized the method of sterilization. A central Family Planning Board was also constituted in 1956 for the purpose. The Fourth Five Year Plan (1969-74) placed the family planning programme, "as one amongst items of the highest national priority". The Seventh Five Year Plan (1985-86 to 1990-91) has underlined "the importance of population control for the success of the plan programme..." But, despite all such exhortations, "the fact remains that the rate of population growth has not moved one bit from the level of 33 per thousand reached in 1979. And in many cases, even the reduced targets set since then have not been realised. (Population Policy and the Law, *ibid*, pages 44-46).

37. The above facts and excerpts highlight the problem of population explosion as a national and global issue and provide justification for priority in policy-oriented legislations wherever needed.

38. None of the petitioners has disputed the legislative competence of the State of Haryana to enact the legislation. Incidentally, it may be stated that Seventh Schedule, List II - State List, Entry 5 speaks of 'Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration'. Entry 6 speaks of 'Public health and sanitation' *inter alia*. In List III - Concurrent List, Entry 20A was added which reads 'Population control and family planning'. The legislation is within the permitted field of State subjects. Article 243C makes provision for the Legislature of a State enacting laws with respect to Constitution of Panchayats. Article 243F in Part IX of the Constitution itself provides that a person shall be disqualified for being chosen as, and for being, a member of Panchayat if he is so disqualified by or under any law made by the Legislature of the State. Article 243G casts one of the responsibilities of Panchayats as preparation of plans and implementation of schemes for economic development and social justice. Some of the schemes that can be entrusted to Panchayats, as spelt out by

Article 243G read with Eleventh Schedule is - Scheme for economic development and social justice in relation to health and sanitation, family welfare. Family planning is essentially a scheme referable to health, family welfare, women and child development and social welfare. Nothing more needs to be said to demonstrate that the Constitution contemplates Panchayat as a potent instrument of family welfare and social welfare schemes coming true for the betterment of people's health especially women's health and family welfare coupled with social welfare. Under Section 21 of the Act, the functions and duties entrusted to Gram Panchayats include 'Public Health and Family Welfare', 'Women and Child Development' and 'Social Welfare'. Family planning falls therein. Who can better enable the discharge of functions and duties and such constitutional goals being achieved than the leaders of Panchayats themselves taking a lead and setting an example.

39. Fundamental rights are not to be read in isolation. They have to be read along with the Chapter on Directive Principles of State Policy and the Fundamental Duties enshrined in Article 51A. Under Article 38 the State shall strive to promote the welfare of the people and developing a social order empowered at distributive justice - social, economic and political. Under Article 47 the State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular the constitutionally down-trodden. Under Article 47 the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. None of these lofty ideals can be achieved without controlling the population inasmuch as our materialistic resources are limited and the claimants are many. The concept of sustainable development which emerges as a fundamental duty from the several clauses of Article 51A too dictates the expansion of population being kept within reasonable bounds.

40. The menace of growing population was judicially noticed and constitutional validity of legislative means to check the population was upheld in **Air India v. Nergesh Meerza and Ors.**. The Court found no fault with the rule which would terminate the services of Air Hostesses on the third pregnancy with two existing children, and held the rule both salutary and reasonable for two reasons - "In the first place, the provision preventing a third pregnancy with two existing children would be in the larger interest of the health of the Air Hostess concerned as also for the good upbringing of the children. Secondly,when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of over-population which, if not controlled, may lead to serious social and economic problems throughout the world."

41. To say the least it is futile to assume or urge that the impugned legislation violates right to life and liberty guaranteed under Article 21 in any of the meanings howsoever expanded the meanings may be.

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The provisions if it violates Article 25?

42. It was then submitted that the personal law of Muslims permits performance of marriages with 4 women, obviously for the purpose of procreating children and any restriction thereon would be violative of right to freedom of religion enshrined in article 25 of the Constitution. The relevant part of Article 25 reads as under:-

25. Freedom of conscience and free profession, practice and propagation of religion. - (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law -

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

43. A bare reading of this Article deprives the submission of all its force, vigour and charm. The freedom is subject to public order, morality and health. So the Article itself permits a legislation in the interest of social welfare and reform which are obviously part and parcel of public order, national morality and the collective health of the nation's people.

44. The Muslim Law permits marrying four women. The personal law nowhere mandates or dictates it as a duty to perform four marriages. No religious scripture or authority has been brought to our notice which provides that marrying less than four women or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy would be irreligious or offensive to the dictates or the religion. In our view, the question of the impugned provision of Haryana Act being violative of Article 25 does not arise. We may have a reference to a few decided cases.

45. The meaning of religion - the term as employed in Article 25 and the nature of protection conferred by Article 25 stands settled by the pronouncement of the Constitution Bench decision in **Dr. M. Ismail Faruqui and Ors. v. Union of India and Ors.**, The protection under Articles 25 and 26 of the Constitution is with respect to religious practice which forms an essential and integral part of the religion. A practice may be a religious practice but not an essential and integral part of practice of that religion. The latter is not protected by Article 25.

46. In **Sarla Mudgal (Smt.), President, Kalyani and Ors. v. Union of India and Ors.**, this Court has judicially noticed it being acclaimed in the United States of America that the practice of polygamy is injurious to 'public morals', even though some reli-

gions may make it obligatory or desirable for its followers. The Court held that polygamy can be superseded by the State just as it can prohibit human sacrifice or the practice of Sati in the interest of public order. The Personal Law operates under the authority of the legislation and not under the religion and, therefore, the Personal Law can always be superseded or supplemented by legislation.

47. In **Mohd. Ahmed Khan v. Shah Bano Begum and Ors.**, the Constitution Bench was confronted with a canvassed conflict between the provisions of Section 125 of Cr.P.C. and Muslim Personal Law. The question was: when the Personal Law makes a provision for maintenance to a divorced wife, the provision for maintenance under Section 125 of Cr.P.C. would run in conflict with the Personal Law. The Constitution Bench laid down two principles; firstly, the two provisions operate in different fields and, therefore, there is no conflict and; secondly, even if there is a conflict it should be set at rest by holding that the statutory law will prevail over the Personal Law of the parties, in cases where they are in conflict.

48. In **Mohd. Hanif Quareshi and Ors. v. The State of Bihar**, (1959) SCR 629, the State Legislation placing a total ban on cow slaughter was under challenge. One of the submissions made was that such a ban offended Article 25 of the Constitution because such ban came in the way of the sacrifice of a cow on a particular day where it was considered to be religious by Muslims. Having made a review of various religious books, the Court concluded that it did not appear to be obligatory that a person must sacrifice a cow. It was optional for a Muslim to do so. The fact of an option seems to run counter to the notion of an obligatory duty. Many Muslims do not sacrifice a cow on the Id day. As it was not proved that the sacrifice of a cow on a particular day was an obligatory overt act for a Mussalman for the performance of his religious beliefs and ideas, it could not be held that a total ban on the slaughter of cows ran counter to Article 25 of the Constitution.

49. In **The State of Bombay v. Narasu Appa Mali**, the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act (XXV (25) of 1946) was challenged on the ground of violation of Article 14, 15 and 25 of the Constitution. A Division Bench, consisting of Chief Justice Chagla and Justice Gajendragadkar (as His Lordship then was), held-

“A sharp distinction must be drawn between religious faith and belief and religious practices. What the State protects is religious faith and belief. If religious practices run counter to public order, morality or health or a policy of social welfare upon which the State has embarked, then the religious practices must give way before the good of the people of the State as a whole.”

50. Their Lordships quoted from American decisions that the laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Their Lordships found it difficult to accept the

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proposition that polygamy is an integral part of Hindu religion though Hindu religions recognizes the necessity of a son for religious efficacy and spiritual salvation. However, proceeding on an assumption that polygamy is recognized institution according to Hindu religious practice, their Lordships stated in no uncertain terms-

“The right of the State of legislate on questions relating to marriage cannot be disputed. Marriage is undoubtedly a social institution an institution in which the State is vitally interested. Although there may not be universal recognition of the fact, still a very large volume of opinion in the world today admits that monogamy is a very desirable and praiseworthy institution. If, therefore, the State of Bombay compels Hindus to become monogamists, it is a measure of social reform, and if it is a measure of social reform then the State is empowered to legislate with regard to social reform under Article 25(2)(b) notwithstanding the fact that it may interfere with the right of a citizen freely to profess, practise and propagate religion.”

51. What constitutes social reform? Is it for the legislature to decide the same? Their Lordships held in **Narasu Appa Mali's case** (supra) that the will expressed by the legislature, constituted by the chosen representatives of the people in a democracy who are supposed to be responsible for the welfare of the State, is the will of the people and if they lay down the policy which a State should pursue such as when the legislature in its wisdom has come to the conclusion that monogamy tends to the welfare of the State, then it is not for the Courts of Law to sit in judgment upon that decision. Such legislation does not contravene Article 25(1) of the Constitution.

52. We find ourselves in entire agreement, with the view so taken by the learned Judges whose eminence as jurists concerned with social welfare and social justice is recognized without any demur. Divorce unknown to ancient Hindu Law, rather considered abominable to Hindu religious belief, has been statutorily provided for Hindus and the Hindu marriage which was considered indissoluble is now capable of being dissolved or annulled by a decree of divorce or annulment. The reasoning adopted by the High Court of Bombay, in our opinion, applies fully to repel the contention of the petitioners even when we are examining the case from the point of view of Muslim Personal Law.

53. The Division Bench of the Bombay High Court in **Narasu Appa Mali** (supra) also had an occasion to examine the validity of the legislation when it was sought to be implemented not in one go but gradually. Their Lordships held - “Article 14 does not lay down that any legislation that the State may embark upon must necessarily be of an all-embracing character. The State may rightly decide to bring about social reform by stages and the stages may be territorial or they may be community-wise.”

54. Rule 21 of the Central Civil Services (Conduct) Rules, 1964 restrains any government servant having a living spouse from entering into or contracting a marriage with

any person. A similar provision is to be found in several service rules framed by the States governing the conduct of their civil servants. No decided case of this court has been brought to our notice wherein the constitutional validity of such provisions may have been put in issue on the ground of violating the freedom of religion under Article 25 or the freedom of personal life and liberty under Article 21. Such a challenge was never laid before this Court apparently because of its futility. However, a few decisions by the High Courts may be noticed.

55. In **Badrudin v. Aisha Begam**, 1957 ALJ 300, the Allahabad High Court ruled that though the personal law of muslims permitted having as many as four wives but it could not be said that having more than one wife is a part of religion. Neither is it made obligatory by religion nor is it a matter of freedom of conscience. Any law in favour of monogamy does not interfere with the right to profess, practise and propagate religion and does not involve any violation of Article 25 of the Constitution.

56. In **Smt. R.A. Pathan v. Director of Technical Education and Ors.** - 1981 (22) GLR 289, having analysed in depth the tenets of Muslim personal law and its base in religion, a Division Bench of Gujarat High Court held that a religious practice ordinarily connotes a mandate which a faithful must carry out. What is permissive under the scripture cannot be equated with a mandate which may amount to a religious practice. Therefore, there is nothing in the extract of the Quaranic text (cited before the Court) that contracting plural marriages is a matter of religious practice amongst Muslims. A bigamous amongst Muslims is neither a religious practice nor a religious belief and certainly not a religious injunction or mandate. The question of attracting Articles 15(1), 25(2) or 26(b) to protect a bigamous marriage and in the name of religion does not arise.

57. In **Ram Prasad Seth v. State of Uttar Pradesh and Ors.** a learned single Judge held that the act of performing a second marriage during the lifetime of one's wife cannot be regarded as an integral part of Hindu religion nor could it be regarded as practising or professing or propagating Hindu religion. Even if bigamy be regarded as an integral part of Hindu religion, the Rule 27 of the Government Servants' Conduct Rules requiring permission of the Government before contracting such marriage must be held to come under the protection of Article 25(2)(b) of the Constitution.

58. The law has been correctly stated by the High Court of Allahabad, Bombay and Gujarat, in the cases cited hereinabove and we record our respectful approval thereof. The principles stated therein are applicable to all religions practised by whichever religious groups and sects in India.

59. In our view, a statutory provision casting disqualification on contesting for, or holding, an elective office is not violative of Article 25 of the Constitution.

60. Looked at from any angle, the challenge to the constitutional validity of Section

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175(1)(q) and Section 177(1) must fail. The right to contest an election for any office in Panchayat is neither fundamental nor a common law right. It is the creature of a statute and is obviously subject to qualifications and disqualifications enacted by legislation. It may be permissible for Muslims to enter into four marriages with four women and for anyone whether a Muslim or belonging to any other community or religion to procreate as many children as he likes but no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy or to have children more than one. What is permitted or not prohibited by a religion does not become a religious practise or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does.

61. If anyone chooses to have more living children than two, he is free to do so under the law as it stands now but then he should pay a little price and that is of depriving himself from holding an office in Panchayat in the State of Haryana. There is nothing illegal about it and certainly no unconstitutionality attaches to it.

Some incidental questions

62. It was submitted that the enactment has created serious problems in the rural population as couples desirous of contesting an election but having living children more than two, are feeling compelled to give them in adoption. Subject to what has already been stated hereinabove, we may add that disqualification is attracted no sooner a third child is born and is living after two living children. Merely because the couple has parted with one child by giving the child away in adoption, the disqualification does not come to an end. While interpreting the scope of disqualification we shall have to keep in view the evil sought to be cured and purpose sought to be achieved by the enactment. If the person sought to be disqualified is responsible for or has given birth to children more than two who are living then merely because one or more of them are given in adoption the disqualification is not wiped out.

63. It was also submitted that the impugned disqualification would hit the women worst, inasmuch as in the Indian society they have no independence and they almost helplessly bear a third child if their husbands want them to do so. This contention need not detain us any longer. A male who compels his wife to bear a third child would disqualify not only his wife but himself as well. We do not think that with the awareness which is arising in Indian women folk, they are so helpless as to be compelled to bear a third child even though they do not wish to do so. At the end, suffice it to say that if the legislature chooses to carve out an exception in favour of females it is free to do so but merely because women are not excepted from the operation of the disqualification it does not render it unconstitutional.

64. Hypothetical examples were tried to be floated across the bar by submitting that there may be cases where triplets are born or twins are born on the second pregnancy and consequently both of the parents would incur disqualification for reasons beyond their control or just by freak of divinity. Such are not normal cases and the validity of the law cannot be tested by applying it to abnormal situations. Exceptions do not make the rule nor render the rule irrelevant. One swallow does not make a summer; a single instance or indicator of something is not necessarily significant.

Conclusion

65. The challenge to the constitutional validity of Section 175(1)(g) and 177(1) fails on all the counts. Both the provisions are held, *intra vires* the Constitution. The provisions are salutary and in public interest. All the petitions which challenge the constitutional validity of the abovesaid provisions are held liable to be dismissed.

66. Certain consequential orders would be needed. The matters in this batch of hundreds of petitions can broadly be divided into a few categories. There are writ petitions under Article 32 of the Constitution directly filed in this Court wherein the only question arising for decision is the constitutional validity of the impugned provisions of the Haryana Act. There were many a writ petitions filed in the High Court of Punjab & Haryana under Articles 226/227 of the Constitution which have been dismissed and appeals by special leave have been filed in this Court against the decisions of the High Court. The writ petitions, whether in this Court or in the High Court, were filed at different stages of the proceedings. In some of the matters the High Court had refused to stay by interim order the disqualification or the proceedings relating to disqualification pending before the Director under Section 177(2) of the Act. With the decision in these writ petitions and the appeals arising out of SLPs the proceedings shall stand revived at the stage at which they were, excepting in those matters where they stand already concluded. The proceedings under Section 177(2) of the Act before the Director or the hearing in the appeals as the case may be shall now be concluded. In such of the cases where the persons proceeded against have not filed their replies or have not appealed against the decision of the Director in view of the interim order of this Court or the High Court having been secured by them they would be entitled to file reply or appeal, as the case may be, within 15 days from the date of this judgment if the time had not already expired before their initiating proceedings in the High Court or this Court. Such of the cases where defence in the proceedings under Section 177(2) of the Act was raised on the ground that the disqualification was not attracted on account of a child or more having been given in adoption, need not be re-opened as we have held that such a defence is not available.

67. Subject to the abovesaid directions all the writ petitions and civil appeals arising out of SLPs are dismissed.

State of M.P.²⁸
Vs
Smt. Sundari Bai and Anr.

Hon'ble Judges:

S.P. Khare, J.

JUDGMENT

S.P. Khare, J.

1. This is first appeal under Section 96, CPC by defendant No. 2 State of Madhya Pradesh against the judgment and decree by which compensation of Rs. 50,000/- has been awarded to the plaintiff for "failure of sterilisation".

2. It is no longer in dispute that plaintiff Sundaribai had two sons. At the time of the birth of second son on 27-8-1980 she got her "sterilisation" done so that there is no further pregnancy. The operation was performed by defendant No. 1 Dr. R. Rathore, Assistant Surgeon, Ashta in the Government Hospital "by ligation method". She conceived again in the year 1986 and gave birth to a female child on 8-12-1986.

3. The plaintiffs case is that she is a poor and illiterate lady. She was told by the lady doctor that she would not have any further pregnancy. According to the plaintiff the defendant No. 1 acted negligently in performing the tubectomy operation. She claimed Rs. 50,000/- as compensation for "failed sterilisation" for expenses incurred in the delivery, for rearing the female child and her marriage, against the doctor and the State Government.

4. The case of the defendants is that the sterilisation was done by "tying the fallopian tubes" on account of personal peculiar physical condition of the plaintiff. Her physical condition could not allow the cutting of the fallopian tubes. She was advised to avoid hard work, physical strain and sexual intercourse for sometime. It has been denied that there was any negligence on the part of the doctor. According to the defen-

28. Full text available at AIR2003MP284

dants the sterilisation failed because of the act of the plaintiff herself. It is scientifically and universally recognised that the sterilisation operation can fail in some cases. The defendants are not liable to pay any compensation as there was no negligence of the doctor who was very competent and experienced.

5. The Trial Court has held that there was negligence on the part of the lady doctor as she did not cut the fallopian tubes and merely “tied” them by adopting “ligation method”. It has also been held that the State Government is vicariously liable for the negligence of the doctor. The compensation of Rs. 50,000/- with interest at the rate of six percent per annum has been awarded.

6. In this appeal it has been argued that the findings of the Trial Court that there was negligence of the doctor is not correct. It is submitted that “ligation method” is one of the recognised modes of sterilisation and if keeping in view the personal and physical condition of the plaintiff the doctor in her judgment adopted this method it cannot be held by the Courts that she acted negligently.

7. The point for determination is whether there was negligence on the part of the doctor in performing the sterilisation operation on the plaintiff.

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10. From the evidence of the lady doctor it is found that she adopted one of the recognised methods of sterilisation and that was “ligation method”. She has given reasons for not cutting the fallopian tubes. According to her testimony, there has been no failure of sterilisation in any other case except that of the plaintiff. The testimony of the lady doctor is reliable. It cannot be said that she was negligent because she did not adopt the section method of sterilisation. She was an experienced doctor and she could exercise her discretion as to which method she should adopt for the purpose of sterilisation. As already stated no evidence has been adduced by the plaintiff to prove negligence of the doctor except her own testimony.

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13. The learned Counsel for the appellant has cited the decision of the Supreme Court in *State of Haryana v. Santra*, (2000) 5 SCC 182. In that case the plaintiff having seven children underwent sterilisation operation. It was found that in her case the right fallopian tube was operated upon and the left fallopian tube was left untouched. The negligence of the doctor was writ large as it was necessary to operate both fallopian tubes to avoid further pregnancy. It is because of this negligence per se the damages were awarded to the plaintiff. The Supreme Court observed that every doctor who enters the medical profession has a duty to act with a “reasonable degree of care and skill”. This is what is known as “implied undertaking” by a member of the medical profession that he would use a fair, reasonable and competent degree of skill. The test

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known as “Bolam test” laid down in Bolam V. Frien Hospital Management Committee, (1957) 2 All ER 118, has been cited with approval. In this case the law was summed up as under :—”The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular Article..... in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time..... there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent.”

.....

16. Now examining the facts of the present case on the touchstone of the above mentioned principles it can be safely held that there was no negligence on the part of the doctor. In the present case the plaintiff had two sons when the sterilisation was performed. Her physical condition was not good. The “ligation method” which is a well recognised mode of sterilisation was adopted. This method was used by the doctor in hundreds of cases and there was no failure of this mode. Even in case of the plaintiff this method worked well for six years and the pregnancy was prevented. Thus the doctor acted with reasonable degree of care and skill. There were more than one “perfectly proper standards” and if the doctor chose one then she cannot be said to be negligent. There might have been an error of judgment while acting with ordinary care and skill and that cannot be equated with negligence. It is one thing to say that it would have been better if “section method” had been chosen for sterilisation but the adoption of “ligation method” on the facts of the present case is not negligence per se. The defendant No. 1 though quite experienced was working in a Primary Health Centre and she used a fair, reasonable and competent degree of skill.

17. Surgical sterilisation is a procedure directed at ending the ability to reproduce. In males this is most commonly achieved by vasectomy, in which the vas deferens is cut or tied; in females, the most frequently used methods involve the dividing or clipping of the fallopian tubes, thus preventing the passage of the ova between the ovary and the womb. Sterilisation is usually permanent although, in a few cases, it is possible to reverse the procedure and restore reproductive capability. Sterilisation is highly effective as a method of contraception although the success of the procedure cannot be guaranteed in every case. Failure may occur even without negligence on the part of the doctor performing the operation. (Butterworths Medico Legal Encyclopaedia by J.K. Mason and R.A. McCall Smith page 532).

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20. A doctor does not give a contractual warranty. He is not an insurer against all possible risks. He or she does not provide insurance that there would be no pregnancy

after sterilisation operation. As demonstrated above there is a chance of sterile being turned into fertile even after the operation has been done with due care and caution. A doctor is not liable in negligence because someone of grater skill and knowledge would have prescribed different treatment or “operated in a different way”. She has to show only a reasonable standard of care. She cannot be held guilty for error of judgment. Considerable deference is paid to the practices of the professions (particularly medical profession) as established by expert evidence and the Court should not attempt to put itself in the shoes of the surgeon or other professional man. In the present case the plaintiff had two sons only. A female baby was born to her after six years. She should accept her with grace as gift of God. The parents are primarily liable to give birth to this child. They should not hold the doctor liable when they have been blessed with this baby. She should not have a feeling that she is an unwanted child. The birth of this baby should be considered a blessing and cause for rejoicing. A healthy female baby after the two sons, a lovely creature, must have brought decency, discipline and sobriety in the family. The doctor not being negligent cannot be fastened with liability to pay damages and therefore the Government is also not vicariously liable.

21. In the result, the judgment and decree of the Trial Court are set aside and the suit of the plaintiff for compensation of Rs. 50,000/- is dismissed.

Mr. Vijay Sharma and Mrs. Kirti Sharma²⁹

Vs

**Union of India (UOI) through the Ministry of Law and
Justice and Ministry of Health and Family Welfare**

Hon'ble Judges:

Swatanter Kumar, C.J. and Ranjana Desai, J.

JUDGMENT

Ranjana Desai, J.

1. In this petition filed under Article 226 of the Constitution of India, the petitioners have challenged the constitutional validity of Sections 2, 3A, 4(5) and 6(c) of the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short, "the said Act") as amended by The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 (for short, "the Amendment Act, 2002").

2. Before dealing with the contentions raised in the petition, it must be stated that challenge to the constitutional validity of the said Act on the ground of violation of Article 21 of the Constitution of India has been rejected by this Court in Vinod Soni and Anr. v. Union of India and Ors. 2005 (3) MLJ 1131. It is not open to the petitioners to raise the same challenge again. We shall, therefore, only deal with the petitioners' contention that the said Act violates the principle of equality of law enshrined in Article 14 of the Constitution of India.

3. The petitioners are a married couple having two female children. It is their case as disclosed in the petition that they are desirous of expanding their family provided they are in a position to select the sex of the child. It is obvious from the petition that the petitioners are desirous of having a male child. According to them, they can then enjoy the love and affection of both, son and daughter simultaneously and their existing

²⁹. Full text available at AIR2008Bom29

children can enjoy the company of their own brother while growing up if they are allowed to select sex of their child and have a son. The petitioners have approached various clinics for treatment for the selection of the sex of the foetus by prenatal diagnostic techniques. However, all clinics have denied treatment to them on the ground that it is prohibited under the said Act.

4. According to the petitioners, they have no intention to misuse the prenatal diagnostic techniques. They contend that they are financially sound and capable of looking after and bringing up one more child. They cannot be treated on par with other couples, who in order to have a male child, indulge in sex selective abortion. The provisions of the said Act cannot be made applicable without distinction. According to the petitioners, they only want to balance their family. They contend that a married couple, who is already having child belonging to one sex should be permitted to make use of the prenatal diagnostic techniques to have a child of the sex which is opposite to the sex of their existing child. In fact, ideal ratio of females to males can be maintained if the prenatal diagnostic techniques are allowed to be used. Burden of the song is that couples who are already having children of one sex should be allowed to have a child of the sex opposite to the sex of their existing children by use of the prenatal diagnostic techniques at Preconception stage.

5. We have heard Ms. Ratna Bargavan, the learned Counsel appearing for the petitioners. The contentions raised in the petition and in the affidavit in reply of petitioner 1 and the contentions raised in the court by the learned Counsel for the petitioners can be summed up as under:

(a) The provisions of the said Act cannot be made applicable without any distinction. Couples who have a male or a female child should be allowed to make use of the prenatal diagnostic techniques to have a child of the sex opposite to the sex of their existing child to balance their family. Such couples cannot be treated on par with couples who choose the sex of foetus in order to have a male child leading to imbalance in male to female ratio. The unconstitutionality of the said Act is visible to the class of couples who are already having child/children of one sex.

(b) The Objects and Reasons of the Medical Termination of Pregnancy Act, 1997 (for short, "MTP Act") read with Section 3(2)(i) thereof permit termination of pregnancy of a woman by a registered medical practitioner if the pregnancy would involve risk to the life of the pregnant woman or grave injury to her physical or mental health. Explanation II to Section 3 states that where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman. However, under the said Act, a woman having children of the same sex is not allowed to use the pre-

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natal diagnostic techniques to have children of the opposite sex. The legislature has not taken into consideration the fact that having a child of the same sex as that of the existing child/children also causes grave mental injury to a woman. Whereas MTP Act allows abortion in case a child is conceived on account of any failure of device used by the couple for the purpose of limiting the number of children on the ground that anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman, while enacting the said Act the legislature has not considered what anguish would be caused to a prospective mother who conceives a female child or a male child for the second or third time. The legislature has not appreciated that such anguish must also be termed as grave injury to the mental health of the prospective mother. Thus, there is discrimination between women situated in similar position. The said Act, therefore, violates Article 14 of the Constitution of India. The MTP Act and the said Act are Central Acts. If by one statute certain rights are conferred upon a prospective mother, the same cannot be denied to a prospective mother by another statute originating from the same source. For this proposition, reliance is placed on the judgment of the Supreme Court in State of Tamil Nadu and Ors. v. Ananthi Ammal and Ors.

(c) Under the MTP Act, termination of pregnancy is allowed under certain circumstances. Feticide is sanctioned under certain circumstances. However, by sex selection before conception with the help of the prenatal diagnostic techniques, sex of the child is determined by choosing the male/female chromosome before fertilization and the fertilized egg is inserted in the womb of the mother. This does not lead to Feticide. There is, therefore, no reason to impose a blanket ban on the use of the prenatal diagnostic techniques.

(d) Under the said Act, the use of the prenatal diagnostic techniques is permitted under certain conditions by registered institutions. The words 'certain conditions' should be interpreted in such a manner that inherent uncertainty existing in Section 2 of the Amendment Act, 2002 and Sections 3A, 4(5) and 6(c) of the said Act as inserted by the Amendment Act, 2002 is removed and the possible hardship of the couples who are already having one child can be avoided by permitting them to have child of the sex opposite to the sex of their existing child.

(e) The intention of the legislature to regulate and prevent misuse of the prenatal diagnostic techniques is evident from the fact that the title of the Amendment Act, 2002 contains the words "Regulation and Prevention of Misuse". These words replace the words "Prohibition of Sex Selection" used in the said Act. The intention of the legislature was to regulate and prevent misuse of the prenatal diagnostic techniques and not a blanket prohibition thereof.

(f) The prenatal diagnostic techniques can be used to achieve positive result i.e.

to attain an ideal male to female ratio. Due to the stringent provisions of the said Act, the prenatal diagnostic techniques are used by doctors and couples in hasty and hush hush manner which is likely to affect the mindset of prospective mothers. Fertility clinics have spawned all over where couples who do not have children are taking treatment to get the child of their choice. Such misuse needs to be prevented by providing for an exception whereby only couples who have a child can be allowed to choose the sex of the second child provided the child they propose to have is of the sex opposite to the sex of their existing child.

(g) Section 31A of the said Act provides that the Central Government may publish an order in the Official Gazette within 3 years from the commencement of the said Act for removal of difficulties if any, in giving effect to the provisions of the said Act. The difficulties of the couples having one child need to be taken into account. It is, therefore, necessary for the Central Government to publish the necessary order in the Official Gazette and bring about necessary amendment in the said Act.

6. Strong exception is taken to the submissions of the petitioners' counsel and the contentions raised by the petitioners, by the learned Counsel for the respondents. Affidavit in reply is filed by Ms. Sushma Rath, Under Secretary, Ministry of Health & Family Welfare and by Versha Deshpande, a Social Worker, whose intervention is allowed by this Court considering the importance of the issues involved in this petition.

7. It is necessary to quote Section 2 of the Amendment Act, 2002 and Sections 3A, 4(5) and 6(c) of the said Act as inserted by the Amendment Act since the constitutional validity of the said provisions is under challenge. Section 2 of the Amendment Act, 2002 reads thus:

2. Substitution of long title. In the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as the principal Act), for the long title, the following long title shall be substituted, namely:

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 Feticide and for matters connected therewith or incidental thereto.

Sections 3A, 4(5) and 6(c) of the said Act read thus:

3. Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics. On and from the commencement of this Act,

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(1) xxx xxx xxx

(2) xxx xxx xxx

(3) xxx xxx xxx

[3A. Prohibition of sex selection. No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, concepts, fluid or gametes derived from either or both of them].

(4) Regulation of prenatal diagnostic techniques. On and from the commencement of this Act,

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) xxx xxx xxx

(4) xxx xxx xxx

(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.

(6) Determination of sex prohibited. On and from the commencement of this Act,

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

8. It is necessary to first deal with the submission that the use of the words "Regulation & Prevention of Misuse" in the Amendment Act, 2002 is indicative of the legislative intent only to regulate and prevent misuse because these words substitute the words "Prohibition of Sex Selection" in the said Act. This, in our opinion, is a totally fallacious argument. The title of the earlier Act was the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (for short, "the 1994 Act"). It's long title prior to its amendment by the Amendment Act, 2002 was as under:

1. Substituted by the Prenatal Diagnostic Techniques (Regulation and Prevention

of Misuse) Amendment Act, 2002 (14 of 2003), S. 2, for long title (w.e.f. 1422003). Prior to its substitution, long title read as under:

An Act to provide for the regulation of the use of prenatal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex linked disorders and for the prevention of the misuse of such techniques for the purpose of prenatal sex determination leading to female Feticide; and, for matters connected therewith or incidental thereto.

By the Amendment Act, 2002, it was substituted by the following long title:

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 Feticide and for matters connected therewith or incidental thereto.

9. By the Amendment Act, 2002, the 1994 Act i.e. the Prenatal Diagnostic Techniques (Regulation & Prevention of Misuse) Act was renamed as the said Act i.e. the Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. The Statement of Objects and Reasons of the Amendment Act, 2002 must be quoted. It reads thus:

Amendment Act 14 of 2003 -Statement of Objects and Reasons. The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 seeks to prohibit prenatal diagnostic techniques for determination of sex of the foetus leading to female Feticide. 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 prenatal 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 the 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

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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 Preconception sex selection techniques and the misuse of prenatal 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 prenatal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended. 5. The Bill seeks to achieve the aforesaid objects.

10. The Statement of Objects and Reasons of the Amendment Act, 2002 therefore clearly indicates that the legislature was alarmed at the severe imbalance created in the male to female ratio on account of rampant use of the prenatal diagnostic techniques made to detect sex of the foetus and to terminate the pregnancy of the unborn child if found to be female. The legislature took note of the fact that certain techniques are being developed whereby even at Preconception stage, sex of the child can be selected and, therefore, the title of the 1994 Act was amended to include the words "Preconception" and "(Prohibition of Sex Selection)" in it. The legislature categorically stated that there was a need to ban Preconception sex selective techniques and made it clear that the 1994 Act was sought to be amended with a view to banning the use of sex selection techniques prior to conception as well as misuse of prenatal diagnostic techniques for sex selective abortions.

11. A look at certain important provisions of the said Act persuade us to reject the submission of the petitioners that the legislative intent is to only regulate the use of the said prenatal diagnostic techniques. "Prenatal diagnostic procedures" are defined under Section 2(1) of the said Act as all gynaecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chronic 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 prenatal diagnostic tests for selection of sex before or after conception.

12. "Prenatal diagnostic test" is defined under Section 2(k) of the said Act as ultrasonography or any test or analysis of amniotic fluid, chronic villi, blood or any tissue or fluid of a pregnant woman or concepts conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or hemoglobinopathies or Sex linked diseases.

13. Section 2(j) defines prenatal diagnostic techniques. It states that prenatal diagnostic techniques include all prenatal diagnostic procedures and prenatal diagnostic tests. Prenatal diagnostic techniques (for convenience, hereinafter referred to as "the

said techniques”) can detect the sex of the foetus. Section 3A prohibits sex selection on a woman or a man or on both of them or on any tissue embryo, concepts, fluid or gametes derived from either or both of them and Section 4 regulates use of the said techniques. Section 4(2) states that the said techniques shall not be conducted except for the purpose of detection of (i) chromosomal abnormalities; (ii) genetic metabolic diseases; (iii) hemoglobinopathies; (iv) sex linked genetic diseases; (v) congenital anomalies or any other abnormalities or diseases as may be specified by the Central Supervisory Board that too on fulfillment of any of the conditions laid down in sub-section 3. Thus the said techniques are to be used only to detect abnormalities in the foetus and not for Sex selection or Sex selective abortions. Section 5(2) states that no person including the person conducting prenatal 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. Section 6(c) prohibits determination of sex by stating that no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

14. Under the said Act machinery is created to ensure that there is no sex selection at Preconception stage or thereafter and there is no prenatal determination of sex of foetus leading to female Feticide. Therefore, the submission that the use of the said techniques is only intended to be regulated, must be rejected.

15. The challenge on the ground of violation of Article 14 rests on the comparison between the said Act and the MTP Act which are Central Acts. In our opinion, the object of both the Acts and the mischief they seek to prevent differ. They cannot be compared to canvass violation of Article 14. We have already quoted the Statement of Objects and Reasons of the Amendment Act, 2002. What it seeks to ban is Preconception sex selection techniques and use of prenatal diagnostic techniques for Sex selective abortions. Having taken note of the alarming imbalance created in male to female ratio and steep rise in female Feticide legislature has amended the Act of 1994. It, inter alia, prohibits sex selection on a woman or a man or on both or on any tissue, embryo, concepts, fluid or gametes derived from either or both of them. It prohibits any person to cause or allowed to be caused selection of sex before or after conception.

16. The MTP Act is an Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. Statement of Objects and Reasons of the MTP Act indicates that it concerns itself with the avoidable wastage of the mother’s health, strength and sometimes life. It seeks to liberalize certain existing provisions relating to termination of pregnancy as a health measure - when there is danger to the life or risk to physical or mental health of the woman, on humanitarian grounds - such as when pregnancy arises from a sex crime like rape or intercourse with a mentally ill woman, etc. and eugenic grounds - where there is substantial risk that the child, if born, would suffer from deformities

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and diseases. It does not deal with sex selective abortion after conception or sex selection before or after conception.

17. It is true that under Section 3(2) of the MTP Act, when two registered medical practitioners form an opinion that continuance of the pregnancy would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health, pregnancy can be terminated and, under Explanation II thereof, where any pregnancy occurs as a result of a failure of a device used by the couple for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy is presumed to constitute a grave injury to the mental health of the woman. It must be remembered that termination of pregnancy under the MTP Act is not prompted because of the unwanted sex of the foetus. It could be a male or a female foetus. The MTP Act does not deal with sex selection. The petitioners want to equate the situation of a prospective mother under the MTP Act with the prospective mother under the said Act. They contend that anguish caused to a woman who is carrying a second or third child of the same sex as that of her existing children and who is desirous of having a child of the opposite sex also constitutes a grave injury to her mental health. According to the petitioners, this aspect has been overlooked by the legislature. They contend that an exception ought to have been carved out for such women. It is their contention that inasmuch as both these Acts are Central Acts and deal with prospective mothers if by MTP Act certain rights are conferred on a prospective mother, the same cannot be denied to the prospective mother by the said Act. We are unable to accept this submission. Apart from the fact that both the Acts operate in different fields and have different objects acceptance of the submissions of the learned Counsel would frustrate the object of the said Act. A prospective mother who does not want to bear a child of a particular sex cannot be equated with a mother who wants to terminate the pregnancy not because of the foetus of the child but because of other circumstances laid down under the MTP Act. To treat her anguish as injury to mental health is to encourage sex selection which is not permissible. Therefore, by process of comparative study, the provisions of the said Act cannot be called discriminatory and, hence, violative of Article 14.

18. It is well settled that when a law is challenged as offending against the guarantee enshrined in Article 14, the first duty of the court is to examine the purpose and the policy of the Act and then to discover whether the classification made by the law has a reasonable relation to the object which the legislature seeks to obtain. The purpose or object of the Act is to be ascertained from an examination of its title, preamble and provisions. We have done that exercise in the preceding paragraphs and we are of the considered opinion that the said Act does not violate the equality clause of the Constitution.

19. Our attention is drawn to the frightening figures which show the imbalance in male to female ratio in various parts of India. Ms. Sushma Rath, Under Secretary,

Ministry of Health & Family Welfare has in her affidavit in reply stated that there is a considerable decline in the number of female children and the financially sound areas of Punjab, Haryana and Delhi are worst affected. Ms. Versha Deshpande has in her affidavit stated that the percentage of female children is on the decline in Maharashtra. The booklet titled "missing" published by the Ministry of Health & Family Welfare on which reliance is placed by respondent 1 makes an interesting reading. It captures the decline in the number of girls as compared to boys in India. It is necessary to quote two paragraphs from the same, which have caused great distress to us.

The sex ratio at birth is slightly favourable to boys. This means that more boys are born as compared to girls. This is a natural phenomenon. The sex ratio at birth is usually between 940-950 girls per 1000 boys. The child sex ratio is calculated as number of girls per 1000 boys in the 0-6 years age group. In India, however, the 1991 Census reported a child sex ratio of 945 girls per 1000 boys which further declined to 927 during 2001 Census. Over the years, this ratio has fallen from 976 in 1961 to 964 in 1971, and 962 in 1981. A stage may soon come when it would become extremely difficult, if not impossible, to make up for the missing girls. Society needs to recognise this discrimination: girls have a right to live just as boys do. Moreover, missing numbers of either sex, and the resulting imbalance, can destroy the social and human fabric as we know it. In States such as Haryana, Punjab, Delhi and Gujarat, this ratio has declined to less than 900 girls per 1000 boys. 70 districts in 16 States and Union Territories have recorded a more than 50 point decline in the child sex ratio during the decade 1991-2001. The ratio stands at a mere 770 in Kurukshetra district of Haryana, 814 in Ahmedabad, and 845 in the South West district of Delhi -even though these regions are amongst the most prosperous in the country.

20. That there is decline in the number of girls is not seriously disputed by the petitioners. According to them, the imbalance is caused by the couples who have no children and who by using the said techniques choose male child. In our opinion, no such distinction is permissible. It cannot be denied that in India there is strong bias in favour of a male child. Various causes have led to this preference. It is felt that son carries the name of the family forward and only he can perform religious rites at the time of cremation of the parents. Sons are said to provide support in the old age. Several socioeconomic and cultural factors are responsible for this craving for a son. It is unfortunate that people should still be under the influence of such outdated notions. As long as such notions exist, the girl child will always be unwanted because it is felt that she brings with her the burden of dowry. These hard realities will have to be kept in mind while dealing with the challenge raised to the constitutional validity of a statute which tries to ban sex selection before or after Preconception and misuse of the said techniques leading to sex selective abortions. None can be allowed to use the said techniques for sex selection. The justification offered by the petitioners is totally unacceptable to us.

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21. Certain averments made in the petition are shocking and they reinforce our conclusion that the challenge to the said Act must be thrown overboard. Ground (g) reads as under:

(g) If the country is not advanced socially and economically to accept a female child, it is better such children are not born. The highly advanced treatment should be accepted and utilized for achieving positive mindset.” Ground (m) reads as under:

(m)As long as the patriarchal system exists the craving for a male child is likely to be there and one cannot erase the said issue from the mindset of the people. Hence, it is necessary to balance the family with a male and female child if financial social and other circumstance permits.

22. The petitioners have boldly proclaimed that if the country is not economically and socially advanced, it is better that female children are not born. Patriarchal system is the answer for the craving for a male child. If patriarchal system or economic and social backwardness is responsible for female Feticide, efforts should be made to rectify the system and improve the socioeconomic status of the society. But this Court cannot accept it as a fate accompli, permit an abject surrender to it and allow sex selection or misuse of the said techniques leading to female Feticide. The petitioner-s’case that the use of the said techniques can result in obtaining equal male to female ratio is nullified by their own averments. We have no doubt that if the use of the said techniques for sex selection is not banned, there will be unprecedented imbalance in male to female ratio and that will have disastrous effect on the society. The said Act must, therefore, be allowed to achieve its avowed object of preventing sex selection. In our opinion, the provisions of the said Act which are sought to be declared unconstitutional are neither arbitrary nor unreasonable and are not violative of Article 14.

23. It is then submitted that by sex selection before conception with the help of the said techniques, sex of the child is determined by using male/female chromosome before fertilization and the fertilized egg is inserted in the womb of the mother. There is, therefore, no Feticide and, hence, it is not necessary to impose any ban on the said techniques.

24. It is not possible to accept this submission. Techniques like sonography which are useful for the detection of genetic or chromosomal disorders or congenital malformations are being used to detect the sex of the foetus and to terminate the pregnancy in case the foetus is female. Similarly, Preconception sex selection techniques which have now been developed make sex selection before conception possible. If prior to conception by choosing male or female chromosome sex of the child is allowed to be determined and fertilized egg is allowed to be inserted in the mother’s womb that would again give scope to choose male child over female child. In such cases, even if it is assumed that there is no female Feticide, indirectly the same result is achieved.

The whole idea behind sex selection before Preconception is to go against the nature and secure conception of a child of one's choice. It can prevent birth of a female child. It is as bad as Feticide. It will also result in imbalance in male to female ratio. The argument that sex selection at Preconception is an innocent act must, therefore, be rejected.

25. We have so far laid stress on the possibility of severe imbalance in male to female ratio on account of artificial reduction in the number of female children caused by the use of the said techniques. But there is yet another and more important fact of this problem. That society should not want a girl child; that efforts should be made to prevent the birth of a girl child and that society should give preference to a male child over a girl child is a matter of grave concern. Such tendency offends dignity of women. It undermines their importance. It violates woman's right to life. It violates Article 39(e) of the Constitution which states the principle of state policy that the health and strength of women is not to be abused. It ignores Article 51A(e) of the Constitution which states that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. Sex selection is therefore against the spirit of the Constitution. It insults and humiliates womanhood. This is perhaps the greatest argument in favour of total ban on sex selection.

26. We are of the considered opinion that the provisions of the said Act as amended by the Amendment Act, 2002 are clear, unambiguous and in tune with their avowed object. There is no uncertainty in any of the provisions as alleged in the petition. Therefore, it is not necessary for the Central Government to issue any order in the Official Gazette under Section 31A of the said Act for removal of difficulties on the grounds stated in the petition. This submission of the petitioners is, therefore rejected.

27. The petitioners have made a grievance that in fertility clinics which have spawned all over, there is a misuse of the said techniques. It is contended that in the said clinics, the couples who do not have children are taking treatment to get a child of their choice. In Centre for Enquiry Into Health & Allied Themes (Cehat) and Ors. v. Union of India and Ors. a grievance was made by a Non Governmental organization that the provisions of the said Act are not properly implemented. After considering this grievance, the Supreme Court has noted that it has already issued directions to secure compliance of the provisions of the said Act. The Supreme Court has issued further directions to the Central Government, State Government and Union Territories to ensure compliance of its earlier directions. If the said directions are followed, proper implementation of the said Act would be secured. Though the petitioners have alleged misuse of the said techniques, no particulars of the misuse have been given. In any case, it is the duty of the respondents to ensure that the provisions of the said Act are properly implemented. The respondents will have to abide by the directions of the Supreme Court. We, therefore, direct the respondents to abide by the directions

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issued by the Supreme Court and take all expeditious steps to prevent the misuse of the said techniques.

28. In the view that we have taken, the petition will have to be dismissed and is accordingly dismissed.

Bharatbhai Dhanjibhai Modi³⁰
Vs
Collector and Ors.

Hon'ble Judges:

M.S. Shah and Ravi R. Tripathi, JJ.

JUDGMENT

M.S. Shah, J.

1. What is challenged in this petition under Article 226 of the Constitution of India, is the show-cause notice dated 14-5-2007 issued by the Collector, Porbandar under the provisions of Clause (h) of Sub-section (1) of Section 11 of the Gujarat Municipalities Act, 1963 (hereinafter referred to as 'the Act'). By the said notice, the petitioner is called upon to show cause why the petitioner should not be removed from the office of Councillor of Porbandar Municipality as the petitioner's third child was born on 16-12-2006 and thus the petitioner has incurred disqualification under the above Clause read with Section 38 which provide that the Councillor who has more than two living children after the period of one year from the date of commencement of the Gujarat Local Authorities Laws (Amendment) Act, 2005 (which Amendment Act came into force on 4-8-2005) shall be disabled from continuing to be a Councillor and his office shall become vacant. The petitioner has also challenged the constitution validity of Clause (h) of Section 11(1) of the Act.

2. Section 11(1) of the Act reads as under:

11. General disqualifications for becoming a Councillor.

Vacation of seat. Decision of State Government in case of disputes.

(1) No person may be a Councillor:

30. Full text available on AIR2008Guj106

(h) who has more than two children:

Provided that a person having more than two children on the date of commencement of the Gujarat Local Authorities Laws (Amendment) Act, 2005 (hereinafter in this Clause referred to as “the date of such commencement”), shall not be disqualified under this Clause, so long as the number does not increase:

Provided further that a child or more than one child born in a single delivery within the period of one year from the date of such commencement shall not be taken into consideration for the purpose of disqualification under this Clause.

Explanation:- For the purpose of this Clause,:

(i) Where a couple has only one child on or after the date of such commencement, any number of children born out of single subsequent delivery shall be deemed to be one entity;

(ii) ‘child’ does not include an adopted child or children.

Section 38(1)(a) of the Act reads as under:

38. Disabilities from continuing as a Councillor.

(1) If any Councillor during the term for which he has been elected or nominated:

(a) becomes subject to any disqualification specified in Section 11, or

(b) to (d) ...

he shall subject to the provisions Sub-section (2) be disabled from continuing to be a Councillor and his office shall become vacant.

3. The constitutional validity of the above provisions is challenged on the ground that the provisions are violative of the petitioner’s fundamental rights under Articles 14 and 21 of the Constitution of India, and also on the ground that the said provisions are inconsistent with the provisions of Section 3(2) of the Medical Termination of Pregnancy Act, 1971 which is a Central Act and that by virtue of the provisions of Article 254 of the Constitution, the provisions of Section 11(1)(h) of the Gujarat Municipalities Act, 1963 being inconsistent with the provisions of the Central Act, cannot be permitted to operate.

4. There is no dispute about the fact that the petitioner’s third child was born after

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one year from the date of commencement of the Amendment Act and that the conditions for applicability of the said Clause are satisfied.

5. At the hearing of this petition, attention of the learned Advocate for the petitioner was invited to the decision of a Bench of three learned Judges of the Apex Court in *Javed and Ors. v. State of Haryana and Ors.* upholding the constitutional validity of similar provisions in the Panchayats and Zila Parishads, Haryana Panchayati Raj Act, 1994.

.....

In spite of the aforesaid direct and binding decision of the Apex Court, the learned Advocate for the petitioner submits that, although the provisions may not be violative of Article 14 or Article 25 of the Constitution, the provisions are violative of Article 21 of the Constitution and are also inconsistent with the provisions of the Hindu Marriage Act, 1955. Relying on the decision of the Apex Court in *Vinita Saxena v. Pankaj Pandit*, it is contended that the husband denying the right of the wife to enjoy the marital bliss and to have children will be treated as inflicting mental cruelty on the wife which would constitute a ground for decree of divorce. It is submitted that the impugned provisions of the State Act are therefore, inconsistent with the provisions of the Hindu Marriage Act, 1955 as well as the provisions of the Medical Termination of Pregnancy Act, 1971, and therefore, by virtue of provisions of Article 254 of the Constitution, the provisions of the State Act will have to yield to the provisions of the said Central Acts.

6. We have carefully considered the submissions made by the learned Advocate for the petitioner. In the first place, when the constitutional validity of an identical provision is upheld by the Apex Court in *Javed v. State of Haryana*, it is not open to this Court to examine the challenge to the constitutional validity of the provision on some other grounds. As per the settled legal position, the decision of the Apex Court directly on the question of constitutional validity is binding on this Court under Article 141 of the Constitution of India and cannot be permitted to be whittled down on the ground that the Act may be considered unconstitutional on some other grounds not considered by the Apex Court.

.....

7. Apart from the above view of the matter, in our considered opinion, the impugned provisions of the State Act cannot be said to be inconsistent with the provisions of the Hindu Marriage Act, 1955. Reliance placed on the decision in *Vinita Saxena v. Pankaj Pandit* is thoroughly misconceived. The undisputed facts in that case were that the appellant-wife was 24 years of age when she got married in 1987. The marriage lasted for five months. The marriage between the parties was not consummated as the

respondent-husband was not in a position to fulfill the matrimonial obligation. The wife filed petition for decree of divorce on two grounds - that the husband had treated the wife with cruelty and that the husband was suffering from severe mental disorder (Paranoid Schizophrenia) of such a kind and to such an extent that the appellant - wife could not reasonably be expected to live with the respondent husband. The trial Court dismissed the petition and the High Court confirmed the judgment of the trial Court. The Apex Court held that the uncontroverted evidence of the appellant wife had proved the case on every count. The appellant had proved beyond doubt that the respondent suffered from mental disorder and that the appellant suffered cruelty by and at the behest of the respondent. It was in the above context that the Apex Court made observations in Paragraphs 42 and 43 of the judgment including reference to the observations of the Division Bench of the Delhi High Court in *Rita Nijhawan v. Balkrishan Nijhawan*.

8. Those observations made in a different context altogether cannot be quoted out of context for the purpose of assailing the constitutional validity of statutory provisions which have been held by the Apex Court to be salutary and in public interest. The statutory provisions under challenge do not take away the right of the wife to enjoy the marital bliss, nor do they impinge upon her right to prevent pregnancy. We may again refer to the observations made by the Apex Court in Para 63 of the judgment in *Javed's case* (supra) that with the awareness which is arising in Indian women folk, they are not helpless as to be compelled to bear a third child even though they do not wish to do so.

.....

10. We fail to see how the impugned provisions of the Gujarat Municipalities Act can be said to be inconsistent with the provisions of the Medical Termination of Pregnancy Act, 1971. We, therefore, see no inconsistency whatsoever between the impugned provisions of the said Act and the provisions of the Hindu Marriage Act, 1955 and the provisions of Medical Termination of Pregnancy Act, 1971.

We find no merit in this petition. The petition, is therefore, summarily dismissed.

**Dr. Nikhil D. Dattar, Gynaecologist, Mr. X
(Identification withheld for preserving confidentiality)
and Mrs. Y (Identification withheld for preserving
confidentiality) being wife of Mr. X³¹
Vs
Union of India (UOI) through its Additional Solicitor
General (Western Region) and State of Maharashtra
through its Govt. Pleader and Advocate General**

Hon'ble Judges:

R.M.S. Khandeparkar and A.A. Sayed, JJ.

JUDGMENT

R.M.S. Khandeparkar, J.

1. Heard. Rule. By consent, heard forthwith. The learned advocates for the respondents waive service.

2. By the present petition, the petitioners are seeking declaration that Section 5 of The Medical Termination of Pregnancy Act, 1971, for short "the said Act", to the extent it does not include the eventualities specified under Section 3(2)(b)(ii) of the said Act is ultra vires and that, therefore, the Section 5(1) of the said Act should be read down to include the said eventualities, and consequently should be read to include the following words "and when there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped" and hence direction should be issued to the respondents to allow the petitioner No. 3 to terminate the pregnancy.

3. The facts which are not in dispute are that the petitioner No. 3 is currently in 26th

31. Writ Petition (L) No. 1816 of 2008, Decided On: 04.08.2008

week of pregnancy. During 24th week of pregnancy, the petitioner No. 3 having undergone the necessary medical tests learnt that the foetus in her womb was diagnosed to have congenital complete heart block. The petitioner Nos. 2 and 3 consulted the petitioner No. 1 and sought his opinion about the possibility for termination of pregnancy after learning about the alleged anomalies in the foetus.

4. It is the case of the petitioners that though the termination of pregnancy has been advised, on account of statutory provisions comprised under the said Act, the doctors are reluctant to perform the necessary surgical operation in that regard.

5. The petition when came up for hearing on 29th July, 2008, after hearing the parties, by reasoned order, this Court (Sri J.N. Patel and Sri K.K. Tated, JJ) required the Chief Medical Officer/Dean of J.J.Hospital to constitute a Committee of gynaecologist and paediatrician experts in the field of Cardiology and to submit the report after examining the petitioner No. 3 on the aspect of termination of pregnancy. Accordingly, report was submitted and the matter came up for hearing on 1st August, 2008.

6. On 1st August, 2008, after going through the report, it was observed by this Court (Sri P.B. Majmudar and Sri A.A. Sayed, JJ) that:

Prima facie, we find contradiction in the report and since the Court is not in a position to get a clear picture from the report of the Committee, as at one place the Committee has said that on medical reasons the Committee feels that the findings do not have substantive significance to resort the termination of pregnancy and at another place it says that the Committee is of the opinion that there are very fair chances that child will be born incapacitated and handicapped to survive.

Having observed as above, the Court issued the following direction:

Learned Counsel for the petitioner may immediately serve this order to the Dean, J.J.Hospital, Mumbai. Let the Government Pleader also Page 3297 communicate this order to the Dean, J.J.Hospital, Mumbai, requesting the Committee Members to give further report as indicated above. Looking to the urgency of the matter, the Committee may give additional report by giving firm finding in this behalf by preparing the report latest by tomorrow evening. The Dean, J.J.Hospital may hand over the additional report/opinion in a sealed envelope giving their findings as indicated above to the Government Pleader before 10.00 a.m. on 4th August, 2008 so that such report can be made available to the Court when the matter is taken up for hearing. The learned Counsel for petitioner No. 3 submitted that Petitioner No. 3 may be granted liberty to get herself examined through an expert Paediatrist/Cardiologist/Gynaecologist and submit report in this behalf. It is for petitioner No. 3 to adopt such course. At this stage, we are not expressing any opinion.

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7. Today, when the matter came up for hearing in the morning session, the report in terms of order dated 1st August, 2008 was placed before us. The said report reads thus:

As per the orders of the Honble Court, Ms. Niketa Mehta has been examined by following 3 specialists and they have submitted their reports which are annexed for your kind perusal:

- 1) Dr. Ashok Anand, Gynaecologist.
- 2) Dr. N.O. Bansal, Cardiologist.
- 3) Dr. Neeta Sutay, Paediatrician.

After discussing with all the 3 specialists, the finding seen on Sonography, the following observations are recorded:

- 1) The lady has 24 weeks gestation.
- 2) The fetal echocardiogram reports can be accurate in observations upto 80 to 85 % of the actual findings. Nowhere in the world findings can be 100% accurate.
- 3) Sonographic examination shows complete heart block with a ventricular rate of 50-55 per minute and heart is structurally and functionally normal.
- 4) Great arteries are in mal position (L-malposition) without any other structural defects and it is viable to normal life provided there are no other structural anomalies in the heart.
- 5) In the echocardiogram done outside, no other structural anomalies are identified.
- 6) Only small percentage of kids will be symptomatic and will require implantation of the pace make costing less than, one lakh of rupees which will be replaced by adult pace make at a later date, leading to normal life.

The consensus of the committee is that whatever is visualized and opined by the Gynaecologist from the pertaining area may not be 100% truth. Page 3298 The committee is of the opinion that there are very least chances that child will be born incapacitated and handicapped to survive. On medical reasons, the committee feels that the findings observed do not have substantive significance to resort the termination of pregnancy. However, it is the liberty of the patient to choose continuation of the pregnancy after knowing the reality.

8. On 1st August, 2008, the petitioners also had sought an opportunity to get the petitioner No. 3 examined through an expert and submit a report in that regard and accordingly, the learned advocate for the petitioners has submitted the opinion of Dr. Snehalata Deshmukh, Dr. Shakuntala Prabhu and Dr. Snehal Kulkarni. The report of Dr. Snehalata Deshmukh reads thus:

As per your interim order the petitioners have sought my opinion in the subject matter.

This opinion is given strictly on the basis of professional experience as Pediatric Surgeon and after studying the reports produced by the petitioner. I have also reviewed the relevant literature.

I state as under.

1) Quality of life for this child is likely to be severely compromised. There is every possibility that this child may be incapacitated & handicapped. The risk is substantial risk if child were born.

2) The age of viability in Indian context is around 26-28 weeks of pregnancy.

9. The provision of law, as comprised under Section 3(1) of the said Act, provides that notwithstanding anything contained in the Indian Penal Code, a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of the said Act. Sub-section (2) of Section 3 of the said Act provides that subject to the provisions of Sub-section (4), a pregnancy may be terminated by a registered medical practitioner, where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that - the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. Explanation I provides that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. Explanation II provides that where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed Page 3299 to constitute a grave injury to the mental health of the pregnant woman. Sub-section (3) thereof provides that in determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in Sub-section (2), account may be taken of the pregnant woman's actual or reason-

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able foreseeable environment. Sub-section (4) provides that no pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian, and save as otherwise provided in Clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

10. Section 5 of the said Act, which is yet another section dealing with the pregnancy, in its Sub-section (1) provides that the provisions of Section 4, and so much of the provisions of Sub-section (2) of Section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman. Sub-section (2) provides that notwithstanding anything contained in the Indian Penal Code, the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified. Sub-section (3) provides that whoever terminates any pregnancy in a place other than that mentioned in Section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years. Sub-section (4) provides that any person being owner of a place which is not approved under Clause (b) of Section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years. Explanation 1 provides that for the purposes of the said section, the expression "owner" in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under the said Act. The Explanation 2 provides that for the purposes of the said section, so much of the provisions of Clause (d) of Section 2 as relate to the possession, by registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply.

11. The above provisions of law comprised under the said Act clearly disclose the circumstances under which pregnancy can be terminated. Undoubtedly, Section 5 of the said Act relates to the right of a pregnant woman to terminate pregnancy in case it is found necessary to save her life. Section 5 nowhere speaks of any right of a pregnant woman to terminate the pregnancy on the Page 3300 ground that delivery of a child may result in some abnormalities in or to the child to be born. It strictly restricts to the cases where life of the pregnant woman would be in danger in case the pregnancy is not terminated and does not refer to any other circumstances. Undoubtedly, the opinion in that regard has to be formed by a registered medical practitioner and such opinion should be in good faith. The expression "good faith" discloses that the opinion has to be based on the necessary examination required to form such an opinion.

12. As far as Section 3(2)(b)(ii) is concerned, it clearly speaks of right to terminate the pregnancy where there is a substantial risk in allowing the child to take birth as it would suffer from such physical or mental abnormalities as to be seriously handicapped. However, such right is restricted to the maximum period of twenty weeks of pregnancy and not beyond it. Section 3(2)(b)(ii) is very clear in that regard. It also provides that before opting for such pregnancy within the said period, it is necessary for two registered medical practitioners to form an opinion in good faith for termination of the pregnancy. In case, the pregnancy has not exceeded twelve weeks, then such an opinion can be formed in good faith by any one medical practitioner.

13. In the case in hand, the opinion expressed by the Committee which was constituted pursuant to the direction of this Court has clearly opined that “there are very least chances that child will be born incapacitated and handicapped to survive. On medical reasons, the committee feels that the findings observed do not have substantive significance to resort the termination of pregnancy.”

14. The findings which have been arrived at on examination of the petitioner No. 3 and various reports of her medical examination and which have been reproduced in the earlier part of the order, undoubtedly refer to “complete heart block with a ventricular rate of 50-55 per minute,”; however, it also discloses the finding to the effect that “heart is structurally and functionally normal. Great arteries are in mal position (L-malposition) without any other structural defects and it is viable to normal life provided there are no other structural anomalies in the heart. In the echocardiogram done outside, no other structural anomalies are identified. Only small percentage of kids will be symptomatic and will require implantation of the pace maker costing less than, one lakh of rupees which will be replaced by adult pace make at a later date, leading to normal life.”

15. The report which is submitted on behalf of the petitioners, that of Dr. Snehalata Deshmukh, nowhere discloses possibilities of any physical or other abnormalities of serious nature having been noted by the doctor, or that the opinion has been formed to the effect that there is a every possibility that the child may be incapacitated and handicapped. The report on the face of record nowhere discloses the opinion having been formed on the basis of any finding arrived at by the concerned expert about possible abnormalities in the child on or after its birth on the basis of examination of the reports.

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16. As far as the report by Dr. Shakuntala Prabhu and Dr. Snehal Kulkarni is concerned, it is in the form of questions and answers. The report discloses that the questions were posed by the petitioner No. 1 and they were answered by the said two doctors. With reference to the question regarding the findings on examination, the doctors have stated that the upper two chambers beating at rate of 133 per minute, and

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Lower two chambers beating at 50 per minute suggest functional abnormality; the atrioventricular connections are abnormal (av discordance). Vessel which needs to arise from right ventricle arises from left and vice a versa, (av discordance) suggest structural anomaly. As regards the question regarding diagnosis, it was stated that "corrected transposition of great vessels with complete heard block." To the question as to whether there are only two defects noticed and will the same require cardiac surgery at or after birth of child, the answer was in the negative, and further it was stated that "on post delivery sonography, 50% of babies show additional defects, and in such cases, cardiac surgery would be required." To the specific question as to whether in the opinion of doctors, whether the child would need a pace maker at birth or afterwards, it was stated that "the literature shows that 80% patients need pace maker with heart block and since the heart rate is very slow, it is surely required pace maker at birth." To the question as to whether the pace maker is a one time solution to the problem, the same was answered in the negative. It was further stated that:

Q. Is pacemaker a one time solution to problem?

Ans: No. Pacemaker has to be changed again. Average interval of change is 4-5 years.

Q. Are there any complications associated with pacemaker?

Ans: Since it is a surgical procedure it has its own set of complications such as infections, risk of anaesthesia.

Q. Is pacemaker put in clinic?

Ans: No.

Q. Do you need hospital, ICCU, operation theatre for the procedure?

Ans: Yes. It cant be put in clinic and patient sent home. It needs hi tech operation theatre to perform procedure.

Q. After putting the pacemaker will child be able to sleep, run, swim etc. like all other children.

Ans: Definitely there will be restrictions on activities and it may affect quality of life.

Q. If any such activity is undertaken by the child what will be the problem?

Ans: The child may have heart arrythmia, sudden death. failure,

Q. Can this fetus develop "hydrops foetalis" (swelling all over the body) and what are the effects on the foetal brain?

Ans: Yes. There is high possibility and can have detrimental effects on fetal brain.

Q. How may children with this abnormality have you seen who are leading totally normal life?

Ans: hardly anybody.

Q. If you would have faced the same problem in your family, would you consider the problem as “substantive risk to fetal life”?

Ans: Yes. We both of are the opinion that in such set of anomaly, there is a substantial risk that if child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

17. Undoubtedly, the opinion given by Dr. Shakuntala Prabhu and Dr. Snehal Kulkarni refers to the possibility of “a substantial risk if the child were born it would suffer from physical or mental abnormalities as to be seriously handicapped.” However, the opinion itself discloses the necessary treatment which is required to be given to overcome the problem which the child on its birth may face, apart from the fact that considering the defects as they are noticed today, both the doctors are not sure that cardiac surgery would be required at or after the birth to the child and according to them, it would all depend upon post delivery sonography to be conducted. The question No. 3 and answer thereto is very clear in this regards and reads thus:

Q.3 Since there are only two defects noticed, can you surely say that the cardiac surgery will not be required at/after birth?

Ans: No.

On post delivery sonography, 50% of babies show additional defects. In such cases cardiac surgery is required.

Being so, taking into consideration the opinion expressed by the doctors committee from J.J.Group of Hospital as well as the Two Expert Committee of two doctors which was constituted by the petitioners themselves, there is no categorical opinion before us from the medical experts to the effect that “if the child were born, it would suffer from physical or mental abnormalities as to be seriously handicapped.” Apart from the fact that already the period of 26 weeks of pregnancy has passed, even the requirements of the provisions of law under Section 3(2)(ii) read with Section 3(2)(b) are not satisfied. In other words, even if the petitioners were to approach this Court before the expiry of 20 weeks of pregnancy, based on the medical opinion placed before us, it would not have been possible for this Court to issue direction for exercise of right in terms of Section 3 of the said Act.

18. It was sought to be argued on behalf of the petitioners that the pre-amble of the said Act clearly provides that there is avoidable wastage of the mothers health, strength and, sometimes, life, and therefore, the legislation in the form of the said Act seeks to liberalise certain existing provisions relating to termination of pregnancy which is nothing but a health measure in cases where there is danger to the life or

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risk to physical or mental health of the woman as also Page 3303 on humanitarian grounds such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc., and where there is substantial risk that the child, if born, would suffer from deformities and diseases, and considering the eventualities under which the pregnancy can be terminated in terms of Section 3, the same should be read in Section 5 also. According to the learned Advocate, there was lapse on the part of the legislators in not including such eventualities under Section 5 of the said Act and relying upon the decision of the Apex Court in the matter of Union of India India v. Association for Democratic Reforms and Anr. reported in MANU/SC/0394/2002, the learned advocate for the petitioners submitted that the said lacuna is required to be filled in by reading down Section 5 to include such eventualities.

19. We are afraid the contention on behalf of the petitioners if accepted would virtually amount to legislating upon Section 5 of the said Act. Under the guise of reading down a provision of law, the Courts are not empowered to legislate upon a statute. That is essentially the function of the legislature.

20. The Statement of Objects and Reasons of the said Act undoubtedly discloses that the legislation in the nature of the said Act was enacted to regulate the matters in relation to the termination of certain pregnancies. Sections 3 and 5 clearly speak of right to terminate pregnancy under the specified circumstances and after taking necessary precautions and after obtaining medical opinion of the medical experts who are required to give their opinion in good faith in that regard. Section 5 can be resorted to for termination of pregnancy when the non-termination of pregnancy would be dangerous to the life of pregnant woman. It is not a mere desire to terminate the pregnancy that will entitle either pregnant woman to go for termination of pregnancy or for the doctors to assist the pregnant woman to terminate the pregnancy by taking resort to Section 5 of the said Act. There has to be an opinion formed in good faith by a medical experts in that regard before going for termination of pregnancy. Undoubtedly, the experts have to ascertain whether there is danger to the life of a pregnant woman on account of pregnancy.

21. As regards the physical or mental abnormalities of serious nature to the child to be born which could be the cause for termination of pregnancy, the legislature in its wisdom has imposed certain period within which the pregnancy can be terminated. Nothing is placed on record on behalf of the petitioners even to remotely suggest that the period so prescribed by the statute has been arbitrarily prescribed or that there is no logic behind the period prescribed by the legislature in that regard.

22. In the circumstances, the petitioners have not placed on record even any material which could perhaps justify the exercise of our discretion in writ Page 3304 jurisdiction to allow the petitioner No. 3 to terminate the pregnancy. No exceptional case in that regard has been made out so as to exercise discretionary jurisdiction under Article 226 of the Constitution of India to issue any writ in the matter.

23. The decision of the Apex Court in Association for Democratic Reforms's case (supra) is of no help to the petitioners. In the said case, the Apex Court was dealing with the matter relating to the power of Election Commission in the matter of conduct of election and the scope of the word "elections" in that regard. The Apex Court has held that mere absence of any provision in relation to the procedure to be followed for effective exercise of the powers of the Election Commission, it is not helpless to formulate the regulations in that regard. It was specifically held that the word "elections" includes the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the process of choosing a candidate and to maintain the purity of elections and in particular to bring transparency in the process of election, the Commission can ask the candidates about the expenditure incurred by the political parties. It was essentially in respect of the procedure to be followed by the Election Commission to ensure that the elections are held in healthy atmosphere and the rules of required discipline to be observed in the process of election.

24. It cannot be disputed that in the matter of procedure, in the absence of any specific provision in that regard, nothing prohibits this Court from laying down certain guidelines whenever required for effective implementation of any statutory provision. However, that would not include the power to frame law relating to substantive rights of the parties. Being so, the decision of the Apex Court in Association For Democratic Reforms's case (supra) is of no help to the petitioners in the matter in hand.

25. It was clearly held by the Apex Court in Divisional Manager, Aravali Golf Club & Anr. v. Chander Hass and Anr. reported in 2008 AIR SCW 406 that the judiciary cannot encroach into the domain of the legislature or executive. In P. Ramchandra Rao v. State of Karnataka reported in, it was ruled that the doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the existing law. Though in reality such watertight separation does not exist, yet one organ of the State should not perform a function that essentially belongs to another organ. It was specifically held that making of an entirely new law, through Page 3305 directions, is not a legitimate judicial function. Further in Union of India and Anr. v. Deoki Nandan Aggarwal reported in AIR 1992 SC 96 : 1991 AIR SCW 2754 it was held that it is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature, the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. Having held so, with reference to the facts of the case before the Apex Court, it was observed that "Modifying and altering the scheme and applying it to others who are not otherwise entitled to under the scheme

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will not also come under the principle of affirmative action adopted by courts sometimes in order to avoid discrimination. If we may say so, what the High Court has done in this case is a clear and naked usurpation of legislative power.”

26. For the reasons stated above, we find no case is made out for the reliefs asked for. Hence, the petition fails and is hereby dismissed. The rule is discharged accordingly. No order as to costs.

**Suo Motu Writ Petition on the reports published in
various Marathi Newspapers about the untimely
death of many children due to malnutrition
within two months³²
Vs
The State of Maharashtra and Ors.**

Hon'ble Judges:

R.M. Lodha and S.A. Bobde, JJ.

ORDER

R.M. Lodha, J.

1. In continuation of various affidavits filed on behalf of the State Government and the directions issued by this Court from time to time, further affidavit has been filed on behalf of the State Government by Dr. Raju Manohar Jotkar, Assistant Director of Health Services on September 20, 2006.

2. It is apparent from the affidavit dated September 20, 2006 that the State Government has failed to combat child deaths within the State, tribal as well as non-tribal areas. In 15 tribal districts of the State, in the year 2003-04, the child mortality was 8,321 while in the years 2004-05 and 2005-06, it was 8,003 and 7,700, respectively. That means, there is only a marginal decrease in child death despite the claim of the State Government that various welfare schemes have been launched in the tribal districts. The statement annexed with the affidavit is also revealing and saddens us. It appears that the child death of one to six years of age has been on increase over the years except the marginal decrease last year. It leads us to infer that either the welfare schemes framed by the State Government are not being implemented properly as it should be or that such schemes have failed to have any impact. Is it not slur on the society that even after more than eight years and five decades of independence, the

32. Full text available at 2006(6)MhLj511

State is having large number of child deaths due to malnutrition as a major contributory factor? In almost all the affidavits filed on behalf of the State Government, from time to time, the statement has been made that the State Government is doing its best to combat the child deaths and that the welfare schemes are being implemented, but the figures that have come on record belie the claim of the State Government.

3. On 12.12.2003, the State Government constituted Child Mortality Evaluation Committee under the chairmanship of Dr. Abhay Bang. The Committee comprised of 13 other members and has submitted two reports. The first report dealt with improving registration of the infant deaths and the child deaths in the tribal areas and in the second report measures to be taken for curbing infant mortality, child mortality, maternal mortality and malnutrition in the tribal districts of the State have been recommended. In the affidavits filed by the State Government from time to time, the recommendations made by Dr. Abhay Bang Committee and the actions taken in that regard have been mentioned. The facts and figures of the infant and child mortality that have come on record show that the steps taken by the State Government so far are not adequate and much more effective steps need to be taken.

4. We may also notice here the affidavit filed on 4.10.2005 by one Pranali Praveen Chitnis, Under Secretary in the office of the Secretary, Women and Child Development Department wherein the statement has been made that the additional sanctioned 12,684 Anganwadi Centres will be made functional by June 2006.

5. To our specific query to the Additional Government Pleader as to whether the sanctioned additional 12,684 Anganwadi Centres have become functional, the Additional Government Pleader submitted that according to the instructions given by Dr. Prakash Doke, about 80% of the said additional Anganwadi Centres have come into operation; all the additional 12,684 Anganwadi Centres have not become functional.

6. It needs no emphasis by us that by such large number of child deaths; malnutrition being major contributory factor, there is wholesome violation of Article 21 of the Constitution of India by the State Government. The salutary directive given in Article 47 of the Constitution of India that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties appears to be distant dream in tribal areas. If the thousands of children die every year in the State of Maharashtra, more particularly in tribal areas; malnutrition being major contributory factor, the only inference that can be drawn is that the State Government has failed in its primary duty in raising the level of nutrition of feeding mothers and the children.

7. Having considered the recommendations given in the two reports by Dr. Abhay Bang Committee, the magnitude and seriousness of the matter, the action taken so far by the State Government and the Constitutional provisions, we issue the following directions as of now:

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(i) The State Government shall make functional additional 12,684 Anganwadi Centres as per the Government of India guidelines as set out in the affidavit dated 4.10.2005 by 31.10.2006. Failure to do so shall expose the Principal Secretary, Women and Child Development Department, Mantralaya, Mumbai, to an action under the Contempt of Courts Act, 1971.

(ii) The State Government shall initiate the Mission "Bal Mrutyu Mukta Maharashtra" (by whatever name called) as suggested by Dr. Abhay Bang Committee and, accordingly, modify "Rajmata Jijau Maternal Child Health and Nutrition Mission" started from 11.3.2005 to ensure that the infant mortality rate due to malnutrition is reduced to almost nil within five years from today. In other words, the State Government shall ensure that by 30th September, 2011, the infant mortality rate due to malnutrition is brought down to almost nil in tribal as well as non-tribal areas.

(iii) To begin with, the State Government shall, as suggested by Dr. Abhay Bang Committee, identify malnutrition free villages and maternal death and child death free villages and felicitate such villages. To achieve that more and more villages are malnutrition free and maternal death and child death free, the State Government shall give responsibility and funds to Gram Panchayats and self-help groups.

(iv) The State Government shall involve the local Gram Panchayats, self-help groups and non-Governmental organisations for control of child deaths and malnutrition.

(v) While reviewing the assessment of the officers/workers working in the Health Department, officers and workers who have contributed in controlling child deaths and malnutrition and in prevention of child mortality, adequate incentives shall be given to such officers and workers.

(vi) The scheme, 'Rajmata Jijau Maternal Child Health and Nutrition Mission', be adequately modified by providing more facilities, adequate medicines and kits to Anganwadis which may help in eradicating malnutrition deaths.

(vii) The State Government, as far as possible, may involve Tribal Gram Sabha where tribal areas are concerned, for the development programme planning.

(viii) The Female Pada volunteers who have been appointed in the districts must be suitably trained for management of common childhood problems and also for home-based neonatal care. Training programme must start, if not started so far, by 1.1.2007.

(ix) For emergency referral of pregnant women, transport should be made avail-

able or the provision for delivery vans should be made.

(x) As per infant mortality rate and severe malnutrition, high risk areas should be identified and these areas should be provided with additional budget and requisite resources. If necessary, Nav Sanjivani Programme initiated by the State Government be modified to ensure that it has the desired impact.

(xi) The State Government shall issue instructions to the Collectors of 15 tribal districts to spend minimum of two days in a month in the tribal villages of the district where there is high rate of infant mortality and severity of malnutrition and during their stay in the tribal villages, the Collectors shall coordinate with all agencies, including N.G.Os., involved in the mission. If there is no substantial improvement in combating the child deaths due to malnutrition in a particular district, the poor performance in this regard must be reflected in the service record of the concerned Collector.

(xii) The Chief Secretary shall ensure that every single rupee allocated in the State budget to the various schemes for the purposes of combating child mortality and malnutrition, is used for such purposes timely and percolates down to the needy.

(xiii) The State Government shall ensure the availability of the Doctors and the emergency obstetrics Centres not only in district hospitals but also in small places.

8. The Chief Secretary shall submit the compliance report on affidavit by 18.10.2006. Stand over to 19.10.2006.

Samira Kohli³³
Vs
Dr. Prabha Manchanda and Anr.

Hon'ble Judges:

B.N. Agarwal, P.P. Naolekar and R.V. Raveendran, JJ.

JUDGMENT

R.V. Raveendran, J.

1. This appeal is filed against the order dated 19.11.2003 passed by the National Consumer Disputes Redressal Commission (for short 'Commission') rejecting the appellant's complaint (O.P. No. 12/1996) under Section 21 of the Consumer Protection Act, 1986 ('Act' for short).

Undisputed facts

2. On 9.5.1995, the appellant, an unmarried woman aged 44 years, visited the clinic of the first respondent (for short 'the respondent') Page 0435 complaining of prolonged menstrual bleeding for nine days. The respondent examined and advised her to undergo an ultrasound test on the same day. After examining the report, the respondent had a discussion with appellant and advised her to come on the next day (10.5.1995) for a laparoscopy test under general anesthesia, for making an affirmative diagnosis.

3. Accordingly, on 10.5.1995, the appellant went to the respondent's clinic with her mother. On admission, the appellant's signatures were taken on (i) admission and discharge card; (ii) consent form for hospital admission and medical treatment; and (iii) consent form for surgery. The Admission Card showed that admission was 'for diagnostic and operative laparoscopy on 10.5.1995'. The consent form for surgery filled by Dr. Lata Rangan (respondent's assistant) described the procedure to be undergone by the appellant as "diagnostic and operative laparoscopy. Laparotomy may be needed".

33. Full text available at AIR2008SC1385

Thereafter, appellant was put under general anesthesia and subjected to a laparoscopic examination. When the appellant was still unconscious, Dr. Lata Rengen, who was assisting the respondent, came out of the Operation Theatre and took the consent of appellant's mother, who was waiting outside, for performing hysterectomy under general anesthesia. Thereafter, the Respondent performed a abdominal hysterectomy (removal of uterus) and bilateral salpingo-oophorectomy (removal of ovaries and fallopian tubes). The appellant left the respondent's clinic on 15.5.1995 without settling the bill.

4. On 23.5.1995, the respondent lodged a complaint with the Police alleging that on 15.5.1995, the Appellant's friend (Commander Zutshi) had abused and threatened her (respondent) and that against medical advice, he got the appellant discharged without clearing the bill. The appellant also lodged a complaint against the respondent on 31.5.1995, alleging negligence and unauthorized removal of her reproductive organs. The first respondent issued a legal notice dated 5.6.1995 demanding Rs.39,325/- for professional services. The appellant sent a reply dated 12.7.1995. There was a rejoinder dated 18.7.1995 from the respondent and a further reply dated 11.9.1995 from the appellant. On 19.1.1996 the appellant filed a complaint before the Commission claiming a compensation of Rs.25 lakhs from the Respondent. The appellant alleged that respondent was negligent in treating her; that the radical surgery by which her uterus, ovaries and fallopian tubes were removed without her consent, when she was under general anesthesia for a Laparoscopic test, was unlawful, unauthorized and unwarranted; that on account of the removal of her reproductive organs, she had suffered premature menopause necessitating a prolonged medical treatment and a Hormone Replacement Therapy (HRT) course, apart from making her vulnerable to health problems by way of side effects. The compensation claimed was for the loss of reproductive organs and consequential loss of opportunity to become a mother, for diminished matrimonial prospects, for physical injury resulting in the loss of vital body organs and irreversible permanent damage, for pain, suffering emotional stress and trauma, and for decline in the health and increasing vulnerability to health hazards.

5. During the pendency of the complaint, at the instance of the respondent, her insurer - New India Assurance Co. Ltd, was impleaded as the second respondent. Parties led evidence - both oral and documentary, Appellant examined an expert witness (Dr. Puneet Bedi, Obstetrician & Gynaecologist), her mother (Sumi Kohli) and herself. The respondent examined herself, an expert witness (Dr. Sudha Salhan, Professor of Obstetrics & Gynaecology and President of Association of Obstetricians and Gynaecologists of Delhi), Dr. Latha Rangan (Doctor who assisted the Respondent) and Dr. Shiela Mehra (Anaesthetist for the surgery). The medical records and notices exchanged were produced as evidence. After hearing arguments, the Commission dismissed the complaint by order dated 19.11.2003. The Commission held : (a) the appellant voluntarily visited the respondent's clinic for treatment and consented for diagnostic procedures and operative surgery; (ii) the hysterectomy and other surgical

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procedures were done with adequate care and caution; and (iii) the surgical removal of uterus, ovaries etc. was necessitated as the appellant was found to be suffering from endometriosis (Grade IV), and if they had not been removed, there was likelihood of the lesion extending to the intestines and bladder and damaging them. Feeling aggrieved, the appellant has filed this appeal.

The appellant's version:

6. The appellant consulted respondent on 9.5.1995. Respondent wanted an ultrasound test to be done on the same day. In the evening, after seeing the ultrasound report, the respondent informed her that she was suffering from fibroids and that to make a firm diagnosis, she had to undergo a laparoscopic test the next day. The respondent informed her that the test was a minor procedure involving a small puncture for examination under general anesthesia. The respondent informed her that the costs of laparoscopic test, hospitalization, and anesthetists charges would be around Rs.8000 to 9,000. Respondent spent hardly 4 to 5 minutes with her and there was no discussion about the nature of treatment. Respondent merely told her that she will discuss the line of treatment, after the laparoscopic test. On 10.5.1995, she went to the clinic only for a diagnostic laparoscopy. Her signature was taken on some blank printed forms without giving her an opportunity to read the contents. As only a diagnostic procedure by way of a laparoscopic test was to be conducted, there was no discussion, even on 10.5.1995, with regard to any proposed treatment. As she was intending to marry within a month and start a family, she would have refused consent for removal of her reproductive organs and would have opted for conservative treatment, had she been informed about any proposed surgery for removal of her reproductive organs.

7. When the appellant was under general anaesthesia, respondent rushed out of the operation theatre and told appellant's mother that she had started bleeding profusely and gave an impression that the only way to save her life was by performing an extensive surgery. Appellant's aged mother was made to believe that there was a life threatening situation, and her signature was taken to some paper. Respondent did not choose to wait till appellant regained consciousness, to discuss about the findings of the laparoscopic test and take her consent for treatment. The appellant was kept in the dark about the radical surgery performed on her. She came to know about it, only on 14.5.1995 when respondent's son casually informed her about the removal of her reproductive organs. When she asked the respondent as to why there should be profuse bleeding during a Laparoscopic test (as informed to appellant's mother) and why her reproductive organs were removed in such haste without informing her, without her consent, and without affording her an opportunity to consider other options or seek other opinion, the respondent answered rudely that due to her age, conception was not possible, and therefore, the removal of her reproductive organs did not make any difference.

8. As she was admitted only for a diagnostic procedure, namely a laparoscopy test, and as she had given consent only for a laparoscopy test and as her mother's consent for conducting hysterectomy had been obtained by misrepresentation, there was no valid consent for the radical surgery. The respondent also tried to cover up her unwarranted/negligent act by falsely alleging that the appellant was suffering from endometriosis. The respondent was guilty of two distinct acts of negligence: the first was the failure to take her consent, much less an informed consent, for the radical surgery involving removal of reproductive organs; and the second was the failure to exhaust conservative treatment before resorting to radical surgery, particularly when such drastic irreversible surgical procedure was not warranted in her case. The respondent did not inform the appellant, of the possible risks, side effects and complications associated with such surgery, before undertaking the surgical procedure. Such surgery without her consent was also in violation of medical Rules and ethics. Removal of her reproductive organs also resulted in a severe physical impairment, and necessitated prolonged further treatment. The respondent was also not qualified to claim to be a specialist in Obstetrics and Gynaecology and therefore could not have performed the surgery which only a qualified Gynaecologist could perform.

The respondent's version

9. The appellant had an emergency consultation with the respondent on 9.5.1995, complaining that she had heavy vaginal bleeding from 30.4.1995, that her periods were irregular, and that she was suffering from excessive, irregular and painful menstruation (menorrhagia and dysmenorrhea) for a few months. On a clinical examination, the respondent found a huge mass in the pelvic region and tenderness in the whole area. In view of the severe condition, Respondent advised an ultrasound examination on the same evening. Such examination showed fibroids in the uterus, a large chocolate cyst (also known as endometrial cyst) on the right side and small cysts on the left side. On the basis of clinical and ultra sound examination, she made a provisional diagnosis of endometriosis and informed the appellant about the nature of the ailment, the anticipated extent of severity, and the modality of treatment. She further informed the appellant that a laparoscopic examination was needed to confirm the diagnosis; that if on such examination, she found that the condition was manageable with conservative surgery, she would only remove the chocolate cyst and fulgurate the endometric areas and follow it by medical therapy; and that if the lesion was extensive, then considering her age and likelihood of destruction of the function of the tubes, she will perform hysterectomy. She also explained the surgical procedure involved, and answered appellant's queries. The appellant stated that she was in acute discomfort and wanted a permanent cure and, Page 0438 therefore whatever was considered necessary, including a hysterectomy may be performed. When appellant's mother called on her on the same evening, the respondent explained to her also about the nature of disease and the proposed treatment, and appellant's mother stated that she may do whatever was best for her daughter. According to the accepted medical practice, if endometriosis is widespread in the pelvis causing adhesions, and

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if the woman is over 40 years of age, the best and safest form of cure was to remove the uterus and the ovaries. As there is a decline in fecundity for most women in the fourth decade and a further decline in women in their forties, hysterectomy is always considered as a reasonable and favoured option. Further, endometriosis itself affected fertility adversely. All these were made known to the appellant before she authorised the removal of uterus and ovaries, if found necessary on laparoscopic examination.

10. On 10.5.1995, the appellant's consent was formally recorded in the consent form by Dr. Lata Rangan - respondent's assistant. Dr. Lata Rangan informed the appellant about the consequences of such consent and explained the procedure that was proposed. The appellant signed the consent forms only after she read the duly filled up forms and understood their contents. All the requisite tests to be conducted mandatorily before the surgery were performed including Blood Grouping, HIV, Hemoglobin, PCV, BT, CT and ECG. The laparoscopic examination of the uterus surface confirmed the provisional diagnosis of endometriosis. The right ovary was enlarged and showed a chocolate cyst stuck to the bowel. Right tube was also involved in the lesion. The left ovary and tube were also stuck to the bowel near the cervix. A few small cysts were seen on the left ovary. The pelvic organs were thick and difficult to mobilize. Having regard to the extent of the lesion and the condition of appellant's uterus and ovaries, she decided that conservative surgery would not be sufficient and the appellant's problem required removal of uterus and ovaries. The respondent sent her assistant, Dr. Lata Rangan to explain to appellant's mother that the lesion would not respond to conservative surgery and a hysterectomy had to be performed and took her consent. The surgery was extremely difficult due to adhesions and vascularity of surface. A 'sub-total hysterectomy' was done followed by the removal of 'rest of the stump of cervix'. As the right ovary was completely stuck down to bowel, pouch of douglas, post surface and tube, it had to be removed piecemeal. When appellant regained consciousness, she was informed about the surgery. The appellant felt assured that heavy bleeding and pain would not recur. There was no protest either from the appellant or her mother, in regard to the removal of the ovaries and uterus.

11. However, on 15.5.1995, Commander Zutshi to whom appellant was said to have been engaged, created a scene and got her discharged. At the time of discharge, the summary of procedure and prescription of medicines were given to her. As the bill was not paid, the respondent filed Suit No. 469/1995 for recovery of the bill amount and the said suit was decreed in due course.

12. Respondent performed the proper surgical procedure in pursuance of the consent given by the appellant and there was no negligence, illegality, impropriety or professional misconduct. There was real and informed consent by the appellant for the removal of her reproductive organs. The surgery (removal of uterus and ovaries), not only cured the appellant of her disease but also saved her intestines, bladder and ureter from possible damage. But for the surgical removal, there was likelihood of the

intestines being damaged due to extension of lesion thereby causing bleeding, fibrosis and narrowing of the gut; there was also likelihood of the lesion going to the surface of the bladder penetrating the wall and causing haematuria and the ureter being damaged due to fibrosis and leading to damage of the kidney, with a reasonable real chance of developing cancer. As the complainant was already on the wrong side of 40 years which is a peri-menopausal age and as the appellant had menorrhagia which prevented her from ovulating regularly and giving her regular cycle necessary for pregnancy and as endometriosis prevented fertilization and also produced reaction in the pelvis which increased the lymphocytes and macrophages which destroyed the ova and sperm, there was no chance of appellant conceiving, even if the surgery had not been performed. The removal of her uterus and ovaries was proper and necessary and there was no negligence on the part of the respondent in performing the surgery. A Doctor who has acted in accordance with a practice accepted as proper by medical fraternity cannot be said to have acted negligently. In the realm of diagnosis and treatment there is ample scope for genuine differences of opinion and no Doctor can be said to have acted negligently merely because his or her opinion differs from that of other Doctors or because he or she has displayed lesser skill or knowledge when compared to others. There was thus no negligence on her part.

Questions for consideration:

13. On the contentions raised, the following questions arise for our consideration:

(i) Whether informed consent of a patient is necessary for surgical procedure involving removal of reproductive organs? If so what is the nature of such consent?

(ii) When a patient consults a medical practitioner, whether consent given for diagnostic surgery, can be construed as consent for performing additional or further surgical procedure — either as conservative treatment or as radical treatment — without the specific consent for such additional or further surgery.

(iii) Whether there was consent by the appellant, for the abdominal hysterectomy and Bilateral Salpingo-oophorectomy (for short AH- BSO) performed by the respondent?

(iv) Whether the respondent had falsely invented a case that appellant was suffering from endometriosis to explain the unauthorized and unwarranted removal of uterus and ovaries, and whether such radical surgery was either to cover-up negligence in conducting diagnostic laparoscopy or to claim a higher fee ?

(v) Even if appellant was suffering from endometriosis, the respondent ought to

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have resorted to conservative treatment/surgery instead of performing radical surgery?

(vi) Whether the Respondent is guilty of the tortious act of negligence/battery amounting to deficiency in service, and consequently liable to pay damages to the appellant.

Re : Question No. (i) and (ii)

14. Consent in the context of a doctor-patient relationship, means the grant of permission by the patient for an act to be carried out by the doctor, such as a diagnostic, surgical or therapeutic procedure. Consent can be implied in some circumstances from the action of the patient. For example, when a patient enters a Dentist's clinic and sits in the Dental chair, his consent is implied for examination, diagnosis and consultation. Except where consent can be clearly and obviously implied, there should be express consent. There is, however, a significant difference in the nature of express consent of the patient, known as 'real consent' in UK and as 'informed consent' in America. In UK, the elements of consent are defined with reference to the patient and a consent is considered to be valid and 'real' when (i) the patient gives it voluntarily without any coercion; (ii) the patient has the capacity and competence to give consent; and (iii) the patient has the minimum of adequate level of information about the nature of the procedure to which he is consenting to. On the other hand, the concept of 'informed consent' developed by American courts, while retaining the basic requirements consent, shifts the emphasis to the doctor's duty to disclose the necessary information to the patient to secure his consent. 'Informed consent' is defined in Taber's Cyclopedic Medical Dictionary thus:

Consent that is given by a person after receipt of the following information : the nature and purpose of the proposed procedure or treatment; the expected outcome and the likelihood of success; the risks; the alternatives to the procedure and supporting information regarding those alternatives; and the effect of no treatment or procedure, including the effect on the prognosis and the material risks associated with no treatment. Also included are instructions concerning what should be done if the procedure turns out to be harmful or unsuccessful.

.....

17. It is quite possible that if the patient been conscious, and informed about the need for the additional procedure, the patient might have agreed to it. It may be that the additional procedure is beneficial and in the interests of the patient. It may be that postponement of the additional procedure (say removal of an organ) may require another surgery, whereas removal of the affected organ during the initial diagnostic or exploratory surgery, would save the patient from the pain and cost of a second

operation. Howsoever practical or convenient the reasons may be, they are not relevant. What is relevant and of importance is the inviolable nature of the patient's right in regard to his body and his right to decide whether he should undergo the particular treatment or surgery or not. Therefore at the risk of repetition, we may add that unless the unauthorized additional or further procedure is necessary in order to save the life or preserve the health of the patient and it would be unreasonable (as contrasted from being merely inconvenient) to delay the further procedure until the patient regains consciousness and takes a decision, a doctor cannot perform such procedure without the consent of the patient.

18. We may also refer to the code of medical ethics laid down by the Medical Council of India (approved by the Central Government under Section 33 of Indian Medical Council Act, 1956). It contains a chapter relating to disciplinary action which enumerates a list of responsibilities, violation of which will be professional misconduct. Clause 13 of the said chapter places the following responsibility on a doctor:

13. Before performing an operation the physician should obtain in writing the consent from the husband or wife, parent or guardian in the case of a minor, or the patient himself as the case may be. In an operation which may result in sterility the consent of both husband and wife is needed.

We may also refer to the following guidelines to doctors, issued by the General Medical Council of U.K. in seeking consent of the patient for investigation and treatment:

Patients have a right to information about their condition and the treatment options available to them. The amount of information you give each patient will vary, according to factors such as the nature of the condition, the complexity of the treatment, the risks associated with the treatment or procedure, and the patient's own wishes. For example, patients may need more information to make an informed decision about the procedure which carries a high risk of failure or adverse side effects; or about an investigation for a condition which, if present, could have serious implications for the patient's employment, social or personal life.

xxx

You should raise with patients the possibility of additional problems coming to light during a procedure when the patient is unconscious or otherwise unable to make a decision. You should seek consent to treat any problems which you think may arise and ascertain whether there are any procedures to which the patient would object, or prefer to give further thought before you proceed.

The Consent form for Hospital admission and medical treatment, to which appellant's

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signature was obtained by the respondent on 10.5.1995, which can safely be presumed to constitute the contract between the parties, specifically states:

(A) It is customary, except in emergency or extraordinary circumstances, that no substantial procedures are performed upon a patient unless and until he or she has had an opportunity to discuss them with the physician or other health professional to the patient's satisfaction.

(B) Each patient has right to consent, or to refuse consent, to any proposed procedure of therapeutic course.

19. We therefore hold that in Medical Law, where a surgeon is consulted by a patient, and consent of the patient is taken for diagnostic procedure/surgery, such consent cannot be considered as authorisation or permission to perform therapeutic surgery either conservative or radical (except in life threatening or emergent situations). Similarly where the consent by the patient is for a particular operative surgery, it cannot be treated as consent for an unauthorized additional procedure involving removal of an organ, only on the ground that such removal is beneficial to the patient or is likely to prevent some danger developing in future, where there is no imminent danger to the life or health of the patient.

20. We may next consider the nature of information that is required to be furnished by a Doctor to secure a valid or real consent. In *Bowater v. Rowley Regis Corporation* [1944] 1 KB 476, Scott L.J. observed:

A man cannot be said to be truly 'willing' unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will.

.....

It was further held that a risk is material 'when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy'. The doctor, therefore, is required to communicate all inherent and potential hazards of the proposed treatment, the alternatives to that treatment, if any, and the likely effect if the patient remained untreated. This stringent standard of disclosure was subjected to only two exceptions : (i) where there was a genuine emergency, e.g. the patient was unconscious; and (ii) where the information would be harmful to the patient, e.g. where it might cause psychological damage, or where the patient would become so emotionally distraught as to prevent a rational decision. It,

however, appears that several States in USA have chosen to avoid the decision in Canterbury by enacting legislation which severely curtails operation of the doctrine of informed consent.

.....

25. In India, Bolam test has broadly been accepted as the general rule. We may refer three cases of this Court. In *Achutrao Haribhau Khodwa v. State of Maharashtra*, this Court held:

The skill of medical practitioners differs from doctor to doctor. The nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the Court finds that he has attended on the patient with due care skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence.... In cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in torts would be maintainable.

In *Vinitha Ashok v. Lakshmi Hospital*, this Court after referring to Bolam, Sidaway and Achutrao, clarified:

A doctor will be liable for negligence in respect of diagnosis and treatment in spite of a body of professional opinion approving his conduct where it has not been established to the court's satisfaction that such opinion relied on is reasonable or responsible. If it can be demonstrated that the professional opinion is not capable of withstanding the logical analysis, the court would be entitled to hold that the body of opinion is not reasonable or responsible.

In *Indian Medical Association v. V.P. Shantha*, this Court held:

The approach of the courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services.

Neither *Achutrao* nor *Vinitha Ashok* referred to the American view expressed in Canterbury.

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26. In India, majority of citizens requiring medical care and treatment fall below the poverty line. Most of them are illiterate or semi-literate. They cannot comprehend medical terms, concepts, and treatment procedures. They cannot understand the functions of various organs or the effect of removal of such organs. They do not have access to effective but costly diagnostic procedures. Poor patients lying in the corridors of hospitals after admission for want of beds or patients waiting for days on the roadside for an admission or a mere examination, is a common sight. For them, any treatment with reference to rough and ready diagnosis based on their outward symptoms and doctor's experience or intuition is acceptable and welcome so long as it is free or cheap; and whatever the doctor decides as being in their interest, is usually unquestioningly accepted. They are a passive, ignorant and uninvolved in treatment procedures. The poor and needy face a hostile medical environment - inadequacy in the number of hospitals and beds, non-availability of adequate treatment facilities, utter lack of qualitative treatment, corruption, callousness and apathy. Many poor patients with serious ailments (eg. heart patients and cancer patients) have to wait for months for their turn even for diagnosis, and due to limited treatment facilities, many die even before their turn comes for treatment. What choice do these poor patients have? Any treatment of whatever degree, is a boon or a favour, for them. The stark reality is that for a vast majority in the country, the concepts of informed consent or any form of consent, and choice in treatment, have no meaning or relevance.

The position of doctors in Government and charitable hospitals, who treat them, is also unenviable. They are overworked, understaffed, with little or no diagnostic or surgical facilities and limited choice of medicines and treatment procedures. They have to improvise with virtual non-existent facilities and limited dubious medicines. They are required to be committed, service oriented and non-commercial in outlook. What choice of treatment can these doctors give to the poor patients? What informed consent they can take from them?

27. On the other hand, we have the Doctors, hospitals, nursing homes and clinics in the private commercial sector. There is a general perception among the middle class public that these private hospitals and doctors prescribe avoidable costly diagnostic procedures and medicines, and subject them to unwanted surgical procedures, for financial gain. The public feel that many doctors who have spent a crore or more for becoming a specialist, or nursing homes which have invested several crores on diagnostic and infrastructure facilities, would necessarily operate with a purely commercial and not service motive; that such doctors and hospitals would advise extensive costly treatment procedures and surgeries, where conservative or simple treatment may meet the need; and that what used to be a noble service oriented profession is slowly but steadily converting into a purely business.

28. But unfortunately not all doctors in government hospitals are paragons of service, nor fortunately, all private hospitals/doctors are commercial minded. There are many a doctor in government hospitals who do not care about patients and

unscrupulously insist upon 'unofficial' payment for free treatment or insist upon private consultations. On the other hand, many private hospitals and Doctors give the best of treatment without exploitation, at a reasonable cost, charging a fee, which is reasonable recompense for the service rendered. Of course, some doctors, both in private practice or in government service, look at patients not as persons who should be relieved from pain and suffering by prompt and proper treatment at an affordable cost, but as potential income-providers/ customers who can be exploited by prolonged or radical diagnostic and treatment procedures. It is this minority who bring a bad name to the entire profession.

29. Health care (like education) can thrive in the hands of charitable institutions. It also requires more serious attention from the State. In a developing country like ours where teeming millions of poor, downtrodden and illiterate cry out for health-care, there is a desperate need for making health-care easily accessible and affordable. Remarkable developments in the field of medicine might have revolutionized health care. But they cannot be afforded by the common man. The woes of non-affording patients have in no way decreased. Gone are the days when any patient could go to a neighbourhood general practitioner or a family doctor and get affordable treatment at a very reasonable cost, with affection, care and concern. Their noble tribe is dwindling. Every Doctor wants to be a specialist. The proliferation of specialists and super specialists, have exhausted many a patient both financially and physically, by having to move from doctor to doctor, in search of the appropriate specialist who can identify the problem and provide treatment. What used to be competent treatment by one General Practitioner has now become multi-pronged treatment by several specialists. Law stepping in to provide remedy for negligence or deficiency in service by medical practitioners, has its own twin adverse effects. More and more private doctors and hospitals have, of necessity, started playing it safe, by subjecting or requiring the patients to undergo various costly diagnostic procedures and tests to avoid any allegations of negligence, even though they might have already identified the ailment with reference to the symptoms and medical history with 90% certainly, by their knowledge and experience. Secondly more and more doctors particularly surgeons in private practice are forced to cover themselves by taking out insurance, the cost of which is also ultimately passed on to the patient, by way of a higher fee. As a consequence, it is now common that a comparatively simple ailment, which earlier used to be treated at the cost of a few rupees by consulting a single doctor, requires an expense of several hundred or thousands on account of four factors : (i) commercialization of medical treatment; (ii) increase in specialists as contrasted from general practitioners and the need for consulting more than one doctor; (iii) varied diagnostic and treatment procedures at high cost; and (iv) need for doctors to have insurance cover. The obvious, may be naive, answer to unwarranted diagnostic procedures and treatment and prohibitive cost of treatment, is an increase in the participation of health care by the state and charitable institutions. An enlightened and committed medical profession can also provide a better alternative. Be that as it may. We are not trying to intrude on matters of policy, nor are we against proper diagnosis or specialisation. We are only wor-

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ried about the enormous hardship and expense to which the common man is subjected, and are merely voicing the concern of those who are not able to fend for themselves. We will be too happy if what we have observed is an overstatement, but our intuition tells us that it is an understatement.

30. What we are considering in this case, is not the duties or obligations of doctors in government charitable hospitals where treatment is free or on actual cost basis. We are concerned with doctors in private practice and hospitals and nursing homes run commercially, where the relationship of doctors and patients are contractual in origin, the service is in consideration of a fee paid by the patient, where the contract implies that the professional men possessing a minimum degree of competence would exercise reasonable care in the discharge of their duties while giving advice or treatment.

31. There is a need to keep the cost of treatment within affordable limits. Bringing in the American concepts and standards of treatment procedures and disclosure of risks, consequences and choices will inevitably bring in higher cost-structure of American medical care. Patients in India cannot afford them. People in India still have great regard and respect for Doctors. The Members of medical profession have also, by and large, shown care and concern for the patients. There is an atmosphere of trust and implicit faith in the advice given by the Doctor. The India psyche rarely questions or challenges the medical advice. Having regard to the conditions obtaining in India, as also the settled and recognized practices of medical fraternity in India, we are of the view that to nurture the doctor-patient relationship on the basis of trust, the extent and nature of information required to be given by doctors should continue to be governed by the Bolam test rather than the 'reasonably prudent patient' test evolved in Canterbury. It is for the doctor to decide, with reference to the condition of the patient, nature of illness, and the prevailing established practices, how much information regarding risks and consequences should be given to the patients, and how they should be couched, having the best interests of the patient. A doctor cannot be held negligent either in regard to diagnosis or treatment or in disclosing the risks involved in a particular surgical procedure or treatment, if the doctor has acted with normal care, in accordance with a recognised practices accepted as proper by a responsible body of medical men skilled in that particular field, even though there may be a body of opinion that takes a contrary view. Where there are more than one recognized school of established medical practice, it is not negligence for a doctor to follow any one of those practices, in preference to the others.

32. We may now summarize principles relating to consent as follows:

- (i) A doctor has to seek and secure the consent of the patient before commencing a 'treatment' (the term 'treatment' includes surgery also). The consent so obtained should be real and valid, which means that : the patient should have the capacity and competence to consent; his consent should be voluntary; and

his consent should be on the basis of adequate information concerning the nature of the treatment procedure, so that he knows what is consenting to.

(ii) The 'adequate information' to be furnished by the doctor (or a member of his team) who treats the patient, should enable the patient to make a balanced judgment as to whether he should submit himself to the particular treatment as to whether he should submit himself to the particular treatment or not. This means that the Doctor should disclose (a) nature and procedure of the treatment and its purpose, benefits and effect; (b) alternatives if any available; (c) an outline of the substantial risks; and (d) adverse consequences of refusing treatment. But there is no need to explain remote or theoretical risks involved, which may frighten or confuse a patient and result in refusal of consent for the necessary treatment. Similarly, there is no need to explain the remote or theoretical risks of refusal to take treatment which may persuade a patient to undergo a fanciful or unnecessary treatment. A balance should be achieved between the need for disclosing necessary and adequate information and at the same time avoid the possibility of the patient being deterred from agreeing to a necessary treatment or offering to undergo an unnecessary treatment.

(iii) Consent given only for a diagnostic procedure, cannot be considered as consent for therapeutic treatment. Consent given for a specific treatment procedure will not be valid for conducting some other treatment procedure. The fact that the unauthorized additional surgery is beneficial to the patient, or that it would save considerable time and expense to the patient, or would relieve the patient from pain and suffering in future, are not grounds of defence in an action in tort for negligence or assault and battery. The only exception to this rule is where the additional procedure though unauthorized, is necessary in order to save the life or preserve the health of the patient and it would be unreasonable to delay such unauthorized procedure until patient regains consciousness and takes a decision.

(iv) There can be a common consent for diagnostic and operative procedures where they are contemplated. There can also be a common consent for a particular surgical procedure and an additional or further procedure that may become necessary during the course of surgery.

(v) The nature and extent of information to be furnished by the doctor to the patient to secure the consent need not be of the stringent and high degree mentioned in Canterbury but should be of the extent which is accepted as normal and proper by a body of medical men skilled and experienced in the particular field. It will depend upon the physical and mental condition of the patient, the nature of treatment, and the risk and consequences attached to the treatment.

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Re : Question No. (iii)

34. 'Gynaecology' (second edition) edited by Robert W. Shah, describes 'real consent' with reference to Gynaecologists (page 867 et seq) as follows:

An increasingly important risk area for all doctors is the question of consent. No-one may lay hands on another against their will without running the risk of criminal prosecution for assault and, if injury results, a civil action for damages for trespass or negligence. In the case of a doctor, consent to any physical interference will readily be implied; a woman must be assumed to consent to a normal physical examination if she consults a gynaecologist, in the absence of clear evidence of her refusal or restriction of such examination. The problems arise when the gynaecologist's intervention results in unfortunate side effects or permanent interference with a function, whether or not any part of the body is removed. For example, if the gynaecologist agrees with the patient to perform a hysterectomy and removes the ovaries without her specific consent, that will be a trespass and an act of negligence. The only available defence will be that it was necessary for the life of the patient to proceed at once to remove the ovaries because of some perceived pathology in them.

What is meant by consent? The term 'informed consent' is often used, but there is no such concept in English law. The consent must be real: that is to say, the patient must have been given sufficient information for her to understand the nature of the operation, its likely effects, and any complications which may arise and which the surgeon in the exercise of his duty to the patient considers she should be made aware of; only then can she reach a proper decision. But the surgeon need not warn the patient of remote risks, any more than an anaesthetist need warn the patient that a certain small number of those anaesthetized will suffer cardiac arrest or never recover consciousness. Only where there is a recognized risk, rather than a rare complication, is the surgeon under an obligation to warn the patient of that risk. He is not under a duty to warn the patient of the possible results of hypothetical negligent surgery....

In advising an operation, therefore, the doctor must do so in the way in which a competent gynaecologist exercising reasonable skill and care in similar circumstances would have done. In doing this he will take into account the personality of the patient and the importance of the operation to her future well being. It may be good practice not to warn a very nervous patient of any possible complications if she requires immediate surgery for, say, a malignant condition. The doctor must decide how much to say to her taking into account his assessment of her personality, the questions she asks and his view of how much she understands. If the patient asks a direct question, she must be given a truthful answer.... To take the example of hysterectomy : although the surgeon will tell the patient that it is proposed to remove her uterus and

haps her ovaries, and describe what that will mean for her future well being (sterility, premature menopause), she will not be warned of the possibility of damage to the ureter, vesicovaginal fistula, fatal haemorrhage or anaesthetic death.

35. The specific case of the appellant was that she got herself admitted on 10.5.1995 only for a diagnostic laparoscopy; that she was not informed either on 9th or 10th that she was suffering from endometriosis or that her reproductive organs had to be removed to cure her from the said disease; that her consent was not obtained for the removal of her reproductive organs; and that when she was under general anaesthesia for diagnostic laparoscopy, respondent came out of the operation theatre and informed her aged mother that the patient was bleeding profusely which might endanger her life and hysterectomy was the only option to save her life, and took her consent.

36. The respondent on the other hand contends that on the basis of clinical and ultra sound examination on 9.5.1995, she had made a provisional diagnosis of endometriosis; that on same day, she informed the complainant and her mother separately, that she would do a diagnostic laparoscopy on the next day and if the endometric lesion was found to be mild or moderate, she will adopt a conservative treatment by operative laparoscopy, but if the lesion was extensive then considering her age and extent of lesion and likelihood of destruction of the functions of the tube, a laparotomy would be done; that the appellant was admitted to the hospital for diagnostic and operative laparoscopy and laparotomy and appellant's consent was obtained for such procedures; that the decision to operate and remove the uterus and ovaries was not sudden, nor on account of any emergent situation developing during laparoscopy; and that the radical surgery was authorized, as it was preceded by a valid consent. She also contends that as the appellant wanted a permanent cure, the decision to conduct a hysterectomy was medically correct and the surgical procedure in fact cured the appellant and saved her intestines, bladder and ureter being damaged due to extension of the lesion. She had also tried to justify the surgical removal of the uterus and ovaries, with reference to the age and medical condition of the complainant.

37. The summary of the surgical procedure (dictated by respondent and handwritten by her assistant Dr. Lata Rangan) furnished to the appellant also confirms that no emergency or life threatening situation developed during laparoscopy. This is reiterated in the evidence of respondent and Dr. Lata Rangan. In her affidavit dated 16.2.2002 filed by way of examination-in-chief, the respondent stated:

15. The laproscopic examination revealed a frozen pelvis and considering the extent of the lesion it was decided that conservative surgery was not advisable and the nature of the problem required for its cure hysterectomy.

16. When the Deponent decided to perform hysterectomy she told Dr. Lata to

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intimate the mother of Ms. Samira Kohli of the fact that hysterectomy was going to be performed on her. No complications had arisen in the operation theatre and the procedure being performed was in terms of the consent given by Ms. Samira Kohli herself.

.....

Thus, the respondent's definite case is that on 9.5.1995, the respondent had provisionally diagnosed endometriosis and informed the appellant; that appellant had agreed that hysterectomy may be performed if the lesion was extensive; and that in pursuance of such consent, reiterated in writing by the appellant in the consent form on 10.5.1995, she performed the AH-BSO removing the uterus and ovaries on finding extensive endometriosis. In other words, according to respondent, the abdominal hysterectomy and bilateral salpingo-oophorectomy (AH-BSO) was not necessitated on account of any emergency or life threatening situation developing or being discovered when laparoscopic test was conducted, but according to an agreed plan, consented by the appellant and her mother on 9.5.1995 itself, reiterated in writing on 10.5.1995. Therefore the defence of respondent is one based on specific consent. Let us therefore examine whether there was consent.

38. The Admission and Discharge card maintained and produced by the respondent showed that the appellant was admitted "for diagnostic and operative laparoscopy on 10.5.1995". The OPD card dated 9.5.1995 does not refer to endometriosis, which is also admitted by the respondent in her cross-examination. If fact, the respondent also admitted that the confirmation of diagnosis is possible only after laparoscopy test:

On clinical and ultrasound examination a diagnosis can be made to some extent. But precise diagnosis will have to be on laparoscopy.

The consent form dated 10.5.1995 signed by the appellant states that appellant has been informed that the treatment to be undertaken is "diagnostic and operative laparoscopy. Laparotomy may be needed." The case summary dictated by respondent and written by Dr. Lata Rangan also clearly says "admitted for Hysteroscopy, diagnostic laparoscopy and operative laparoscopy on 10.5.1995." (Note : Hysteroscopy is inspection of uterus by special endoscope and laparoscopy is abdominal exploration by special endoscope.)

39. In this context, we may also refer to a notice dated 5.6.1995 issued by respondent to the appellant through counsel, demanding payment of Rs.39,325/- towards the bill amount. Paras 1, 3, and 4 are relevant which are extracted below:

1. You were admitted to our clinic Dr. Manchanda, No. 7, Ring Road, Lajpat Nagar, New Delhi for diagnostic and operative laparoscopy and Endometrial biopsy on 10.5.1995....

3. The findings of laparoscopy were: a very extensive lesion of the endometriosis with pools of blood, extensive adherence involving the tubes of the uterus and ovaries, a chocolate cyst in the right ovary and areas of endometriosis on the surface of the left ovary but no cyst.

4. The findings were duly conveyed to Ms. Somi Kohli who was also shown a video recording of the lesion. You and Mrs. Somi Kohli were informed that conservative surgery would be futile and removal of the uterus and more extensive surgery, considering your age and extensive lesion and destruction of the functions of the tubes, was preferable.

This also makes it clear that the appellant was not admitted for conducting hysterectomy or bilateral salpingo-oophorectomy, but only for diagnostic purposes. We may, however, refer to a wrong statement of fact made in the said notice. It states that on 10.5.1995 after conducting a laparoscopic examination, the video-recording of the lesion was shown to appellant's mother, and the respondent informed the appellant and her mother that conservative surgery would be futile and removal of uterus and more extensive surgery was preferable having regard to the more extensive lesion and destruction of the function of the tubes. But this statement cannot be true. The extensive nature of lesion and destruction of the functions obviously became evident only after diagnostic laparoscopy. But after diagnostic laparoscopy and the video recording of the Lesion, there was no occasion for respondent to inform anything to appellant. When the laparoscopy and video recording was made, the appellant was already unconscious. Before she regained consciousness, AH-BSO was performed removing her uterus and ovaries. Therefore, the appellant could not have been informed on 10.5.1995 that conservative surgery would be futile and removal of uterus and extensive surgery was preferable in view of the extensive lesion and destruction of the function of the tubes did not arise.

40. The admission card makes it clear that the appellant was admitted only for diagnostic and operative laparoscopy. It does not refer to laparotomy. The consent form shows that the appellant gave consent only for diagnostic operative laparoscopy, and laparotomy if needed. Laparotomy is a surgical procedure to open up the abdomen or an abdominal operation. It refers to the operation performed to examine the abdominal organs and aid diagnosis. Many a time, after the diagnosis is made and the problem is identified it may be fixed during the laparotomy itself. In other cases, a subsequent surgery may be required. Laparotomy can no doubt be either a diagnostic or therapeutic. In the former, more often referred to as the exploratory laparotomy, an exercise is undertaken to identify the nature of the disease. In the latter, a therapeutic laparotomy is conducted after the cause has been identified. When a specific operation say hysterectomy or salpingo-oophorectomy is planned, laparotomy is merely the first step of the procedure, followed by the actual specific operation, namely hysterectomy or salpingo- oophorectomy. Depending upon the incision placement, laparotomy gives access to any abdominal organ or space and is Page 0457 the first

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step in any major diagnostic or therapeutic surgical procedure involving a) the lower part of the digestive tract, b) liver, pancreas and spine, c) bladder, d) female reproductive organs and e) retroperitoneum. On the other hand, hysterectomy and salpingo-oophorectomy follow laparotomy and are not themselves referred to as laparotomy. Therefore, when the consent form refers to diagnostic and operative laparoscopy and “laparotomy if needed”, it refers to a consent for a definite laparoscopy with a contingent laparotomy if needed. It does not amount to consent for OH-BSO surgery removing the uterus and ovaries/fallopian tubes. If the appellant had consented for a OH-BSO then the consent form would have given consent for “diagnostic and operative laparoscopy. Laparotomy, hysterectomy and bilateral salpingo-oophorectomy, if needed.”

41. On the documentary evidence and the histopathology report the appellant also raised an issue as to whether appellant was suffering from endometriosis at all. She points out that ultra-sound did not disclose endometriosis and the histopathology report does not confirm endometriosis. The respective experts examined on either side have expressed divergent views as to whether appellant was suffering from endometriosis. It may not be necessary to give a definite finding on this aspect, as the real question for consideration is whether appellant gave consent for hysterectomy and bilateral salpingo-oophorectomy and not whether appellant was suffering from endometriosis. Similarly there is divergence of expert opinion as to whether removal of uterus and ovaries was the standard or recognized remedy even if there was endometriosis and whether conservative treatment was an alternative. Here again it is not necessary to record any finding as to which is the proper remedy. It is sufficient to note that there are different modes of treatment favoured by different schools of thought among Gynaecologists.

42. Respondent contended that the term ‘laparotomy’ is used in the consent form (by her assistant Dr. Lata Rangan) is equal to or same as hysterectomy. The respondent’s contention that ‘Laparotomy’ refers to and includes hysterectomy and bilateral salpingo-oophorectomy cannot be accepted. The following clear evidence of appellant’s expert witness — Dr. Puneet Bedi (CW 1) is not challenged in cross examination :

Laparotomy is opening up of the abdomen which is quite different from hysterectomy. Hysterectomy is a procedure which involves surgical removal of uterus. The two procedures are totally different and consent for each procedure has to be obtained separately.

On the other hand, the evidence of respondent’s expert witness (Dr. Sudha Salhan) on this question is evasive and clearly implies laparotomy is not the same as hysterectomy. The relevant portion of her evidence is extracted below:

Q. As per which medical authority, laparotomy is equal to hysterectomy?

Ans. Consent for laparotomy permits undertaking for such surgical procedure

necessary to treat medical conditions including hysterectomy.

Q. I put it to you that the medical practice is to take specific consent for hysterectomy.

Ans. Whenever we do hysterectomy only, specific consent is obtained.

43. Medical texts and authorities clearly spell out that Laparotomy is at best the initial step that is necessary for performing hysterectomy or salpingo-oophorectomy. Laparotomy by itself is not hysterectomy or salpingo-oophorectomy. Nor does 'hysterectomy' include salpingo-oophorectomy, in the case of woman who has not attained menopause. Laparotomy does not refer to surgical removal of any vital or reproductive organs. Laparotomy is usually exploratory and once the internal organs are exposed and examined and the disease or ailment is diagnosed, the problem may be addressed and fixed during the course of such laparotomy (as for example, removal of cysts and fulguration of endometric area as stated by respondent herself as a conservative form of treatment). But Laparotomy is never understood as referring to removal of any organ. In medical circles, it is well recognized that a catch all clause giving the surgeon permission to do anything necessary does not give roving authority to remove whatever he fancies may be for the good of the patient. For example, a surgeon cannot construe a consent to termination of pregnancy as a consent to sterilize the patient.

When the oral and documentary evidence is considered in the light of the legal position discussed above while answering questions (i) and (ii), it is clear that there was no consent by the appellant for conducting hysterectomy and bilateral salpingo-oophorectomy.

44. The Respondent next contended that the consent given by the appellant's mother for performing hysterectomy should be considered as valid consent for performing hysterectomy and salpingo-oophorectomy. The appellant was neither a minor, nor mentally challenged, nor incapacitated. When a patient is a competent adult, there is no question of someone else giving consent on her behalf. There was no medical emergency during surgery. The appellant was only temporarily unconscious, undergoing only a diagnostic procedure by way of laparoscopy. The respondent ought to have waited till the appellant regained consciousness, discussed the result of the laparoscopic examination and then taken her consent for the removal of her uterus and ovaries. In the absence of an emergency and as the matter was still at the stage of diagnosis, the question of taking her mother's consent for radical surgery did not arise. Therefore, such consent by mother cannot be treated as valid or real consent. Further a consent for hysterectomy, is not a consent for bilateral salpingo - ooperectomy.

45. There is another facet of the consent given by the appellant's mother which requires to be noticed. The respondent's specific case is that the appellant had agreed

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for the surgical removal of uterus and ovaries depending upon the extent of the lesion. It is also her specific case that the consent by signing the consent form on 10.5.1995 wherein the treatment is mentioned as “diagnostic and operative laparoscopy. Laparotomy may be needed.” includes the AH-BSO surgery for removal of uterus and ovaries. If the term ‘laparotomy’ is to include hysterectomy and salpingo-oophorectomy as contended by the respondent and there was a specific consent by the appellant in the consent form signed by her on 10.5.1995, there was absolutely no need for the respondent to send word through her assistant Dr. Lata Rangan to get the consent of appellant’s mother for performing hysterectomy under general anesthesia. The very fact that such consent Page 0459 was sought from appellant’s mother for conducting hysterectomy is a clear indication that there was no prior consent for hysterectomy by the appellant.

46. We may, therefore, summarize the factual position thus:

(i) On 9.5.1995 there was no confirmed diagnosis of endometriosis. The OPD slip does not refer to a provisional diagnosis of endometriosis on the basis of personal examination. Though there is a detailed reference to the findings of ultrasound in the entry relating to 9.5.1995 in the OPD slip, there is no reference to endometriosis which shows that ultrasound report did not show endometriosis. In fact, ultra-sound may disclose fibroids, chocolate cyst or other abnormality which may indicate endometriosis, but cannot by itself lead to a diagnosis of endometriosis. This is evident from the evidence of CW1, RW1 and RW2 and recognized text books. In fact respondent’s expert Dr. Sudha Salhan admits in her cross examination that endometriosis can only be suspected but not diagnosed by ultrasound and it can be confirmed only by laparoscopy. Even according to respondent, endometriosis was confirmed only by laparoscopy. [Books on “Gynaecology” clearly state : “The best means to diagnose endometriosis is by direct visualization at laparoscopy or laparotomy, with histological confirmation where uncertainty persists.”] Therefore the claim of respondent that she had discussed in detail about endometriosis and the treatment on 9.5.1995 on the basis of her personal examination and ultra-sound report appears to be doubtful.

(ii) The appellant was admitted only for diagnostic laparoscopy (and at best for limited surgical treatment that could be made by laparoscopy). She was not admitted for hysterectomy or bilateral salpingo-oophorectomy.

(iii) There was no consent by appellant for hysterectomy or bilateral salpingo-oophorectomy. The words “Laparotomy may be needed” in the consent form dated 10.5.1995 can only refer to therapeutic procedures which are conservative in nature (as for example removal of chocolate cyst and fulguration of endometriotic areas, as stated by respondent herself as a choice of treatment), and not radical surgery involving removal of important organs.

47. We find that the Commission has, without any legal basis, concluded that “the informed choice has to be left to the operating surgeon depending on his/her discretion, after assessing the damage to the internal organs, but subject to his/her exercising care and caution”. It also erred in construing the words “such medical treatment as is considered necessary for me for...” in the consent form as including surgical treatment by way of removal of uterus and ovaries. The Commission has also observed : “whether the uterus should have been removed or not or some other surgical procedure should have been followed are matters to be left to the discretion of the performing surgeon, as long as the surgeon does the work with adequate care and caution”. This proceeds on the erroneous assumption that where the surgeon has shown adequate care and caution in performing the surgery, the consent of the patient for removal of an organ is unnecessary. The Commission failed to notice that the question was not about the correctness of the decision to remove the uterus and ovaries, but the failure to obtain the consent for Page 0460 removal of those important organs. There was a also faint attempt on the part of the respondent’s counsel to contend that what were removed were not ‘vital’ organs and having regard to the advanced age of the appellant, as procreation was not possible, uterus and ovaries were virtually redundant organs. The appellant’s counsel seriously disputes the position and contends that procreation was possible even at the age of 44 years. Suffice it to say that for a woman who has not married and not yet reached menopause, the reproductive organs are certainly important organs. There is also no dispute that removal of ovaries leads to abrupt menopause causing hormonal imbalance and consequential adverse effects.

Re : Question Nos. (iv) and (v):

48. The case of the appellant is that she was not suffering from endometriosis and therefore, there was no need to remove the uterus and ovaries. In this behalf, she examined Dr. Puneet Bedi (Obstetrician and Gynaecologist) who gave hormone therapy to appellant for about two years prior to his examination in 2002. He stated that the best method to diagnose endometriosis is diagnostic laparoscopy; that the presence of endometrial tissue anywhere outside the uterus is called Endometriosis; that the Histopathology report did not confirm endometriosis in the case of appellant; and that the mode of treatment for endometriosis would depend on the existing extent of the disease. He also stated that removal of uterus results in abrupt menopause. In natural menopause, which is a slow process, the body gets time to acclimatize to the low level of hormones gradually. On the other hand when the ovaries are removed, there is an abrupt stoppage of natural hormones and therefore Hormone Replacement Therapy is necessary to make up the loss of natural hormones. Hormone Replacement Therapy is also given even when there is a natural menopause. But hormone replacement therapy has side effects and complications. He also stated that on the basis of materials available on the file, he was of the view that Hysterectomy was not called for immediately. But if endometriosis had been proven from history and following diag-

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nostic laparoscopy, hysterectomy could be considered as a last resort if all other medical methods failed. What is relevant from the evidence of Dr. Puneet Bedi, is that he does not say that hysterectomy is not the remedy for endometriosis, but only that it is a procedure that has to be considered as a last resort.

49. On the other hand, the respondent who is herself a experienced Obstetrician and Gynaecologist has given detailed evidence, giving the reasons for diagnosing the problem of appellant as endometriosis and has referred to in detail, the need for the surgery. She stated that having regard to the medical condition of complainant, her decision to perform hysterectomy was medically correct. The complainant wanted a cure for her problem and the AH-BSO surgery provided her such cure, apart from protecting her against any future damage to intestines, bladder and ureter. She explained that if the uterus and ovaries had not been removed there was a likelihood of lesion extending to the intestines causing bleedings, fibrosis and narrowing of the gut; the lesion could also go to the surface of the bladder penetrating the wall and causing haematuria and the ureter could be damaged due to fibrosis leading to damage of the kidney; there was also a chance of development of cancer also. She also pointed out that the complainant being 44 years of age, was in the pre-menopausal period and had menorrhagia which prevented regular ovulation which was necessary for pregnancy; that endometriosis also prevented fertilization and produced reaction in the pelvis which increased lymphocytes and macrophages which destroy the ova and sperm; and that the state of bodily health did not depend upon the existence of uterus and ovaries.

50. The respondent also examined Dr. Sudha Salhan, Professor and Head of Department (Obstetrics and Gynaecology) and President of the Association of Obstetricians and Gynaecologists of Delhi. Having seen the records relating to appellant including the record pertaining to clinical and ultra-sound examinations, she was of the view that the treatment given to appellant was correct and appropriate to appellant's medical condition. She stated that the treatment is determined by severity of the disease and hysterectomy was not an unreasonable option as there was no scope left for fecundability in a woman aged 44 years suffering from endometriosis. She also stated that the histopathology report dated 15.5.1995 confirmed the diagnosis of endometriosis made by respondent. She also stated that she saw video-tape of the laparoscopic examination and concurred that the opinion of respondent that the lesion being extensive conservation surgery was not possible and the problem could effectively be addressed only by more extensive surgery that is removal of the uterus and ovaries. She also stated that the presence of chocolate cyst was indicative of endometriosis. She also stated that medication merely suppresses endometriosis and the definitive treatment was surgical removal of the uterus and both the ovaries. She also stated that hysterectomy is done when uterus comes out from a prolapse and the woman is elderly, or when there is a cancer of the uterus, or when there are massive fibroids or when a severe grade of endometriosis along with ovaries or in cases of malignancy or the cancer of the ovaries.

51. The evidence therefore demonstrates that on laparoscopic examination, respondent was satisfied that appellant was suffering from endometriosis. The evidence also demonstrates that there is more than one way of treating endometriosis. While one view favours conservative treatment with hysterectomy as a last resort, the other favours hysterectomy as a complete and immediate cure. The age of the patient, the stage of endometriosis among others will be determining factors for choosing the method of treatment. The very suggestion made by appellant's counsel to the expert witness Dr. Sudha Salhan that worldwide studies show that most hysterectomies are conducted unnecessarily by Gynecologists demonstrates that it is considered as a favoured treatment procedure among medical fraternity, offering a permanent cure. Therefore respondent cannot be held to be negligent, merely because she chose to perform radical surgery in preference to conservative treatment. This finding however has no bearing on the issue of consent which has been held against the respondent. The correctness or appropriateness of the treatment procedure, does not make the treatment legal, in the absence of consent for the treatment.

52. It is true that the appellant has disputed the respondent's finding that she was suffering from endometriosis. The histopathology report also does not diagnose any endometriosis. The expert witness examined on behalf of the appellant has also stated that there was no evidence that the appellant was suffering from endometriosis. On the other hand the respondent has Page 0462 relied on some observations of the histopathology report and on her own observations which has been recorded in the case summary to conclude that the appellant was suffering from endometriosis. The evidence shows that the respondent having found evidence of endometriosis, proceeded on the basis that removal of uterus and ovaries was beneficial to the health of the appellant having regard to the age of the appellant and condition of the appellant to provide a permanent cure to her ailment, though not authorized to do so. On a overall consideration of the evidence, we are not prepared to accept the claim of appellant that the respondent falsely invented a case that the appellant was suffering from endometriosis to cover up some negligence on her part in conducting the diagnostic/operative laparoscopy or to explain the unauthorized and unwarranted removal of uterus and ovaries.

Re : Question No. (vi):

53. In view of our finding that there was no consent by the appellant for performing hysterectomy and salpingo-oophorectomy, performance of such surgery was an unauthorized invasion and interference with appellant's body which amounted to a tortious act of assault and battery and therefore a deficiency in service. But as noticed above, there are several mitigating circumstances. The respondent did it in the interest of the appellant. As the appellant was already 44 years old and was having serious menstrual problems, the respondent thought that by surgical removal of uterus and ovaries she was providing permanent relief. It is also possible that the respondent thought that the appellant may approve the additional surgical procedure when she regained

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consciousness and the consent by appellant's mother gave her authority. This is a case of respondent acting in excess of consent but in good faith and for the benefit of the appellant. Though the appellant has alleged that she had to undergo Hormone Therapy, no other serious repercussions is made out as a result of the removal. The appellant was already fast approaching the age of menopause and in all probability required such Hormone Therapy. Even assuming that AH-BSO surgery was not immediately required, there was a reasonable certainty that she would have ultimately required the said treatment for a complete cure. On the facts and circumstances, we consider that interests of justice would be served if the respondent is denied the entire fee charged for the surgery and in addition, directed to pay Rs.25,000 as compensation for the unauthorized AH-BSO surgery to the appellant.

54. We accordingly allow this appeal and set aside the order of the Commission and allow the appellant's claim in part. If the respondent has already received the bill amount or any part thereof from the appellant (either by executing the decree said to have been obtained by her or otherwise), the respondent shall refund the same to the appellant with interest at the rate of 10% per annum from the date of payment till the date of re-payment. The Respondent shall pay to the appellant a sum of Rs.25,000/- as compensation with interest thereon at the rate of 10% per annum from 19.11.2003 (the date of the order of Commission) till date of payment. The appellant will also be entitled to costs of Rs.5,000 from the respondent.

Smt. Jyoti Kewat³⁴
Vs
State of M.P. and Anr.

Hon'ble Judges:

Dipak Misra, J.

ORDER

Dipak Misra, J.

1. Gone are the days of yore when the mythical King Sagar was instrumental in procreation of 60,000 sons who were burnt to ashes by the wrath of Kapil Muni and the great devotee King Bhagirath, by his incomparable and inimitable penance, brought Goddess Ganges from the heaven for their salvation. The presentation may be a myth, a symbol or a metaphor or an image to convey an idea or it may be a portrayal of a larger than life situation to strike home a point. The phenomenon as has been depicted may be accepted in a symbolic manner but it cannot be literally construed either to give a denotative meaning or a connotative expanse for the simon pure reason that no one by whatever reason, at present, be permitted to get himself or herself engaged in procreation of this magnitude as that would lead to untold and unimaginable cat- aclysm and catastrophe.

2. At this juncture I may clarify at the cost of repetition that the purpose of putting forth the aforesaid myth is only to indicate that a distinct scene has emerged in the last few decades in "Bharat" where the primary duty of every citizen has been empha- sized to have limited number of children. The welfare state has taken number of measures to facilitate the said action so that the country is not overblown by the growth of population perpetuating maladies like non-availability of nutritious food, non-getting of proper hygienic living atmosphere, non-employment and violence to nature. The active and effective step taken by the State Government is Family Planning and in this planning numerous facets are highlighted to curtail the growth of population by lessening the procreation of the off-spring beyond a particular num-

34. Full text available on 2003(1)MPHT482

ber. One such measure is introduction of operation on the husband - the male sterilization. In medical terminology it is called Vasectomy. The centrum question that arises for adjudication in the present writ petition is if the operation results in failure whether the wife who has been compelled to bear a child despite of her desire, because of the trust reposed in the consequence of operation would be entitled to damages or compensation or should she suffer the ignominy and indignity by hearing unwarranted whispered comments from the collective? Should the State as well as the operating surgeon be allowed to get off scot-free?

3. Presently to the factual setting. The petitioner who had already given birth to two children, a son, named Amit and a daughter, named Neelu, amicably decided with the consent of her husband not to have any more children as they felt it was extremely difficult on their part to provide appropriate facilities to the already begotten children. To concretise the decision taken, as per the scheme floated by the State Government, the husband of the petitioner, Sharda Prasad, decided to undergo the Vasectomy operation. The operation took place on 14-11-1996 at the Medical College, Jabalpur and the same was carried out by the respondent No. 2. The certificate bearing registration No. 2266 indicating that the operation had taken place on 14-11-1996 has been brought on record as per Annexure P-1. After the operation the husband of the petitioner carefully and scrupulously followed the advice rendered by the doctor. Despite the care taken by the spouse of the petitioner the trouble cropped up and the petitioner got herself examined. It was perceived that she was pregnant and eventually a female child was born on 30-11-1998. The petitioner prayed to the authorities of the Medical College complaining that she was facing immense trouble in the society and had been mentally anguished and physically affected. The doctors gave a mechanical reply that due to the failure of the operation the child was born. They prescribed certain medicines and assured that she would not pave on the path of procreation in the future. The petitioner felt assured but the assurance given by the doctors died early and she again became pregnant and another child was born on 16-10-1999. The birth certificate issued by the Government Medical College Hospital, Jabalpur in the Department of Obstetrics and Gynaecology has been brought on record as Annexure P-3.

4. It is pleaded that at that juncture the petitioner got herself examined by the authorities of Netaji Subhash Chandra Bose Medical College, Jabalpur and in the examination it was mentioned that it was a case of V.T. failure. Thereafter she filed an application before the Dean, Medical College, Jabalpur, on 7-9-1999 indicating her plight. She sent a registered notice claiming compensation of Rs. 2.5 lacs. One lac each for maintenance of each child and Rs. 50,000/- for the physical suffering, social shame and mental agony faced by her. Though the notice was received by the respondents, a sphinx like silence was maintained. According to the writ petitioner she has suffered ignominy due to the negligence of the doctor who had carried out the operation and he being employed under the State she is entitled to be awarded compensation by the State. It is putforth in the petition that in spite of the operation of Vasectomy having

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already been carried out on the husband, she gave birth to two children. She has undergone unwarranted insult, uncalled for humiliation, unimaginable shame and incurable demoralisation and hence, it is the bounden obligation of the State to maintain the children. The dignity, as set forth by her, has been affected and a purposeful and meaningful life has been denied to her as she has been subjected to such indignity. It is urged in the petition that she is a poor lady living with her husband and they have no source for livelihood and it is extremely difficult to maintain the children by providing them adequate requisite facilities and, therefore, she should be granted compensation of Rs. 2.5 lacs. It is worth noting to mention here that a plea is advanced that people are raising eyebrows against her indicating that the children are not legitimate and she is leading an adulterous life as she has begotten children though her husband had undergone a sterilization operation.

5. A counter affidavit has been filed by the respondent No. 2, the doctor who had conducted the operation. It is put forth that the Vasectomy is performed on the male person and it is not the petitioner who had been operated. According to the said respondent he had conducted 102 Vasectomy operations between the year 1987 till 1992. The factum of operation of the petitioner has not been disputed. It is pointed out that any operation done by a Resident Surgical Officer is supervised by the consultant surgeon. In the present case the operation was done by him on the husband of the petitioner under the guidance and supervision of Dr. L.P. Ahirwar and thence the Resident Surgical Officer cannot be blamed and the responsibility of failure of the operation, if any, is on the Consultant Surgeon under whose guidance and supervision a Resident Surgical Officer performs his duties. It is put forth that so far as Vasectomy operation is concerned, there is possibility of its failure. Certain extracts from the text books have been brought on record to highlight that there is possibility of failure. It is also set forth by him that the patient who undertakes the operation in question has to comply with the instructions given to him by the doctor and he is required to report for periodical check-ups as directed. The husband of the petitioner was operated on 1441-1996 and before being operated upon he gave an undertaking in which it was clearly mentioned that in the event of failure of the operation the hospital administration/Surgeon would not be responsible. The undertaking given by the husband of the petitioner has been brought on record as Annexure R-4. The husband of the petitioner never appeared for the post-operational check-ups as directed, and therefore, it was not possible on the part of the respondent No. 2 to carry out any physical check-up of the husband of the petitioner and to give him necessary advice. As the husband of the petitioner had exhibited a lackadaisical attitude it is he who is to be blamed and not the respondent. The patient has not taken due precautions as directed. It is also set forth whether there had been failure of the operation can only be ascertained after clinical examination of the patient but no document has been filed regarding the failure of Vasectomy operation which has resulted in birth of two children. It is contended in the return that in absence of any special clinical test conducted upon the husband of the petitioner it cannot be said that the operation performed on him by the respondent No. 2 had resulted in failure. Further the case of the respondent No. 2 is

that the petitioner's husband served a legal notice on the respondent No. 1 which was duly enquired into by Dr. B.K. Raina, who at that point of time was the Professor in the Department of Surgery and he submitted a report pertaining to the operation. In the report dated 10-5-2000 Dr. Raina had informed that the husband of the petitioner though was operated never came for post-operative examination to avail the follow-up treatment. Report of Dr. Raina dated 10-5-2000 has been brought on record as Annexure R-5. Though the petitioner had come to know about the failure of the operation in question on her husband she did not take any care nor did she get her husband operated again. The sheer negligence on the part of the petitioner and her husband makes them guilty and, therefore, they are not entitled for any compensation. Callousness on the part of the petitioner has been emphasized in the return to exposit that the negligence squarely rests on the petitioner and her husband and they cannot be given benefit of their own negligence.

6. It is noteworthy to mention here that an application has been filed by the respondent No. 2 for taking additional facts and documents on record. In the said application it has been set forth that the operation was performed on 14-11-1996 and the first delivery took place on 13-11-1998 after almost 24 months and the petitioner, though fully aware of the failure entered into second pregnancy knowingly and deliberately. Highlighting this it has been stated that the fault exclusively lies on the petitioner but a maladroit attempt has been made to put the blame on the respondent No. 2. It is also stated that the husband of the petitioner chose not to avail post-operative medical check-up nor did he follow the instructions given to him. No semen analysis was done after the operation. When the petitioner became pregnant for the first time she did not care to inform this fact to the medical authorities otherwise MTP/LTT/VT (Redo) could have been done. Certain texts relating to medical termination of pregnancy have been brought on record as Annexures R-6 and R-7. It is also the case of the respondent No. 2 that it is not established whether the Vasectomy operation had failed or not. In case of immediate failure pregnancy could have been occurred earlier which has not taken place in the present case. Late pregnancy occurs in case of late failure which can be on account of recanalization. It is also put forth that in absence of semen analysis or DNA test of children it cannot be conclusively proved that Vasectomy operation has failed.

7. On a perusal of the pleadings that has been put forth by the parties three questions emerge for consideration, namely, whether the failure in the operation had occurred due to negligence on the part of the respondent No. 2; secondly whether the husband of the petitioner had contributed by his conduct to be a catalytic factor in causation of failure of the operation; and thirdly whether the State is liable to compensate the petitioner for negligence caused by its employee. Be it noted that if it is proven that the operation had failed due to the negligence on the part of the respondent No. 2, the legal consequences are to follow.

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16. The medical ethics has been regarded to have the paramount role in the society. Starting from the days of Hippocrates till the days of the moderns immense significance and importance have been given on medical ethics. Under no circumstances it can be regarded as a triviality. Marginalisation of the same would amount to anathema of basic human morality. One may conceive that doctors are targetted but the same has no place in the world of actual practice where medical ethics are to be the governing factor. In this regard I may profitably refer to the decision rendered in the case of Spring Meadows Hospital v. Harjol Ahluwalia through K.S. Ahluwalia, AIR 1998 SC 1801, wherein it has been held as under :—

“In the case in hand we are dealing with a problem which centres round the medical ethics and as such it may be appropriate to notice the broad responsibilities of such organisations who in the garb of doing service to the humanity have continued commercial activities and have been mercilessly extracting money from helpless patient and their family members and yet do not provide the necessary services. The influence exerted by a doctor is unique. The relationship between the doctor and the patient is not always equally balanced. The attitude of a patient is poised between trust in the learning of another and the general distress of one who is in a state of uncertainty and such ambivalence naturally leads to a sense of inferiority and it is, therefore, the function of medical ethics to ensure; that the superiority of the doctor is not abused in any manner. It is a great mistake to think that doctors and hospitals are easy targets for the dissatisfied patient. It is indeed very difficult to raise an action of negligence. Not only there are practical difficulties in linking the injury sustained with the medical treatment but also it is still more difficult to establish the standard of care in medical negligence of which a complaint can be made. All these factors together with the sheer expense of bringing a legal action and the denial of legal aid to all but the poorest operate to limit medical litigation in this country..... In recent days there has been increasing pressure on hospital facilities, falling standard of professional competence and in addition to all, the ever increasing complexity of therapeutic and diagnostic methods and all this together the responsible for the medical negligence. That apart there has been a growing awareness in the public mind to bring the negligence of such professional doctors to light. Very often in a claim for compensation arising out of medical negligence a plea is taken that it is a case of bona fide mistake which under certain circumstances may be excusable, but a mistake which would tantamount to negligence cannot be pardoned. In the former case a Court can accept that ordinarily human fallibility precludes the liability while in the latter the conduct of the defendant is considered to have gone beyond the bounds of what is expected of the reasonable skill of a competent doctor.”

17. It is obligatory on my part to refer to a two Judge Bench decision rendered in the case of State of Haryana and Ors. v. Smt. Santra, AIR 2000 SC 1888, which has been placed reliance upon by Mr. Tiwari. In the said case their Lordships spoke thus :—

“In a country where the population is increasing by the tick of every second on the clock and the Government had taken up the family planning as an important programme for the implementation of which it had created mass awakening for the use of various devices including sterilisation operation, the doctor as also the State must be held responsible in damages if the sterilization operation performed by him is a failure on account of his negligence which is directly responsible for another birth in the family, creating additional economic burden on the person who had chosen to be operated upon for sterilization. ‘Negligence’ is a ‘tort’. Every doctor who enters into the medical profession has a duty to act with a reasonable degree of care and skill. This is what is known as ‘implied undertaking’ by a member of the medical profession that he would use a fair, reasonable and competent degree or skill. Where a person is guilty of negligence per se, no further proof is needed. The Medical Officers entrusted with the implementation of the Family Planning Programme cannot, by their negligent acts in not performing the complete sterilisation operation, sabotage the scheme of national importance.”

It is appropriate to state here that in the case of Smt Santra (supra) the Apex Court addressed itself with regard to the aspect relating on whom the expenses shall be saddled for bringing up the unwanted children. Their Lordships referred to many a decision rendered by various Courts in the globe and also took note of the decision rendered by this Court in the case of State of Madhya Pradesh v. Asharam, 1997 ACJ 1224, and thereafter in Paragraphs 40 and 41 held as under :—

“40. Having regard to the above discussion, we are positively of the view that in a country where the population is increasing by the tick of every second on the clock and the Government had taken up the family planning as an important programme for the implementation of which it had created mass awakening for the use of various devices including sterilisation operation, the doctor as also the State must be held responsible in damages if the sterilisation operation performed by him is a failure on account of him negligence, which is directly responsible for another birth in the family creating additional economic burden on the person who had chosen to be operated upon for sterilisation.

41. The contention as to the vicarious liability of the State for the negligence of its officers in performing the sterilisation operation cannot be accepted. In view of the law settled by this Court in N. Nagendra Rao and Co. v. State of A.P., AIR 1994 SC 2663 : (1994) 6 SCC 205 : (1994 AIR SCW 3753), Common Cause, A Regd. Society v. Union of India, (1999) 6 SCC 667 : AIR 1999 SC 2979 : (1999 AIR SCW 2899) and Achutrao Haribhau Khodwa v. State of Maharashtra, 1996 Acc CJ 505 : (1996 AIR SCW 919 : AIR 1996 SC 2377). The last case, which related to the fallout of a sterilisation operation, deals, like the two previous cases, with the question of vicarious liability of the State on account of medical

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negligence of a doctor in a Govt. hospital. The theory of sovereign immunity was rejected.”

Eventually in Paragraph 42 their Lordships directed that the respondent Santra was entitled to claim full damages from the State Government to enable her to bring up the child who was a girl at least till she attained puberty.

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20. At this juncture, I think it apposite to refer to certain medical literature which has been brought on record by the respondent No. 2 in his own defence. Prior to that I think it appropriate to indicate how the operation is conducted. In this context, I quote a passage from the book entitled Farquharson’s Textbook of Operative Surgery edited by R.F. Rintoul :

“Ligation or division of the vas deferens.—As an independent operation this may be carried out in order to effect sterilisation. More commonly it is performed in association with prostatesctomy, with the object of preventing spread of infection from the posterior urethra along the vas or its lymphatics to the epididymis.

Technique.—The vas is identified by palpation through the thin skin on the postero-lateral aspect of the neck of the scrotum, and is fixed by underpinning with a needle. It is then delivered through a small incision, and is cleared of its coverings. It is divided between forceps, and its ends are ligatured. If desired a segment of the vas may be excised.”

21. A reference to Rob & Smith’s Operative Surgery edited by Hugh N. Whitfield is apposite. The principles and necessity for post operative care and complications as provided therein read as under :—

“Vasectomy is very commonly performed as a method of contraception. A patient who requests a vasectomy for this purpose must be counselled carefully. No hard and fast rules can be laid down about the criteria to be expected of those wishing to undergo a vasectomy. The influence of age, marital status and previous children is best left for the patient and his surgeon to discuss. Psychological screening is difficult if not impossible in a relatively short consultation and the recommendation of the patient’s general practitioner is important.

The medicolegal cases which arise following vasectomy serve to illustrate the vital importance of covering the following points during counselling :—

- (1) The operations should be regarded as irreversible. Sperm banks may offer the chance to retain ‘fertility’. Successful vasectomy reversal in terms of the

presence of spermatozoa will occur in 90% of cases, but the pregnancy rate is approximately 50%.

(2) Bleeding and infection are both recognized as short-term complications. No long term sequelae has been confirmed, although a number have been suggested, e.g., atheroma, testicular cancer.

(3) Other methods of contraception must be employed until two consecutive samples of semen have been demonstrated to be completely azoospermic.

(4) The decrease in ejaculatory volume will be of the order of 10%.

(5) A vasectomy does not improve or impair libido and erections.

(6) A recanalization risk exists which is of the order of 3-5 per 1000 cases.

Post-operative care :

The patient should wear tight underpants for a week to support the scrotum and should avoid baths, showers and strenuous physical activity for 48-72 h. Semen analyses should be performed, starting 6 weeks after the operation, until two consecutive specimens have shown a complete absence of spermatozoa in a centrifuged aliquot.

Complications :

Bleeding occurs occasionally, but is rarely severe enough to cause a scrotal haematoma which requires evacuation. Such bleeding is usually due to a failure to secure the artery to the vas deferens. Infection can arise, but will usually respond to antibiotics spermatozoa are found in about 25% of patients but very few provoke symptoms. The incidents of recanalization of the vas deferens is in the order of 1 in 3000-4000 cases, but whether this is due to a technical failure on the part of the surgeon or to true recanalization is never possible to ascertain for certain."

22. In this context I may usefully refer to Park's Textbook of Preventive and Social Medicine. The relevant paragraphs are Male sterilization, causes of failure and post-operative advice. They read as under :—

"Male sterilization or vasectomy being a comparatively simple operation can be performed even in primary health centres by trained doctors under local anaesthesia. When carried out under strict aseptic technique, it should have no risk of mortality. In vasectomy, it is customary to remove a piece of vas at least 1 cm after clamping. The ends are ligated and then folded back on themselves and

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sutured into position so that the cut ends face away from each other. This will reduce the risk of recanalisation at a later date. It is important to stress that the acceptor is not immediately sterile after the operation, usually until approximately 30 ejaculations have taken place. During this intermediate period another method of contraception must be used. If properly performed, vasectomies are almost 100 per cent effective.

Following vasectomy, sperm production and hormone output are not affected. The sperm produced are destroyed intraluminally by phagocytosis. This is a normal process in the male genital tract, but the rate of destruction is greatly increased after vasectomy. Vasectomy is a simpler, faster and less expensive operation than tubectomy, in terms of instruments, hospitalization and doctor's training. Cost-wise, the ratio is about 5 vasectomies to one tubal ligation.

Causes of failure :

The failure rate of vasectomy is generally low, 0.15 per 100 person—years. The most common cause of failure is due to the mistaken identification of the vas. That is, instead of the vas, some other structure in the spermatic cord such as thrombosed vein or thickened lymphatic has been taken. Histological confirmation has therefore been recommended on all vasectomy specimens by some authors in developed countries. In developing countries, histological confirmation is ruled out because of lack of facilities for such an examination. A simpler method has been recommended, that is, microscopic examination of a smear prepared by gentle squeezing of the vas on a glass slide and staining with Wright's stain. The vas can be identified by the presence of columnar epithelial cells that line the lumen of the vas. In some cases, failure may be due to spontaneous recanalisation of vas. Sometimes there may be more than one vas on one side. Pregnancy could also result from sexual intercourse before the disappearance of sperms from the reproductive tract.

Post-operative advice :

To ensure normal healing of the wound and to ensure the success of the operation, the patient should be given the following advice :—

- (1) The patient should be told that he is not sterile immediately after the operation; at least 30 ejaculations may be necessary before the seminal examination is negative.
- (2) To use contraceptives until aspermia has been established.
- (3) To avoid taking bath for at least 24 hours after the operation.

(4) To wear a T-bandage or scrotal support (langot) for 15 days : and to keep the site clean and dry.

(5) To avoid cycling or lifting heavy weights for 15 days; there is, however, no need for complete bed rest.

(6) To have the stitches removed on the 5th day after the operation.”

23. I may profitably refer to Campbell's Urology, Seventh Edition wherein Methods of Vasal Occlusion and Vasectomy Failure find place. The same is as under :—

“... Documented counselling, diligent follow-up to obtain at least Mo azoospermic semen specimens post-operatively, and careful selection of appropriate candidates for vasectomy in the first place provide the best protection from malpractice suits.”

There is also a paragraph which deals with the post-operative semen analysis. It reads as under :—

“Post-operative Semen Analysis :

No technique of vasal occlusion, short of removing the entire scrotal vas, is 100% effective. Follow-up semen analysis with the goal of obtaining two absolutely azoospermic specimens 4 to 6 weeks apart is essential. If any motile sperm are found in the ejaculate 3 months after vasectomy, the procedure should be repeated. If rare non-motile sperm are found, contraception may be cautiously discontinued and repeat semen analysis performed every 3 months. Rare complete sperm in a spun semen analysis pellet are found in 10% of semen specimens at a mean of 10 years after vasectomy (Lemack and Goldstein, 1996).”

24. Submission of Mr. Satish Sharma, learned Counsel for the respondent No. 2 is that the aforesaid literatures go a long way to show that if the patient has not availed the post operative care by no stretch of reasoning the operative surgeon can be held liable. It is putforth by him that when the husband of the petitioner had filled up the form vide Annexure R-4 knowing well that there can not be 100% success in the operation in question, the wife can not come forward to seek compensation. Mr. S.K. Yadav, learned Government Advocate has supported the stand of the respondent No. 2.

25. On a fair reading of the medical literature certain facets are absolutely clear, namely, a vasectomy operation cannot be 100% successful in all cases; that failure rate is low; that a patient is required to make himself available for post operative care; that there may be recanalization in 3 to 5 cases per 1000 cases; that in certain cir-

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cumstances other methods of contraception are also necessary; and that documented counselling is also essential. Quite apart from the above as has been found in Campbell's Urology there is insistence by some urologists in removing of a segment from vas primarily for medicolegal reasons. I may hasten to add that it has also been mentioned that even from the legal point of view a pathologist's report confirming the presence of vas in the vasectomy specimen offers no protection from the litigation. Thereafter it has been mentioned which I think it necessary to quote at the cost of repetition :

".... Documented counselling, diligent follow-up to obtain at least two azoospermic semen specimens post-operatively, and careful selection of appropriate candidates for vasectomy in the first place provide the best protection from malpractice suits."

26. In this regard I may also quote a passage from Farquharson's Textbook of Operative Surgery edited by R.F. Rintoul. It reads as under :—

"It is important to tell patients requesting vasectomy that they must regard themselves fertile, and take other contraceptive precautions until two negative seminal analyses have been obtained (the first at least 3 months after the operation and the second at least 3 weeks after the first); that occasionally the fluids do not become negative, and the operation has to be redone, and that 1 or 2% of patients get more bruising than others and may be uncomfortable for some time."

27. At this juncture I may mention, as stated by Dr. K. Park which has been quoted hereinbefore, that contraceptives are to be used to get aspermia established. The patient has to be given number of advices and if aspermia does not take place after a reasonable period of time and after 30 ejaculations there can be a presumption that the operation has not been properly conducted. There can be spontaneous recanalization and the vas is no exception. The surgeon has a duty to explain this aspect to the patient.

27-A. On the anvil of aforesaid medical guidance the present factual matrix is to be tested. As has been stated earlier the husband of the petitioner had undergone the operation on 14-11-1996 at the Government Medical College Hospital, Jabalpur. Annexure P-4 which has been brought on record, has been issued by the Netaji Subhash Chandra Bose Medical College, Jabalpur which is run by the State Government. It is mentioned therein that it is a case of vasectomy failure. Quite apart from the above the first child was born in November, 1998 and second child was born in October, 1999. The only possible contention that is available to the respondent No. 2 is that there can be recanalization. The matter would have been different if the pregnancy had taken place at an earlier point of time. The blame could have been put on the patient that he had not taken adequate care and involved himself in sexual inter-

course before 30 ejaculations took place or aspermia had been established. The gap is more than 16 months. If the operation had been successful the petitioner could not have been pregnant except in case of spontaneous recanalization. Whether there is spontaneous recanalization or not is difficult to find out at this juncture. This is not possible by scanning or any other method. The only mode is to open the operated area to find out the development. In my opinion, that is neither advisable nor warranted. Submission of Mr. Sharma is that when no semen test or DNA test has been done the allegation made by the petitioner can not be sustained.

28. The real crux of the matter is whether proper diligence was exercised by the respondent No. 2 or not. It is worth noting here that in the counter affidavit the respondent No. 2 has endeavoured to put the blame on the consultant surgeons, namely, Dr. J.K. Tandon and Dr. L.P. Ahirwar and hence, he cannot be blamed. Quite apart from the above he has also stated that without any clinical test upon the husband of the petitioner, operating surgeon could not be put to blame. What is not disputed by filing a rejoinder affidavit by bringing documents is that the husband of the petitioner had availed post operative care. The heart of the matter is whether the petitioner was apprised to avail these post-operative cares. I may hasten to add here that I am not going to address myself in regard to spontaneous recanalization. Whole thing rests on the foundation whether due diligence was exercised by the respondent No. 2 in carrying on of the operation. In its ambit and sweep it includes the factum of supervision to the effect that the operation is successful by taking care of post operative measures. A patient is to be told in detail about the post operative measures to be taken by him. As has been quoted above in Campbell's Urology emphasis has been laid on removing a segment of vas for pathological verification. I am conscious that the said act is not an absolute defence, but in the present case the same was not done. There is emphasis on "documented counselling". The hub of the matter is whether there has been documented counselling or not. Mr. Sharma has placed reliance on Annexure R-4 annexed to the counter affidavit. Annexure R-4 as has been described in the affidavit is an undertaking given by the petitioner. The said document is in Hindi. On being translated it reads as under :—

"Kindly arrange for my family planning operation. My age is 26 years and my husband's/wife's age is 24 years.

We are married and my wife/husband is alive. We have 1 (boy), 1 (girl) surviving. The age of youngest child is 2-1/2 years.

I have decided for family planning operation independently of my own, without any pressure, allurements or force. I know that other contraceptive methods are available to me. I know that this operation is permanent for all practical purposes and no more child would be born. My husband/wife had not been operated for family planning. I also know that the operation I am undergoing has risk factors. The norms for eligibility of this operation have been made clear to me and

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I take oath that I am eligible for this operation as per these norms. I agree for any type of anaesthesia which is appropriate for me according to the surgeon for this operation and for any type of medicines to be administered by the doctors in this regard.”

On reading of the same it transpires that patient's husband was made aware of his eligibility and cautioned about the failure of operation. As has been indicated in the Text Books which have been relied upon by the respondent No. 2 and which I have also perused (the original texts have been produced by the learned Counsel for the respondent No. 2 with the assistance of Mr. Manish Datt) it is plain as day that there has to be “documented counselling”. One can not be oblivious of the fact that as the medical knowledge shows that vasectomy is one of the reliable means to prevent conception. True it is some sperms still remain in the main system following the vasectomy operation and hence, the resulting sterilization is not immediate. Once the doctor confirms absence of sperm the chance of pregnancy is minimum. The risk of vasectomy failure is sometimes due to severed acts of vas deferens have rejoined to allow the sperm through but this occurs in rare cases. Certain eminent doctors state that the case of failure are due to the fact that the doctors do not confirm that the vasectomy has been successful and that the ejaculation does not contain sperms. Advice is to be given to use other birth control devices after surgery. It is also advised that vasectomy though not a major surgical operation it should be conducted by expert urologists. A study of United States and United Kingdom as well as other developed countries shows that the rate of failure of the operation is 1 to 3 per 1000. They have also expressed the opinion that getting all the sperms out of the semen takes 3 months or about 30 ejaculations. I have referred to this aspect though I have also quoted that the percentage can slightly be higher. In the instant case I am not concerned with the percentage of failure or factum of recanalization. What this Court is concerned is whether the respondent No. 2 has performed his duties properly or not. Has he followed the guidelines of the Text Books? Has he been properly guided by essential requirements that have been prescribed by the medical ethics for the surgeons? Had he apprised the patient about the obligations to be performed by him after the operation? As has been stated earlier the husband of the petitioner only signed a document expressing no objection wherein it was mentioned that the operation may be a failure. As has been held by the Allahabad High Court it is not sufficient. I am in respectful agreement with the aforesaid view. In the instant case there is no document to show that the petitioner was told in writing about the care to be taken by him. Advice has to be well documented. In absence of documented counselling and further care to be taken by the doctor the blame can not be totally put on the husband of the petitioner. The respondent No. 2 has put the blame on the consultant surgeons and tried to justify the action. In my considered opinion the justification given by the respondent No. 2 does not meet the requirement and in fact such a justification is of no avail to the said respondent.

29. Another aspect which can not be lost sight of is that the petitioner did not bring

it to the notice of the doctor after the first pregnancy occurred. Second child was born to her. What is worthnoting here that the respondent No. 2 has also pleaded that in absence of semen analysis and the DNA test of the child it can not be said that the vasectomy operation has failed. In this particular stand, if I allow myself to say so, the respondent No. 2 has commented on the character of the petitioner, I am not inclined to delve deep into the said aspect but this is a facet to show that the petitioner had definitely faced indignity in the society.

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30-A. Testing the factual matrix on the anvil of the aforesaid decisions and taking note of the fact that the respondent No. 2 has not taken due care and not shown due diligence to confirm that the operation had not become a failure, (I have arrived at this conclusion in absence of ‘documented counselling’ and test of vas by a pathologist) it is to be borne in mind that a broad view of law relating to tortious liability has to be taken. Two aspects that arise for consideration are existence of negligence and extent of liability. The aspect relating to negligence includes the duty to take care and failure of the same, its proximity, and the resultant factors. If the Courts arrive at the conclusion fair, just and reasonable care has not been taken in breach of duty, liability can be fastened. It has to be kept in mind that in certain countries it is regarded interference with an individual’s decision to procreate a child is violating his/her ‘bodily integrity’ and ‘sexual privacy’. Simultaneously welfare of children is of paramount consideration and if an unwanted child is born either due to failure of sterilisation operation which also includes not being careful to give proper counselling to the patient or to misinterpret the post operative test, the suffering person is entitled to recover damages. When a woman comes forward to claim damages it can not be said that “The Lady Doth Protest Too Much”. No one can be permitted to wield anarmoury in that regard.

31. Now to the aspect of quantum. It is averred in the petition that she belongs to the lower strata of the society. She is poverty stricken. She would not have begotten any child and that is why the husband had undergone the operation. Both the children born after the operation have seen the surface of the earth because of the fault of the respondent No. 2. The respondent No. 2 is under the employment of the State Government. The State Government has undertaken the family planning programme and the people have come forward to co-operate with the said programme. When citizens come with immense hope and unshaken faith, they have to be properly guided and any omission in that regard amounts to negligence and the State can not seek absolution. In this context I may quote with profit what the Apex Court said in the case of Smt. Santra (supra) :—

“Ours is a developing country where majority of the people live below poverty line. On account of the ever-increasing population, the country is almost at the saturation point so far as its resources are concerned. The principles on the

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basis of which damages have not been allowed on account of failed sterilisation operation in other countries either on account of public policy or on account of pleasure in having a child being offset against the claim for damages cannot be strictly applied to the Indian conditions so far as poor families are concerned. The public policy here professed by the Government is to control the population and that is why various programmes have been launched to implement the State-sponsored family planning programmes and policies. Damages for the birth of an unwanted child may not be of any value for those who are already living in affluent conditions but those who live below the poverty line or who belong to the labour class who earn their livelihood on daily basis by taking up the job of an ordinary labour, cannot be denied the claim for damages on account of medical negligence.”

32. In view of the aforesaid and the law laid down by the Apex Court in number of decisions referred to hereinbefore I experience no difficulty in coming to the conclusion that the State is liable for fault of its employees and the present case is not an exception. Considering the totality of circumstances I fix the compensation at Rs. 50,000/- (Rupees fifty thousand only) to be paid by respondent No. 1 within a period of three months to the petitioner. I may hasten to add that it would be open to the respondent No. 1 to conduct an enquiry and fix the responsibility in carrying out of the operation and recover the amount from those who are found responsible.

33. The writ petition is accordingly allowed in part. However, in the peculiar facts and circumstances of the case there shall be no order as to costs.

B.K. Parthasarathi³⁵
Vs
Government of A.P. and others

Hon'ble Judge:

Motilal B. Naik and J. Chelameswar, JJ.

ORDER

Motilal B. Naik, J.

1. An important question of law as to the constitutional validity of Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994 is raised in these writ petitions.
2. In all these three writ petitions, the individual petitioner is either an elected Chairman or some other office bearer of one of the local bodies created under the Andhra Pradesh Panchayat Raj Act, 1994.
3. For the purpose of convenience, few facts relating to each of these three writ petitions are traced as under:

In Writ Petition No. 19068 of 1997, the petitioner is the Chairman of Anantapur Zilla Parishad. He was initially elected as ZPTC member from Roddam Territorial Constituency of Anantapur District and subsequently he was elected as Chairman of Zilla Parishad, Anantapur on 20-3-1995. By the time he choose to contest the elections for the office of ZPTC member, he had four children. However, after being elected as Chairman, Zilla Parishad, Anantapur, a female child was born to him on 28-4-1997 in Gautami Nursing Home, Anantapur. It is alleged that a birth of an additional child during holding of the office under the said Act beyond permissible limits as provided under Section 19(3) of the Act disqualifies a person to hold such office. The petitioner was, therefore, issued proceedings in Rc No.2502/97/Cl, dated 3-8-1997 by the third respondent intimating about the disqualification of the petitioner.

35. Full text available at 2000(1)ALD199

4. In Writ Petition No.23521 of 1998, the petitioner was elected as a member of Mandal Parishad Territorial Constituency, Epurupalem village and later on, he was elected as President of Mandal Praja Parishad, Chirala on 18-3-1995. At the time of contesting the elections, the petitioner had five children and he underwent vasectomy operation on 5-1-1995. However, as the vasectomy operation failed, while holding the post of President, MPP, Chirala, another child was born to him which attracted disqualification of the petitioner in terms of Section 19(3) of the Act. The second respondent, therefore, issued proceedings in Re No.10256/96 dated 24-2-1997 intimating that the petitioner is disqualified to continue as President, MPP, Chairala as well as MPTC member. Petitioner, however, moved the Court of the Principal Junior Civil Judge-cum-Tribunal constituted under the A.P. Panchayat Raj Act, Chairala questioning the validity of the said proceedings in OP No.2 of 1996. The said Tribunal dismissed the said OP No.2 of 1996 on 1 -8-1998.

5. In Writ Petition No.29460 of 1998, the petitioner was elected as a member of Gambheerraopet Gram Panchayat from Ward No.1. By that time, he had four children. While the petitioner was holding the said post, a fifth child was born to him on 2-8-1997. The fourth respondent, therefore, issued proceedings in A/57/98 dated 4-8-1998 disqualifying the petitioner from holding the said post in terms of Section 19(3) of the Act.

6. The Legislature of Andhra Pradesh made “Andhra Pradesh Panchayat Raj Act, 1994” in pursuance of the provisions of Part-IX of the Constitution of India, which provisions authorised the respective State Legislatures to make bylaw provisions with respect to the composition of the “Panchayats” and matters connected therewith. The expression ‘Panchayat’ is defined under Article 243(a) of the Constitution. The Legislature of Andhra Pradesh while making such law, prescribed various disqualifications in regard to holding of various offices created under the above-mentioned enactment. The relevant section for the purpose of deciding the issue before us is subsection (3) of Section 19, which reads as under:

“A person having more than two children shall be disqualified for election or for continuing as member:

Provided that the birth within one year from the date of commencement of the Andhra Pradesh Panchayat Raj Act, 1994 hereinafter in this Section referred to as the date of such commencement of an additional child shall not be taken into consideration for the purpose of this section;

Provided further that a person having more than two children (excluding the child if any born within one year from the date of such commencement) shall not be disqualified under this Section for so long as the number of such commencement does not increase;

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Provided also that the Government may direct that the disqualification in this Section shall not apply in respect of a person for reasons to be recorded in writing.”

As indicated above, in all these three writ petitions, the Constitutional validity of Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994, is challenged, mainly on three grounds.

7. Leading the arguments on behalf of the writ petitioners, Sri S. Ramachandra Rao, learned senior Counsel, firstly, submitted that the impugned provision is in the nature of violating the right of privacy of the petitioners as enshrined under Articles 19 and 21 of the Constitution of India. It is secondly contended that the impugned provision has no nexus with the purpose which is sought to be achieved through the said Act. It is thirdly argued that the impugned provision violated Article 14 of the Constitution of India. In support of his submissions, the learned senior Counsel has taken us to few decisions of the Supreme Court of India as well as the Supreme Court of America.

8. We have also heard the learned Additional Advocate General for the official respondents as well as Sri M.R.K. Chowdary, learned senior Counsel, Sri B. Adinarayana Rao, learned Counsel and also Sri K. Venkataramaiah, learned Counsel for the implead-petitioners, and Sri A. Sudarsana Reddy, learned Counsel for the petitioner in WPN0.29460 of 1998.

9. The “right of privacy” as a constitutionally protected right is not to be found in the express language of the Constitution of India. However, the said right is recognised as a facet of Article 21 of the Constitution of India. In *Kharak Singh v. State of Uttar Pradesh*, and in *Govind v. State of Madhya Pradesh*, the Supreme Court while examining this aspect held that the right to privacy is only a facet of Article 21 of the Constitution.

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13. Various attempts of the State to invade the personality-contents and process of mind either by way of bodily intrusion or control, public command or deliberate omission became the subject-matters of debate before the American Supreme Court in various cases. The laws through which Government attempted to shape the minds of the subjects in the areas of liberty and conscience, education and freedom of enquiry, screening the sources of consciousness, coercive conditioning, intrusion on the body life physical invasion or gross neglect, decisions about the birth and babies, the liberty of the individual in the areas of risk taking, vocation, travel, appearance and apparel, the reputation and records are some of the specific areas which were considered by the American Supreme Court in the context of “right of privacy.”

14. The personal decisions of the individual about the birth and babies called 'the right of reproductive autonomy' is a facet of a 'right of privacy.' The American Supreme Court in *Skinner v. Oklahoma*, 316 US 535, characterised the right to reproduce as a "one of the basic civil rights of man."

15. The right to make a decision about reproduction is essentially a very personal decision either on the part of the man or woman. Necessarily, such a right includes the right not to reproduce. The intrusion of the State into such a decision making process of the individual is scrutinised by the constitutional Courts both in this country and in America with great care.

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18. In *Roe v. Wade*, 410 US 113, the Court held that the right to have an abortion was a part of the fundamental constitutional right of privacy of the woman and such a right could be interfered with by the State only to promote a compelling interest of the State. The protection of the health of the woman was held to be a compelling interest of the State.

19. All the above-mentioned cases, of course, deal with the right of the individual either a man or a woman to take a decision not to reproduce and where the State sought to interfere with such a decision making process, Irrespective of the conclusion reached by the Court in each of the individual cases, the Court recognised in all these decisions that the 'right of privacy' is not an absolute right and such a right could be restricted if required to promote some compelling interest of the State.

20. As discussed above, 'the right of privacy' which is held to be a facet of Article 21 of the Constitution, in this country must also be subjected to similar restrictions which are held constitutionally permissible in the context of the other facets of the right guaranteed under Article 21 of the Constitution of India. The Supreme Court in *Govind's case* (supra) held that even the right under Article 21 is not an absolute right.

21. Applying these principles, the challenge to the impugned provisions of the Andhra Pradesh Panchayat Raj Act, 1994 must be examined.

22. The impugned provision, viz., subsection (3) of Section 19 of the said Act does not directly curtail or directly interfere with the right of any citizen to take a decision in the matter of procreation. It only creates a legal disability on the part of any person who has procreated more than two children as on the relevant date of seeking an elected office under the Act. The substance of the provision is that it does not compel directly anyone to stop procreation, but only disqualifies any person who is otherwise eligible to seek election to various public offices coming within the ambit of the Andhra Pradesh Panchayat Raj Act, 1994 or declares such persons who have already

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been holding such offices to be disqualified from continuing in such offices if they procreate more than two children.

23. On behalf of the official respondents, the learned Additional Advocate-General submitted that the object behind creating such a disqualification is to encourage some measures of birth control more particularly in the context of persons who are seeking to hold public offices as representatives of the people. Learned Additional Advocate -General submitted that practice of such birth control measures by the elected representatives to the offices under the said Act is likely to have profound influence on the people whom they represent. It is in this background, the learned Additional Advocate-General submitted that the restrictions brought out under sub-section (3) of Section 19 of the said Act cannot be held to be illegal and violative of Articles 19 and 21 of the Constitution of India. According to the learned Additional Advocate-General, right to contest to an elected office is only a statutory right and not a fundamental right and through the impugned Legislation none of the fundamental rights of the petitioners is infringed and that the petitioners have to show to this Court as to which of their fundamental rights are taken away by the impugned Legislation.

24. Sri S. Ramachandra Rao, learned senior Counsel appearing on behalf of the petitioners, however, made efforts to convince us that if at all the objective of population control is to be achieved, the Legislature could as well have included all other elected representatives like members of Legislative Assembly etc. It is submitted that Section 177 of the Act provides for the composition of Zilla Parishads. Subsection (3) thereof provides that the Zilla Parishad shall consist of persons elected under Section 179, and the Members of the Legislative Assembly of the State representing the Constituency, the Member of the House of the People representing the Constituency which comprises either wholly or partly the district concerned and the Member of the Council of the States who is a registered voter in the district and two persons belonging to the minorities to be co-opted in accordance with the procedure prescribed. The learned senior Counsel contended that though all the above-mentioned categories of persons are the members of the Zilla Parishad, but for the purpose of disqualification, only the elected members under this Act alone are sought to be disqualified under sub-section (3) of Section 19 of the Act. Learned senior Counsel submitted that there is a disparity in the classification of members which offends Article 14 of the Constitution of India.

25. Whether creation of a restriction such as the one created in this case, would in fact achieve the object sought to be achieved, cannot be demonstrated in proceedings like this, but however, the legislative measure is reasonably be connected with the object sought to be achieved. In our considered view, the inquiry must stop there and this Court would not be justified in making a further inquiry as to what extent such a purpose would be achieved. The fact remains that the population growth is one of the major problems facing this country and any measure to control the population growth unless it impermissibly violates some constitutionally protected right, must be

upheld as a legally permissible exercise of legislative power. Laurence H Tribe in his “American Constitutional law” says thus:

“.....To make sense for Constitutional law out of the smorgasbord of philosophy, sociology, religion and history upon which our understanding of humanity subsists, we must turn from absolute propositions and dichotomies so as to place each allegedly protected act, and each allegedly illegitimate intrusion, in a social context related to the Constitution’s text and structure.....”

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27. This has been the consistent view of the Supreme Court till today. Therefore, the submission made on behalf of the petitioners ‘right to privacy’ is infringed, is untenable and must be rejected.

28. The next submission made on behalf of the petitioners is that the Legislature by placing the impugned restriction made an unreasonable classification. Elaborating his submissions on this aspect, Sri S. Ramachandra Rao, learned Senior Counsel submitted that the disqualification prescribed under Section 19(3) of the Act is applicable to the elected members under this Act only. Counsel submitted that the composition of the Zilla parishad as provided under Section 177 of the said Act consists of Members of the Legislative Assembly of the State representing the Constituency and other co-opted members within the territory of that Zilla parishad, who are not disqualified though many of them have more children than the prescribed limit or they have procreated additional child while holding office, which would otherwise disqualify them. According to the learned senior Counsel, leaving these members and bringing only the elected members under the impugned provision is discriminatory and offends Article 14 of the Constitution of India.

29. We are not inclined to accept this submission of the learned senior Counsel. The Legislature while bringing out a particular enactment need not embrace all categories within its scope. It is for the Legislature to determine as to the categories it could embrace within the scope of the Legislation. This proposition has been well settled. In *Sakhawant All v. State of Orissa*, *Bhagawati, J.*, speaking for the Constitutional Bench of the Supreme Court held thus:

“The simple answer to this contention is that Legislation enacted for the achievement of a particular object or purpose need not be all embracing. It is for the Legislature to determine what categories it would embrace within the scope of Legislation and merely because certain categories which would stand on the same footing as those which are covered by the Legislation are left out would not render Legislation which has been enacted in any manner discriminatory and violative of the fundamental right guaranteed by Article 14 of the Constitution.”

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31. On the various propositions supporting the contentions of the learned Counsel appearing for all the parties and the learned additional Advocate-General appearing on behalf of the official respondents, we have given our consideration to the genesis of the problem vis-a-vis the Legislative intention which is brought under Section 19(3) of the A.P.Panchayat Raj Act, 1994. As is evident from the various decisions which are discussed by us, the privacy of a person to lead a life according to his desire has been well recognised by Courts. However, there is no reason for us to hold that through the impugned Legislation, the privacy of an individual is attacked or sought to be taken away. The Legislature, through the impugned legislation, prescribed certain disqualifications for a person either to hold or contest the elected office under the Act if he procreates more children than the prescribed limit. At the cost of repetition, we must say that choosing to contest an elected office is not a fundamental right but only a right arising out of a Statute. That being so, no grievances could be made out on the ground that the right to liberty and right to privacy of an individual are deprived by the impugned legislation. The Legislature, however, has visualised a contingency arising out of birth of an additional child, during holding of an elected office, which disqualifies a person from holding such office, by empowering the Government to hold that such disqualification may not apply in respect of a person, by recording reasons in writing. Therefore, notwithstanding the fact of giving birth to an additional child than the prescribed limit by a person holding the office under the Act, still the Government is empowered to permit such person to continue in office, by recording reasons in writing. When the Legislature has provided this remedy, it cannot be said that the impugned provision is a draconian act of the Legislature whereby the right to privacy of a person is deprived and such deprivation offends Articles 19 and 21 of the Constitution of India.

32. Challenge to a similar provision arising out of the Rajasthan Panchayat Raj Act was made before the Rajasthan High Court in Mukesh Kumar Ajmera v. State of Rajasthan, AIR 1997 Raj. 251. The Rajasthan High Court repelled the contentions made against such provision and upheld the validity of the said provision while considering various decision of the Supreme Court and other High Courts.

33. For the foregoing reasons, we find no merits in these writ petitions and we accordingly dismiss the same holding that the rigour of the provision as brought out under Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994 is not violative of any fundamental rights or it is in the nature of depriving the privacy of an individual. No costs.

34. During the course of hearing of these writ petitions, Sri S. Ramachandra Rao, learned senior Counsel submitted that the petitioner in WP No.19068 of 1997 who is the Chairman, Zilla Parishad, Anantapur has submitted a representation to the first respondent-Government of Andhra Pradesh as provided under the proviso to sub-section (3) of Section 19 of the Act, requesting the Government to pass appropriate order holding that the disqualification in this Section shall not apply to him. Learned sen-

ior Counsel submitted that the Government has not passed any order on the representation of the petitioner in WP No.19068 of 1997. It is in this background, learned senior Counsel urged before us that the Government be directed to pass appropriate order on the said representation and pending passing orders on the same, status quo obtaining as on today with regard to the office held by the petitioner be maintained. Having regard to the submissions and in view of the proviso to sub-section (3) of Section 19 of the Act, we direct the first respondent-Government of Andhra Pradesh to pass appropriate order on the representation filed by the petitioner in WP No. 19068 of 1997. Pending passing of appropriate order by the first respondent, we direct status quo obtaining as on today with regard to the office held by the petitioner in WP No. 19068 of 1997 shall be maintained.

35. Immediately after delivering the judgment, Sri. S. Ramachandra Rao, learned senior Counsel appearing on behalf of the petitioner in WP No.23521 of 1998 and Sri A. Sudarsana Reddy, Counsel appearing on behalf of the petitioner in WP No.29460 of 1998 have stated that the petitioners in these two writ petitions have also submitted representations to the Government as provided under the proviso to sub-section(3) of Section 19 of the Act, requesting the Government to pass orders holding that the disqualification in this Section shall not apply to them. Both the learned Counsel stated that the Government has not passed any order on the said representations filed by the petitioners. Both the learned Counsel, therefore, urged us that the Government be directed to pass appropriate orders on the representations filed by these petitioners also and pending passing orders on the same, status quo obtaining as on today with regard to the offices held by them be maintained. Accepting the said submissions, and in view of the proviso to sub-section (3) of Section 19 of the Act, we direct the Government of Andhra Pradesh (first respondent) to pass appropriate orders on the representations filed by the petitioners in Writ Petition Nos.23521 and 29460 of 1998. Pending passing of appropriate orders by the Government, we direct status-quo obtaining as on today with regard to the offices held by the petitioners in Writ Petition Nos. 23521 and 29460 of 1998 shall be maintained.

V. Krishnan³⁶
Vs
**G. Rajan alias Madipu Rajan and The Inspector of
Police (Law and Order)**

Hon'ble Judges:

Srinivasan and Abdul Hadi, JJ.

ORDER

Srinivasan, J.

INTRODUCTION

1. The great Tamil Saint said:- "Take not away from any living thing the life that is sweet unto all even if it be to save thine own." (*Thirukkural* -33-7)

2. But the petitioner has prayed for issue of a direction to the Superintendent, Government Kasthuri Bhai Gandhi Hospital, Triplicane Madras, to terminate the pregnancy of his daughter Sasikala. Thus, he prays for a direction to put an end to a life in the womb of Sasikala on the ground that she is still in her teens and teenage pregnancy will lead to many complications physically, physiologically, mentally and socially. The irony of the matter is Smt. Kasturba Gandhi, after whom the hospital is named, was married at the age of 13 and had her first child at the age of 15 and the second child at the age of 17:

FACTS

3. The petitioner filed H.C.P.No. 1450 of 1993 for issue of a writ of Habeas Corpus direction the first respondent to produce Sasikala, the daughter of the petitioner, aged about 16 and set her at liberty. The Second respondent in the petition is the Inspector Police (Law & Order), K-3 Aminjikarai Police Station. It was alleged in the petition that on 9.5.1993, the petitioner's daughter left the house stating that she was going to the

36. Full text also available at

temple, but did not return home. On enquiries, the petitioner came to know that the first respondent had kidnapped her for the purpose of marrying her and gave a complaint in Aminjikarai Police Station under Section 366-A of the Indian Penal Code. The first respondent and the petitioner's daughter who will be referred to hereafter by her name Sasikala, were taken in custody by the police on 13.5.1993 and produced before the V Metropolitan Magistrate, Egmore. The first respondent was remanded to judicial custody and Sasikala was sent to Government Orphanage Home, Madras-10. The first respondent was later released on bail on a petition filed by him. The Magistrate set Sasikala free on the ground that she was aged between 20 and 25 years as per the report of the Radiological Officer. A complaint was given by the petitioner's sister to All Women Police Station, Thousand Lights that Sasikala was taken away by the first respondent. The Sub Inspector refused to take any action. When the petitioner went to the first respondent's house, he was prevented from seeing his daughter. Hence, he was obliged to move the Court for issue of a habeas corpus.

4. It was also alleged in the affidavit that about 500 persons belonging to the place of the first respondent threatened the petitioner at the point of knife and made him to append his signature to a letter consenting to the marriage of the first respondent and Sasikala. It was further stated that Sasikala lost her mother when she was three years old and she was brought up by the petitioner with great care and affection and her life will be ruined if she marries the first respondent, an uneducated, jobless and notorious rowdy element. Admittedly, however, the petitioner had not given any complaint to the police about the alleged extortion of consent letter at the point of knife by 500 persons. According to learned counsel for the petitioner, that took place on 13.5.1993 when the petitioner gave the complaint under Section 366-A I.P.C. to the police. But the consent letter signed by the petitioner and produced by the first respondent's counsel bears the date 9.5.1993, the day on which Sasikala left the house.

5. When the matter came before a Division Bench on 20.9.1993, the Court heard both sides and passed an order that Sasikala is a minor, her date of birth being 20.11.1977 and as she is not willing to go with her father, the petitioner, she should be kept in Avvai Home at Adyar till she attains majority. The petitioner undertook to bear the expenses during her stay at Awai Home. The Bench made it clear that during her stay at Awai Home, the petitioner may be permitted to see his daughter during regular visiting hours; but neither the first respondent nor his parents shall be permitted to see the girl.

6. Accordingly, the girl Sasikala is staying in Awai Home. In the present petition it is stated that the petitioner met his daughter at Awai Home on 1.11.1993, when he went to pay the charges for November, 1993. He was shocked to learn that his daughter has become pregnant. After referring to the provision in Section 3 of the Medical Termination of Pregnancy Act, the petitioner has stated as follows:-

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“5. I am advised to submit that my daughter is only 16 years and continuance of pregnancy may endanger her life and health because of anticipated complicated of Teenage Pregnancy. She was illegally made pregnant and her delivery of child may lead to many complications physically, physiology mentally and socially. According to medical expert a woman can safely deliver a child only after twenty one years of age.

6. I submit that the first respondent is an unemployed rowdy element and a vagabond and if my daughter delivered a child for him it may lead to various problems. She was not married. She could not be also married. She and her expected child has to bear the agony stigma throughout their lives.

7. My daughter life would be ruined if the pregnancy is not terminated.

The certificate does not disclose any abnormality. One can say that the girl will deliver a child in the normal course.

8. Thereafter, the girl was also produced in Court and the matter was heard. We thought fit to put some questions to the girl in our Chamber. We spoke to the girl and found that she was not willing to have the pregnancy terminated. We recorded the same and posted the matter in Court for arguments. Counsel on both sides argued at length. We thought it better to record the evidence of the girl in so far as it relates to the prayer in this petition and also give an opportunity to the petitioner’s counsel to cross-examine her. Her deposition was recorded in camera. We have found that the girl is quite capable of understanding things. She had no hesitation whatever in answering all questions put to her by counsel for the petitioner as well as by Public Prosecutor. The Court put some questions. Her answers are quite clear and specific. She knows her mind and she appears to be having definite ideas about her future. Her answers disclose enormous self-confidence on her part. In particular, the petitioner’s counsel asked her as to what she would do if the first respondent deserts her, after some time. Her answer is “I am not worried”. Counsel put another question as to what she would do if the first respondent disowns the child. Pat came the answer that she will bring up the child herself. At the end of the examination, the Court asked her as to what she meant when she said that she is not worried if Rajan deserts her. She clarified by saying that she will live alone even if he deserts her. According to the girl, her mother left the house with her younger brother when she was aged about 5. According to her, the first respondent married her and after the marriage they had sexual relationship resulting in the pregnancy. A perusal of her deposition shows that she is fully aware of the consequences of the pregnancy and the child-birth. She is quite categorical that the pregnancy should not be disturbed. It is quite obvious that she has already started loving the child that is growing in her womb. We are remained of the saying of Thiruvalluvar that

“The touch of children is the delight of the body; the delight of the ear is the hearing of their speech.” (*Tirukkural* - 7-5).

9. Learned counsel for the petitioner vehemently contends that Sasikala has no say in this matter as she is a minor, aged about 16. In so far as this proceeding is concerned, the Bench which passed the order earlier proceeded on the footing that her date of birth is 20.11.1977. In her deposition before us, when she replied to a question put by the petitioner’s counsel, she has given the same date of birth. For the purpose of this petition, we are proceeding on the footing that she is aged about 16 years. We are aware that the Metropolitan Magistrate has relied upon the report of the Radiologist that the girl is aged between 20 and 25. The question as to the correct age of the girl may arise before the Metropolitan Magistrate in the proceeding pending before him and he has to decide the same on the material placed before him. In so far as this habeas corpus petition is concerned, the Court has accepted the prima facie evidence afforded by the birth certificate produced by the petitioner and treated the girl as a minor. This Court has not given any conclusive finding on the age of the girl which can be decided only by the Metropolitan Magistrate on the basis of the entire evidence placed before him the petitioner is disputing the correctness and validity of the age certificate issued by the Radiologist. That is a matter to be considered by the Metropolitan Magistrate.

10. Learned counsel for the petitioner contends that Sasikala being a minor, is not entitled express her opinion as to whether pregnant (SIC) should be continued or terminated. According to him, the petitioner being the father and guardian is the only person who can decide that the welfare of his minor daughter requires the termination of the pregnancy. Reliance is placed by learned counsel on the provisions of Section 3 of the Medical Termination of Pregnancy Act (Act 34 of 1972 (hereinafter referred to as ‘the Act’) and particular attention is drawn to Sub-section (4)(a) therefore according to which, “no pregnancy of a woman who has not attained the age of eighteen years who, having attained the age of eighteen years a lunatic, shall be terminated except with the (SIC) sent in writing of her guardian”. It is contended learned counsel that the pregnancy in this case caused by rape as defined in Section 375 of the India Penal Code and the Court shall presume that would cause grave injury to the mental health Sasikala. It is submitted by him that the first respondent is a bad character and he is likely desert Sasikala and her child and, therefore, (SIC) pregnancy should not be allowed to continue. (SIC) argued that the mother of Sasikala not being (SIC) able, the only person interested in her welfare the petitioner. In fact learned counsel has rejected to the recording of the deposition Sasikala. We overruled the objection (SIC) proceeded as stated earlier. Learned counsel (SIC) places reliance on the judgment of a Division Bench of this Court in *Komalavalli v. C.R. Nair and Ors.* (1983 L.W.(CrI.)190) and submits that a direction was issued in that case by the Bench to terminate the pregnancy of the petitioner therein as per the provisions of the Act.

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11. Per contra, the learned Additional Public Prosecutor contends that the said Act is intended only to protect Medical Practitioners from being prosecuted under Sections 312 to 318 of the Indian Penal Code. Under Section 312, I.P.C., the termination of pregnancy of a woman is a punishable offence unless it is caused in good faith for the purpose of saving the life of the woman. The Act only provided additional grounds for terminating pregnancies. The grounds set out in the affidavit of the petitioner do not fall within the ambit of Section 3 of the Act. The prayer in the petition cannot be granted on the averments made in the affidavit. The pregnant girl is capable of understanding the world as well as the consequences of the pregnancy. Her opinion is of great importance and the Court should take that into account before considering the prayer of the petitioner. If termination of pregnancy is ordered against the will of the girl, it will harm her mental health and may also affect her physical health. It is her fundamental right to have child having become pregnant. She cannot be deprived of that right just because she is only 16 years old. The Constitution of India does not make a distinction between a major and a minor in the matter of fundamental rights. The learned Additional Public Prosecutor has referred to the law that is declared by Courts in America and the English Law. He has also referred to the judgments of the Supreme Court. It is submitted by him that the Act contains a special definition of the term 'guardian' and the petitioner may not fall within that definition, as the girl is now not under the care of the petitioner. The learned Additional Public Prosecutor invited us to dismiss the petition as not sustainable.

MILLION DOLLAR QUESTION

12. This question is not reported to have arisen before any Court in India. It is of great importance and relevance in the present day society as the number of teenage pregnancies is said to be on the increase. The question is whether the guardian of a minor girl is entitled to an order from the Court directing the termination of the pregnancy of his ward when the pregnant girl is not agreeable for such termination.

MEDICAL OPINION ON TEENAGE PREGNANCIES AND ABORTION

13. According to learned counsel for the petitioner, Medical Experts are advising against teenage pregnancies in view of the complications which may be caused thereby. He places reliance on the following passages found in "Current Reviews in Obstetrics & Gynaecology — J.K. Russell — Early Teenage Pregnancy — Churchill Livingstone :

"In western advanced societies few mothers now die in childbirth and because of the sparsity of deaths it is difficult to assess the specific risk for selected groups of mothers. In England and Wales since 1952 confidential enquiries have been made on all maternal deaths and the results have been published at 3-yearly intervals in a series of report (Report on Confidential Enquiries) into Maternal Deaths in England and Wales, 1952-1975). In these reports there is some acknowledgment of the risk to the lives of very young mothers though the number of maternal deaths in the youngest age group is understandably small.

But it is accepted by the Regional Assessors for Maternal Deaths in England and Wales that the available evidence points to a higher than average risk of mortality in mothers aged 15 and younger.” (Page 24).

... ..

“Indeed the optimal age for reproduction would certainly include girls aged 17-19 and the risk of morbidity or mortality in this group is very slight indeed.” (Page 25)

... ..

“In summary the evidence points to an increased risk of mortality especially among less educated, poorly motivated youngsters and those aged 16 and under.” (Page 26).

... ..

“Again people tend to associate teenage pregnancy with poor standards of child-bearing high infant death rates and subsequent uncontrolled high fertility. In summary most advanced societies regard teenage pregnancy as being socially as well as medically unacceptable.” (Page 71).

However, in the Introduction at page 4, the author says:-

“Finally I have come to learn over the years that it is not possible to talk or write of teenage pregnancy in terms of that are applicable throughout the world. The social, educational, medical and nutritional consequence of early teenage pregnancy vary considerably and depend upon the community in which the girl lives.”

At page 19 it is said:-

“In summary, I have found that operations of pregnancy termination in girls aged 13 to 16 years compared with those in the age group 17 to 19 carry greater risks of immediate medical complications attributable to the immature state of the cervix in the younger group.”

14. Teenage pregnancies are generally discouraged in view of the fact that in many a girl the cervix could not have grown fully and properly and deliveries may have to be caused by caesarean operations. But, even to-day, normal deliveries are recorded in the case of several teenage girls. As per the Medical History, the youngest mother in the world delivered a child in Lema, Peru, in May 1939 and her age at that time was 5 years 8 months. But, once a pregnancy has come into existence, the question is

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whether the same should be terminated because the pregnant girl is in her teens. N. Jeffcoate in "Principles of Gynaecology", 5th Edition, says that "Termination of pregnancy, therapeutic or legal, is always potentially dangerous". (Page 630). The learned author has listed out the dangers and complications which follow the termination of pregnancies on women who are generally fit physically, such as mortality and morbidity. At page 623 in the same book it is said:-

"The World Medical Association laid down some principles in the Declaration of Geneva and stated that abortion should only be performed as a therapeutic measure and that doctors should be advised always to act on the principle "I will maintain the utmost respect for human life from the time of conception."

15. In a Book entitled "Abortion —Questions & Answers" by Dr. & Mrs. J.C. Willke, 1985 Edition, the questions and answers are as follows :- (vide pages 108 to 111):

What About Teenage Abortions? Are They Different? After years of legalized abortion experience, a pro-abortion professor of OB/GYN at the University of Newcastle-on-Tyne reported on his follow-up, ranging from two to twelve years, of 50 teenage mothers who had been aborted by him. He noted that "the cervix of the young teenager, pregnant for the first time, is invariably small and tightly closed and especially liable to damage on dilatation". He reported on the "rather dismal" results of their 53 subsequent pregnancies:

Six had another induced abortion. Nineteen had spontaneous miscarriages. One delivered a stillborn baby at 6 months. Six babies died between birth and 2 years. Twenty-one babies survived.

J. Russel, "Sexual Activity and Its consequences in the Teenager," Clinics in OB, GYN, Vol.1, No.3, Dec. 1974, pp.683-698.

"Physical and emotional damage from abortion is greater in a young girl. Adolescent abortion candidates differ from their sexually mature counterparts, and these differences contribute to high morbidity." They have immature cervixes and "run the risk of a difficult, potentially traumatic dilatation." The use of laminaria in no way mitigates our present concern over the problems of abortion."

C. Cowell, Problems of Adolescent Abortion, Oriho Panel 14, Toronto General Hospital.

"The younger the patient, the greater the gestation (age of the unborn), the higher the complicate rate....Some of the most catastrophic complication occur in teenagers."

“Eighty-seven per cent (87%) of 436 obstetrician and gynecologists has to hospitalize at least one patient this year due to complications of legal abortions.”

M. Bulfin, M.D. OB-GYN Observer, Oct.-Nov. 1975.

But Pregnancy For Teenagers Has Higher Risks Too! This is incorrect. Earlier opinion had taught this. In recent years, however, it has been shown that teenage mothers have no more risks during pregnancy and labour, and their babies fare just as well as their more mature sister babies, if they have had good prenatal care.

“We have found that teenage mothers, given proper care, have the least complications in childbirth. The younger the mother, the better the birth. (If there are more problems,) society makes it so, not biology.”

B. Sutton-Smith, Jour. of Youth and Adolescence, as reported in the *New York*

Times, April 24, 1979.

Pregnancy in a very young teenager (12 to 16 years) does not appear to be inherently high risk.

J. Dwyer, Roosevelt Hospital, New York Family Practice News, May 1, 1978.

Dr. Jerome Johnson of John Hopkins University, and Dr. Felix Heald, Professor of Pediatrics, University of Maryland, agree that the fact that teenage mothers often have low birth weight babies is not due to a pregnant teen-ager’s biologic destiny.” They pointed to the fact that the cause for this almost invariably is due to the lack of adequate parental care. With optimal care, the outcome of an adolescent pregnancy can be as successful as the outcome of a non-adolescent pregnancy.”

Family Practice News, Dec. 15, 1975.

“The overall incidence of pregnancy complications among adolescents 16 years and younger is similar to that period for older women.’

E. Hopkins, “Pregnancy Complications Not Higher in Teens, OB GYN News, Vol.15, No. 10, May 1980.

“Obstetric and neonatal risks for teenagers over 15 are no greater than for women in their twenties provided they receive adequate care.”

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There is evidence that in 15 to 17 years old women, pregnancy may even be healthier than in older ages.

E. McAnarney, Pregnancy May be Safer.” OB-GYN News, Jan. 1978.

Pediatrics, Vol.6 No. 2, Feb. 1978, pp. 199-205.

The question relating to abortion to save mother’s life and the answer to the same are as follows:-

“what about Abortion to Save the Mother’s Life? : These are almost non-existent in today’s sophisticated medical climate. Such an abortion would be a true “therapeutic” abortion.

If the mother’s actual life were threatened, a conscientious doctor would try to save both. In the rare, rare case where such a decision is really needed, the problem would be that of balancing one human life against another (note that all other reasons given for abortion are reasons less than human life itself).

In such a case, it would be proper to give to the local family and local medical and ethical authorities the right to make whatever decision they believed right. An ethical physician would certainly try to save both, but might have to make a choice. The proposed Human Life Amendments allow this exception.” (pp.87 and 88).

16. It is also the opinion of the Medical Experts that termination of first pregnancy would result in sterility and the woman concerned may not have any pregnancy thereafter. Dr. T.R. Bedi, M.D., while answering readers questions regarding health problems in the “Woman’s era”, has opined that a medical termination of pregnancy may result in tubal infection, adhesions, etc., to cause secondary sterility. (Vide “Woman’s Era”, Vol.18, Issue No. 426, September (First) 1991, page 18). No doubt, teenage pregnancies are discouraged by medical world in view of the complications which may follow. But, abortions of such pregnancies are frowned at by medical experts as the consequences are more harmful. The prevalent opinion is that the complications which may arise due to teenage pregnancies can be avoided by proper ante-natal care, such as examining the pregnant girl at least once in a week in the third trimester.

THE RELIGIOUS VIEWPOINT

A. CHRISTIANITY

17. The Catholic Church has always denounced and opposed abortion. It has consistently defended the right of the unborn to live. The belief is that human life comes

from God at the time of conception and that man is only the custodian of his life rather than the owner and abortion represents an act that denies the sanctity of life on the assumption that the woman is the owner of her life and that of her unborn child. In the book "Christian Marriage" by Jean de Fabregues, at pages 65 and 66 it is said:-

"Since it is in and by the procreation of children that the marriage union achieves its ends and its perfect fulfilment so it is here also that the laws laid down by the Church for Christian marriage find their full meaning.

Speaking to midwives Pius XII recalled that when a new life is being formed the whole of the order willed by the Creator is involved:

"In this case it is not a question of purely physical, or biological laws, laws obeyed of necessity by agents deprived of reason, or by blind forces, but of laws whose execution and effects are dependent on the free and willing co-operation of man. This order, established by the supreme intelligence, is directed to the end willed by its Creator. It includes both the exterior action of man and the interior assent of his free-will. Nature puts at man's disposal the entire chain of events that leads to the making of a new human life. It is man's part to set free this living force, that of nature to develop it and bring it to its appointed end. When man has done his share and set in motion the wonderful unfolding of life, his duty is one of religious respect for this process, a duty which forbids him to stop the work of nature or prevent its natural development. (October 29th, 1951.)

We can see now what follows from this respect, in and through nature, for the divine will and design which are expressed in it: consent to the marriage union in all its fullness and with all the consequences that follow the central act by which it is expressed, that is the act of love in all its creative dignity, and the joyful acceptance of the child which is to be born.

"Every human being, even the child in his mother's womb, holds his title to life directly from God, and not from his parents or from any human society or authority. Therefore no man, no indication medical, eugenic, social, economic or normal can show or give a valid legal right to dispose of an innocent human life directly and deliberately, that is to dispose of it with a view to its destruction, whether this is regarded as the end, or as the means to an end which may not in itself be in any way unlawful."

These last lines are very important, for, they cover the case where the sacrifice of the unborn child may preserve the mother's health.

"The Church has never at any time taught that the life of the child was to be

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preferred to that of the mother... For the one as for the other there can be only one consideration; all efforts should be made to save the lives of both.” Pius XII also said: “Who could judge with any certainty which of these two lives is really the most precious?” (November 26th, 1951.)

“If in order to save the life of the mother-to-be, quite apart from her pregnant condition, surgical intervention or other therapeutical application is urgently required, which may, as an accidental consequence, bring about the death of the foetus, such an act could not be called a direct attempt on the innocent life.” (Pius XII-Address to the Associations of Large Families, November 26th, 1951.)”

B. ISLAM

18. In Syed Abdul A’la Maududi’s “Birth Control”, the following passage is found at pages 82 and 83:-

“The Holy Qur’an lays down a fundamental principle that effecting change in the scheme of God (Khalq-Allah) is a fiendish act. (Al-Qur-an, 4: 119.) Changing ‘God’s scheme and creation signifies misuse of a thing, its utilisation for a purpose other than the one for which it was intended, or to use it in a manner that its real purpose is defeated. In the light of this fundamental principle let us see as to what is “God’s scheme” in the marital relationship of man and woman, i.e., what is the real natural purpose of this relationship and whether birth control changes it in the other direction. The Qur’an is not silent on this point. It has, on the one hand, forbidden sexual relations outside marriage, and on the other, laid bare the objective which matrimonial relationship between men and women are to serve. These objectives are (a) procreation and (b) fostering of love and affection and promoting culture and civilization. The Qur’an says:

“Your wives are a tilth for you, so go into your tilth as you like and do good beforehand for yourselves.”

This verse expounds the first objectives of marriage. The other one is referred to in the following verse:

“And one of His signs is that he created mates for you from yourselves that you may find consolation in them and He ordained between you love and compassion.”

In the first verse by describing woman as a tilth an important biological fact has been pointed out. Biologically man is tiller and woman a tilth and the foremost purpose of the inter-relationship between the two is the procreation of human race. This is an objective which is common to all human beings, animals, and the world of vegetation. The tiller of the soil cultivates the land not in vain, but

for the produce. Take away this purpose, and the entire pursuit becomes meaningless. Through the parable of the tilth this important fact has been stressed by the Qur'an."

At pages 99 and 100, it is said:-

"Medical opinion is almost unanimous in asserting that abortion is highly dangerous for the general health of a woman and her nervous system. We will quote here Dr. Fredrick J. Taussig who has so succinctly summed up the expert medical opinion on the subject:

"When pregnancy is prematurely interrupted by what we term abortion, the human race suffers loss and damage in 3 ways:

First an infinite number of potential human beings are destroyed before their birth.

Secondly, abortion carries with it a considerable death rate among expectant mothers.

And finally, abortion leaves in its wake a high incidence of pathologic conditions some of which interfere with the further possibility of reproduction."

19. According to Dr. Yusuf al-Quaradawi "While Islam permits preventing pregnancy for valid reasons, it does not allow doing violence to the pregnancy once it occurs". (See page 201 of his Book "HALAL AND HARAM".) According to him, "Muslim jurists agree unanimously that after the foetus is completely formed and has been given a soul, aborting it is haram." (See page 201 of the same book.)

20. In "Do's and Do not's in Islam" by Abdur Rehman Shad, it is said (at page 89):-

"Unlike birth control abortion means the elimination of an already fertilized living human entity. A deliberate abortion with no justifiable grounds is regarded as a murderous crime. Only when the continuation of pregnancy constitutes a real threat to the life of the expectant mother, the abortion is permitted. So, instead of losing two lives, we should have the full and already grown-up life of the mother."

C. HINDUISM

21. Abortion or killing of foetus has always been considered to be a sin and prohibited as such The person who causes abortion is described as "Bhrunaha Hkzw.kgk" and the killing of foetus is described as Bhrunahatih Hkzw.kgfr% References in Atharvana Vedha show that abortion was known in the Vedic age. Abortion was always consid-

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ered to be a sin for which, however, expiation ceremonies were prescribed in Taittiryapanishad and also in Arunam. Manu in his Dharma Sastra said that a killer of a priest or destroyer of an embryo casts his guilt on the willing eater of his provisions.(Chapter VIII Verse 317) Kautilya's Arthashastra provides for the highest punishment for causing abortion by physical assault. It refers to Yajnavalkya and Manu as well as Vishnupurana. Lesser punishments are also provided for inducing miscarriage by drugs.

ENGLISH LAW

22. England's first criminal abortion statute, Lord Ellenborough's Act was passed in 1803. It made abortion of a quick foetus a capital crime; but it provided lesser penalties for the felony of abortion before quickening. A notable development was made in the case of Rex (SIC) Bourne (1938-3-All E.R.615), which held that was for the prosecution to prove beyond a reasonable doubt that the abortion was not performed in good faith for the purpose only a preserving the life of the mother. The surgeon was not to wait until the patient was in peril of immediate death, but it was his duty to perform the operation if, on reasonable grounds and with adequate knowledge, he was of opinion that the probable consequence of the continuance of the pregnancy would be to make the patient a physical and mental wrack. The British Parliament enacted the Abortion Act of 1967, which provided (a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman or of injury to her physical or mental health or of any existing children of her family, greater than if the pregnancy was terminated, or, (b) there is a substantial risk that if the child was born it would suffer from such physical or mental abnormalities as to be seriously handicapped. The Act also provided that in making this determination, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

23. Rt. Hon'ble Lord Denning in his book "The Closing Chapter" says thus:-

"The unborn child

.....it is not only the Christian doctrine but it is the doctrine of our law and our common law that the unborn child has a life of its own and a right of its own which is recognised by the law at least from the time of quickening, and the common law has always recognised that. Our great jurist, Sir William Blackstone, put it in this way:

Life is the immediate gift of God, a right inherent by nature in every individual, and it begins in contemplation, at law as soon as the infant is able to stir in its mother's womb.

Such a child was protected by the law almost to the same extent as a new-born baby. If anyone terminated the pregnancy and thus destroyed the life of the

child he or she was guilty of a felony punishable by life imprisonment.

“In 1939 in Bourne’s case that was modified to this extent by the common law. It was a defence if the termination was necessary to save the life of the mother. If the probable consequences of not terminating was to make the mother a physical or mental wreck then it was justifiable, but that was the only circumstance in which in the common law it was justifiable to terminate the pregnancy. So the common law laid great stress on the existence in the unborn child of a fire of its own and a right of its own.

Responsibility on the medical profession.

Now for the 1967 Act. As I read it, it does not alter that fundamental principle, but what it does do is to define the circumstances in which pregnancy can be terminated...

Obtainable on demand

(The Act) has been interpreted by some medical practitioners so loosely that abortion has become virtually obtainable on demand: Whenever a woman has an unwanted pregnancy there are doctors who will say that a risk is involved to her mental health....It is because there is not enough guidance given to the medical profession.”

24. In Halsbury’s Laws of England Fourth Edition, Vol.30, paragraph 44 at page 37 deals with Medical termination of pregnancy’. It reads thus:

“No offence is committed under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith, that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family greater than if the pregnancy were terminated, or that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. Any treatment for the termination of pregnancy must generally be carried out in a hospital vested in the Secretary of State or in a place for the time being approved by him. No person is under any duty, whether by contract or by any statutory or other legal requirement, to participate in any authorised treatment for the termination of pregnancy to which he has a conscientious objection, but this provision does not affect any duty to participate in treatment which is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman.”

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25. In Volume 11 of Halsbury's Laws of England' Fourth Edition, paragraph 1176 at page 628 reads as follows:-

“1176. Child destruction. Any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother is guilty of the offence of child destruction, if it is proved that the act was not done in good faith for the purpose only of preserving the life of the mother. The punishment for this offence is imprisonment for life or for any shorter term.”

26. In *Paton v. Trustees of BPAS and Anr.* (1978 2 All.ER.987), the Queen's Bench Division held that the husband of the pregnant woman had no right, enforceable at law or in equity, to stop his wife having, or a registered medical practitioner performing a legal abortion. His prayer for injunction was denied.

27. In the book “Current Reviews in Obstetrics & Gynaecology - J.K. Russell - Early Teenage Pregnancy - Churchill Livingstone”, in the Chapter “Therapeutic Abortion and the Law” at pages 42 and 43, the following passage is found: -

“ When the girl is under the age of 16 the legal considerations are rather different and in some ways sufficiently unclear for there to be confusion in some cases in the minds of the girls, their parents and doctors. For example, it is widely assumed that a doctor is acting lawfully if he terminates a pregnancy in such a young girl with the parents approval. But this assumption may be wrong. There is a widespread belief that parents can decide about whether or not their young daughter's pregnancy should continue or be aborted if she is aged under 16. This too may be a wrong assumption (Joint Working Party on Pregnant School girls and School girl Mothers 1979.) A few years ago a young Sheffield girl was made a Ward of Court by Justice Heilbron in order to prevent her being sterilised in spite of the fact that the mother wished this to be done and a senior and experienced doctor had agreed that it ought to be done. It would seem from this case that the consent of a parent is not, in the eyes of the law, seen to be wholly acceptable. It is conceivable that this same ruling might hold in the case of a young girl who is pregnant and where the parents press either for the pregnancy to continue or to be terminated. There would appear to be no reason why the Law should not be capable of acting in the same way and making the child a Ward of Court thereby assuming responsibility about what should happen to the pregnancy. Next the girl may not wish to have the pregnancy terminated and if she says so openly and persistently it would be unwise for the doctor to proceed with the abortion in that his action might be judged to be against the spirit of the 1967 Abortion Act. It would be difficult for the doctor under these circumstances to argue that pregnancy termination was in the best interests of the girl's mental or physical health. The Law on this issue has not, so far, been tested.”

28. In *L. v. K.* (1985) 1 All ER 961, the Family Division at Liverpool held that the rule of the criminal law that there is an irrebuttable presumption that a boy under the age of 14 is not able to have sexual intercourse is not a rule that applies in the civil law and accordingly, paternity cases relating to boys under 14 should be decided on a commonsense basis on the facts in the particular case and without any preconceived notions or presumptions. It was said that in such cases, if a mother gives evidence which is corroborated that sexual intercourse took place at the relevant time, it will be for the putative father himself to show, if it be the case, that he was not fertile and that he was incapable of fathering the child. The case arose out of an affiliation proceeding taken out by a young woman who gave birth to a child. She alleged that L, a 14 year old boy, was the father of the child. The Magistrates who heard the evidence, held that L was the father. L appealed by way of a case stated in respect of the decision of the Magistrates and the High Court dismissed the appeal holding that on the evidence, no other conclusion was possible.

29. In *Gillick v. West Norfolk and Wisbech Area Health Authority and Anr.* (1985) 3 All ER 402, the House of Lords held that a Doctor can give advice to a girl below 16 in the matter of abortion without the knowledge and consent of her parents. Lord Fraser of Tullybelton said:-

“The statutory provisions to which I have referred do not differentiate so far as the capacity of a minor under 16 is concerned between contraceptive advice and treatment and other forms of medical advice and treatment. It would, therefore, appear that, if the inference which Mrs. Gillick’s advisers seek to draw from the provisions is justified, a minor under the age of 16 has no capacity to authorise any kind of medical advice or treatment or examination of his own body. That seems to me so surprising that I cannot accept it in the absence of clear provisions to that effect. It seems to me verging on the absurd to suggest that a girl or a boy aged 15 could not effectively consent, for example, to have a medical examination of some trivial injury to his body or even to have a broken arm set. Of course, the consent of the parents should normally be asked, but they may not be immediately available. Provided the patient, whether a boy or a girl, is capable of understanding what is proposed, and of expressing his or her own wishes, I see no good reason for holding that he or she lacks the capacity to express them validly and effectively and to authorise the medical man to make the examination or give the treatment which he advises. After all, a minor under the age of 16 can, within certain limits, enter into a contract. He or she can also sue and be sued, and can give evidence on oath. Moreover, a girl under 16 can give sufficiently effective consent to sexual intercourse to lead to the legal result that the man involved does not commit the crime of rape: see *R v. Howard* (1965 3 All ER 684 at 685 = 1966 1 WLR 13 at 15), when Lord Parker CJ said:

.....in the case of a girl under sixteen, the prosecution, in order to prove rape, must prove either that she physically resisted, or if she did not, that her under-

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standing and knowledge were such that she was not in a position to decide whether to consent or resist.....there are many girls under sixteen who know full well what it is all about and can properly consent.

Accordingly, I am not disposed to hold now, for the first time, that a girl aged less than 16 lacks the power to give valid consent to contraceptive advice or treatment, merely on account of her age.”

30. In *C and Anr. v. S and Ors.* (1987 1 All E.R.1230), the first defendant was an unmarried woman, who was between 18 and 21 weeks pregnant. She wanted to terminate her pregnancy. Two medical practitioners certified in accordance with the provisions of Abortion Act. The man who caused the pregnancy sought on his own behalf and as next friend of the child en ventre sa mere an injunction restraining the first defendant from undergoing the termination and restraining the physicians and authorities from performing the operation. He conceded that as father of the child he had no locus standi to make an application but contended that he had a sufficient personal interest to do so because the proposed termination of the pregnancy would be a crime concerning the life of his child. He further contended that the unborn child was a proper party to the proceedings since it was the subject of the threatened crime. The Judge refused to grant an injunction holding that a foetus had no right to be a party and the father had failed to establish that an offence under the Infant Life (Preservation) Act 1929 would be committed if the termination was carried out. The plaintiff filed an appeal. The appeal was dismissed and it was held that though the foetus of a gestational age of 18 to 21 weeks could be said to demonstrate real and discernible signs of life, the medical evidence was that such a foetus would be incapable of breathing either naturally or with the aid of a ventilator. Hence, the termination of the pregnancy of that length would not constitute an offence under the Act. Heilbron J. said that a foetus had no right of action until it was subsequently born alive and while it was unborn, it cannot be a party to an action.

31. In *Re B (a minor) (Wardship Sterilisation)* (1987 2 All E.R.206), the House of Lords held that the Court had jurisdiction to authorise the operation of sterilisation, if it was in the welfare and best interests of the minor. It was held that the sterilisation operation of a child under 18 could be carried out only with the consent of Court exercising wardship jurisdiction. A similar ruling was given in *F. v. West Berkshire Health Authority and Anr. (Mental Healthy Act Commission intervening)* (1989 2 All ER 545). That was a case of a mentally handicapped person and the House of Lords held that sterilisation could be carried out only with the consent of the Court.

32. In view of the aforesaid two judgments of the House of Lords, a Practice Note was issued by the Official Solicitor, England, in May 1993. (See (1993) 3 All ER 222). The Practice Note related to the procedure to be followed in applications for the sanction of the High Court in cases where the sterilisation of a minor or mentally incompetent adult is sought. The note replaced the Practice Notes of 1989 and 1990. Paragraph 7

of the Note enjoins the Official Solicitor to act as either an independent and disinterested guardian representing the interests of the patient, or as an ex-officio defendant. He is required to meet and interview the patient in private in all cases where the latter is able to express any views (however limited) about the legal proceedings, the prospect of sterilisation, parenthood, other means of contraception or other relevant matters.

33. Thus, in the English Law, the opinion of the parents or natural guardian in the matter of abortion is irrelevant and if the minor girl is capable of understanding the implications, her opinion is quite relevant and important.

AMERICAN LAW

34. In the United States, the law in all but a few States was the pre-existing English Common Law. The first American abortion legislation was a Connecticut statute of the year 1821. By 1900, all American States had laws restricting abortion. Post quickening abortions were dealt with more severely than abortions before quickening. Even an attempt to cause abortion was penalised. Between 1962 and 1973, legislations were introduced in some States liberalising abortion. In 1973, the judiciary brought about a sweeping change. The Supreme Court held in *Roe v. Wade* (35 L.Ed. 2d. p.147) that the right of privacy of a woman is protected by the Due Process Clause of the Fourteenth Amendment and that right enabled her to decide whether or not to terminate a pregnancy. The subject matter of challenge in that case was a Texas statute on abortion. The Court held by a majority of 7-2 that for the stage prior to approximately the end of the first trimester the State has no right to interfere with the right of the woman and her physicians. For the next stage, the State in promoting the interest in the health of the mother may regulate the abortion procedure in ways that are reasonably related to maternal health. For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life, may regulate or prescribe abortion except where it is necessary for the preservation of the life or health of the mother.

35 In *Planned Parenthood of Central Missouri v. John C. Danforth*, Attorney General of the State of Missouri (49 L.Ed.2d 788), the Supreme Court dealt with the rights of an unmarried woman under the age of 18 years. The Court held that the right of privacy gave an individual, married or single, the right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. It was further held that a provision in a State Abortion Statute setting forth conditions and limitations for abortions which requires the written consent of a parent or person in loco parentis of an unmarried woman under the age of 18 years who seeks an abortion during the first 12 weeks of pregnancy, unless the abortion is certified by a physician as necessary for the preservation of the mother's life, is unconstitutional and that the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over

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the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent. The Court said that Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority; minors, as well as adults, are protected by the Constitution and possess constitutional rights.

36. In *Maier v. Roe* (53 L.Ed.2d 484), the Supreme Court held that a woman has at least an equal right to choose to carry her foetus to term as to choose to abort it.

37. In the book "Abortion, Medicine, and the Law" Edited by J. Douglas Butler and David E. Walbert, in the Chapter "Minors' Rights to Confidential Abortions : The Evolving Legal Scene", it is said at page 137:-

"The majority opinions of the Supreme Court recognize:

1. "Mature" minors, who are capable of understanding the consequences of pregnancy and abortion, have a constitutional right to obtain confidential abortion services without parental involvement.

2. "Immature" minors have a constitutional right to abortion services if this would be in their best interests, and a right to abortion without parental involvement if such involvement would be detrimental to their best interests:

3. In order to protect "immature" minors from improvident decision making, states may require parental notification or consent prior to a minor's abortion, but such laws covering all minors must contain an administrative or judicial bypass mechanism whereby mature or immature "best interests" minors can be exempted from the mandated parental involvement.

4. When State laws that interfere with minors' rights to abortion are challenged, courts will examine them under a "significant state interests" test as opposed to the "compelling state interests" test required for laws that interfere with the abortion rights of adult women."

At page 139, reference is made to the decision in *Denforth's case* (49 L.Ed.2d 788) referred to above. The case in *Bellotti v. Baird* (428 U.S.132 (1976)) is also referred to in the same page. In that case, the Supreme Court dealt with a Massachusetts statute requiring parental consent, providing that if one or both parents refused their consent, the minor could try to obtain consent from a State court judge. The Supreme Court abstained from deciding whether the provision was constitutional and sent it back for an interpretation by the Massachusetts Supreme Court. Subsequently, it was interpreted by the Massachusetts State Court that the statute required every minor to go initially to her parents. When the matter came again before the Supreme Court, by the majority of 8-1 decision, the Court ruled that the statute as interpreted by the

State Court was unconstitutional. The ruling established that minor's constitutional right to choose abortion cannot be arbitrarily abrogated through mandatory parental involvement statutes. It was held (1) that mature minors have a right to make their own decisions about abortion without parental involvement; (2) that mature and immature minors must, as a matter of constitutional law, have the opportunity, through an alternative judicial or administrative procedure, to obtain an abortion without parental consent or consultation; and (3) that with respect to immature minors, the sole test must be their own best interests. At page 140 it is said that "a pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is "immature" and not able to make this decision independently, the desired abortion would be in her best interests". At page 142, the following passage is found:

"Therefore, as of 1983, the Supreme Court has recognized that minors have a fundamental constitutional right to make and effectuate the decision to choose abortion. Although the State may legislate to interject parents in order to protect immature minors and perhaps for other "family integrity" reasons, any such consent or notification statute must contain a mechanism whereby mature or best interests minors are exempted from parental involvement."

At page 147, Note 15 reads thus:-

"This decision provides constitutional protection not only to those minors whose parents would withhold consent, but also to those minors who want to exercise their "fundamental right to give birth," but whose parents try to force abortions. See, *Matter of Mary P.*, 444 N.Y.S. 2d 545, 547 (N.Y. Fam. Ct. 1981)."

38. In *Ohio v. Akron for Reproductive Health* (GJ 1991 page 15), the Court reiterated the principles laid down in *Bellotti v. Baird* (443 U.S.622 (1979)).

39. There is a proposal to amend the Constitution of the United States. If the amendment is carried out, abortion will not be as liberal as at present, as several restrictions will be imposed. It is represented that the Supreme Court of United States, is likely to reverse the view taken in *Roe v. Wade* (410 U.S.113 (1973 = 35 L.Ed.2d.147) and that a slight shift in the stand is perceptible in *William L. Webster, Attorney General of the State of Missouri Et al v. Reproductive Health Services Et al* (492 U.S.490 (1989)). It is not necessary for us to well further on that matter.

INDIAN LAW

40. In India causing abortion has been an offence for ever. The Indian Penal Code uses the expression miscarriage and deals with it in Section 312 to 318. Section 312 reads:

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“Whoever voluntarily causes a woman with child to miscarry, shall, if such marriage is not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation A woman who causes herself to miscarry, is within the meaning of this section.”

Thus, the only exception is that caused in good faith for the purpose of saving the life of the woman. Under the section, the consent of the pregnant woman is immaterial as she is also liable to be punished. In August 1971, Parliament passed the Act with a design to create more exceptions to the strict provisions of the Penal Code. It is said that the original suggestion for the enactment came from a family planning organisation and most of the work of drafting and pushing the legislation was done by the family planning officials. It is also said that unwanted pregnancies were on the increase and the Legislature wanted to widen the protection to medical practitioners and passed the Act. Whatever might have been the motive for the legislation, we are concerned only with the provisions thereof. According to the preamble, the Act is to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. Section 2(a) defines guardian as a person having the care of the person of a minor or lunatic. Section 2(c) defines a ‘minor’ as a person who under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority. The expression ‘registered medical practitioner’ is defined in Section 2(d) of the Act. Section 3 is the pivotal section. It reads thus:-

(1) Notwithstanding anything contained in the Indian Penal Code, a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of Sub-section (4), a pregnancy may be terminated by a registered medical practitioner,

(a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation I. Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy, shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation II. Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in Sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in Clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman."

Section 4 prescribes the place where pregnancy may be terminated. Section 5 excludes the applicability of Section 4 and a part of Section 3 to the termination of pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman. Section 6 empowers the Central Government to make rules. Section 7 empowers the State Government to make regulations. Section 8 bars the institution of a suit or other legal proceeding against any registered medical practitioner for any damage caused or likely to be caused by anything which is done in good faith or intended to be done under the Act.

41. Rules were framed originally in 1972. They were superseded by a fresh set of rules framed in 1975. The State Government has framed regulations in January 1976. It is not necessary for the purpose of this case to consider the rules and regulations.

42. The provisions of the Act do not confer or recognise any right on any person to cause an abortion or termination of pregnancy. Even the pregnant woman cannot terminate the pregnancy except under the circumstance set out in the in the Act. Even

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during the first trimester, the woman cannot abort at her will and pleasure. There is no question of abortion 'on demand'. Section 3 is only an enabling provision to save the registered medical practitioner from the purview of the Indian Penal Code. Termination of pregnancy under the provisions of the Act is not the rule and it is only an exception. The normal rule that the pregnancy should continue to its term shall prevail unless a registered medical practitioner in the case of a pregnancy not exceeding twelve weeks or two registered medical practitioners in the case of a pregnancy exceeding 12 weeks but less than twenty weeks, opine in good faith that the continuance of the pregnancy would involve (i) a risk to the life of the pregnant woman, or (ii) grave injury to her physical or mental health, or (iii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. Under Section 3(2), there can be no termination of pregnancy if the length of the pregnancy had exceeded twenty weeks. The only exception thereto is found in Section 5, under which the pregnancy can be terminated immediately to save the life of the pregnant woman at any stage of the pregnancy, if the opinion of the medical practitioner is formed in good faith. Under explanation I to Section 3(2), if the pregnancy is alleged to have been caused by rape, the mental anguish resulting therefrom shall be presumed to constitute a grave injury to the mental health of the pregnant woman. The Explanation only provides for a presumption which can be rebutted in the facts and circumstances of the case. It is not necessary for us to refer to Explanation II in the present case. Sub-section (4)(a) of Section 3 provides that if the pregnant woman has not attained the age of 18, or if she is a lunatic, the pregnancy shall not be terminated except with the consent of her guardian in writing. Sub-section (4)(b) provides that no-pregnancy shall be terminated except with the consent of the pregnant woman save as otherwise provided in Clause (a).

43. Learned counsel for the petitioner places considerable reliance on the provisions of Sub-section (4)(a) and (4)(b) of Section 3. It is contended by him that Sub-section (4)(p) is subject to the provisions of Sub-section (4)(a) and in the case of a minor, it is only the guardian who can decide whether the pregnancy should be terminated or not. According to him, the application of Sub-section 4 (b) is excluded by its own language if the pregnant woman has not attained the age of eighteen. We are unable to accept this contention. The entire scheme of the Act shows that the provisions thereof can be invoked only by the pregnant woman. If she happens to be a minor, the registered medical practitioner, who is approached for terminating the pregnancy must take care to get the consent of the guardian of the minor in writing. Sub-section (4)(a) can never be understood as dispensing with the consent of the pregnant woman if she is below 18 years of age. The provision is only intended to help the registered medical practitioner to take into account all the relevant facts and circumstances as set out in Section 3 so as to decide whether the continuance of the pregnancy will involve any of the risks mentioned in the Section. For example, Sub-section (3) requires the medical practitioner to take into account the pregnant woman's actual or reasonably foreseeable environment while determining the question whether the continuance of the pregnancy would involve such risk as is mentioned in Sub-section (2). In the case of

a minor, it is, therefore, necessary for the medical practitioner in order to ascertain the relevant facts under Sub-section (3) to notify the guardian of the minor and get his written consent.

44. Learned counsel for the petitioner submits that the pregnancy of the petitioner's daughter has been caused by rape as defined by the Indian Penal Code and the requirements of Sub-section (2) of Section 3 of the Act are fulfilled. According to him, the continuance of the pregnancy would involve grave injury to the physical or mental health of his daughter. There is no substance in this contention. As pointed out already, Explanation I provides only for a presumption. No doubt the Court is bound to presume, as the expression used is "shall be presumed". But, such presumption can be rebutted on the facts. In the present case, the question whether the pregnancy is caused by rape cannot be decided here, as it may arise before the Metropolitan Magistrate. But, even if it is assumed that the pregnancy is caused by rape, there is no question of anguish caused by such pregnancy in the pregnant woman. We have already pointed out that Sasikala is very keen on continuing the pregnancy and bearing the child. Hence, the continuance of the pregnancy will not cause any injury to her mental health.

45. Learned counsel for the petitioner invites our attention to the judgment of a Division Bench of this Court in *Komalavalli v. C.R. Nair and Ors.* (1983 L.W.(CrI.)190). The petitioner therein was a woman having two children. She was gang-raped by three or four persons and became pregnant. She was detained in a Women's Welfare Institution. She applied under Article 226 of the Constitution of India for a direction to the government Maternity Hospital to terminate her pregnancy. The Court was satisfied that she was impregnated against her will and unless the pregnancy was terminated, she will suffer traumatic and psychological shock. Hence, the Court granted the petition subject to the condition that qualified gynaecologists examine her and find that pregnancy can be terminated without detriment to her life and safety. The petitioner's husband was also a party to the proceeding. He was present in Court. The Bench has recorded that he stated that he will make the necessary arrangements for the future custody of the petitioner. That ruling will have no bearing in this case. Counsel on both sides have not been able to place before us a ruling of any Court in India which has a relevance to this case.

46. In *Sushil Kumar Verma v. Usha* (AIR 1987 Delhi 86), a single Judge of the Delhi High Court held that the wife's aborting foetus in her first pregnancy without the consent of the husband would amount to cruelty within the meaning of Section 13(1)(ia) of the Hindu Marriage Act (25 of 1955). Of course, the ruling has no relevance; but that is a case in which the Court took the view that the wife is not entitled to terminate her pregnancy without the consent of her husband. It is not necessary for us in this case to discuss the correctness of the view taken therein.

47. The other reasons adduced by the petitioner in support of his prayer that the first

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respondent is a bad character and if his daughter delivered a child for him, it may lead to various problems, have no relevance. Even if the petitioner is entitled to pray for termination of pregnancy, the same can be ordered only if the continuance of the pregnancy would involve the risks mentioned in Sub-section (2) of the Section 3 of the Act. In the present case, the petitioner has not made out any ground for granting the prayer. We are also of the opinion that if termination of pregnancy is ordered against the will of Sasikala, it will undoubtedly affect her mental health and there is likelihood of her physical health also being affected thereby.

48. The learned Additional Public Prosecutor rightly points out that the Constitution of India does not make any distinction between a major and a minor in the matter of fundamental rights. According to him, Article 21 of the Constitution of India is wide enough to include the right of the girl Sasikala to continue her pregnancy and have a child. In Durga Das Basu's "Shorter Constitution of India", 10th Edition, the following passage is found at page 108:-

"Are there any unenumerated Fundamental Rights under the Constitution of India? A view is recently gaining ground that even though a right is not specifically mentioned in Article 19(1), it may still be regarded as a fundamental right if it can be regarded as 'an integral part' of any of the fundamental rights specifically mentioned in Article 19(1) as distinguished from the ordinary incidents of a named right.

Consonant with this view, it has been held that the following unenumerated rights can be enforced under Article 19 even though not mentioned therein:

- (a) Right to travel, which is necessary for exercising one's fundamental rights of trade or business under Article 19(1)(g).
- (b) Right to privacy, as an integral part of the freedom of movement under Article 19(1)(d).
- (c) Right to receive such higher or professional education as is necessary for carrying on a particular trade or profession, under Article 11(1)(g).
- (d) Right to human dignity.
- (e) Right of an accused to a speedy trial."

Again, at page 157 it is said:

"Right of privacy. 1. In Kharak Singh's case (AIR 1963 S.C.1295), domiciliary visit by the Police without the authority of a law, was held to be violative of Article 21, assuming that a right or privacy was a fundamental right derived

from the freedom of movement guaranteed by Article 19(1)(d), as well as personal liberty guaranteed by Article 21.

2. But such right would not be absolute but must be subject to reasonable restrictions so that a provision for domiciliary visits would not be unreasonable if confined to habitual criminals or persons having criminal antecedents. Nor would it be violated by posting Policemen immediately outside the jail.

3. Similarly, wire-tapping of voluntary conversation, for the purpose of investigation of crime, has been upheld, assuming that privacy of conversation would be derived from personal liberty' under Article 21."

49. The learned Additional Public Prosecutor referred to the judgment of the Supreme Court in *Govind v. State of Madhya Pradesh and Anr.* (AIR 1975 SC 1378). Dealing with the right of privacy, the Court said that it will necessarily have to go through a process of case-by-case development. The Court referred to the judgment of the Supreme Court of the United States in *Roe v. Henry Wade* (1973) 410 US 113).

50. Our attention is drawn to the judgment of the Supreme Court in *State of Maharashtra v. Madhukar Narayan Mardikar* (AIR 1991 SC 207). It is held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when one likes. So also it is not open to any and every person to violate her person as and when he wishes.

51. We are also of the view that the life of the child in the embryo cannot be taken away for the reasons urged by the petitioner.

52. Jane E.S. Fortin, Lecturer in Law, King's College, London has in his Article "Legal Protection for the Unborn child" at page 54 in the "The Modern Law Review", January 1988, (Vol.51, No. 1) said thus:-

"The fact that the unborn child is physically dependent on its mother prior to birth need not lead to the assumption that it has no relevant separate existence nor to the assumption that it has no moral or legal significance."

53. The Hindu law has always recognised the right of a son en ventre sa mere in the family property. In *Mayne's Hindu Law*, 12th Edition, page 688 (Para 443) it is said:-

"A son who was in his mother's womb at the time of partition but was born subsequent to it, is however entitled to reopen the partition and to receive a share equal to that of his brothers. For, a son in the womb is in point of law in existence. If the pregnancy is known at the time, the distribution should be deferred till its result is ascertained, or the distribution may take place, and a share equal to that of a son may be provisionally reserved so as to be allotted to the

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after-born son, if any. If the pregnancy is not known, and a son is afterwards born, a redistribution must take place of the estate as it then stands. However, if the son in the womb is not born alive he has no rights.”

54. Section 20 of the Hindu Succession Act, 1956, is in the following terms:-

“A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate.”

CONCLUSION

55. Taking the facts and circumstances of the case into account, we hold that the prayer of the petitioner cannot be granted. However, we consider it necessary to issue appropriate directions in the interests of the girl as regards the care and attention to be given to her during her pregnancy and for the post-delivery period. We will pass a separate order containing such directions. Hence, this petition is dismissed.

SRINIVASAN & ABDUL HADI, JJ.

ORDER -Srinivasan, J.

ORDER: Learned counsel for the petitioner prays for Special Leave to Appeal to the Supreme Court. No doubt, the case is the first of its kind but the provisions of the Medical Termination of Pregnancy Act are very clear. We do not find any justification to grant leave to appeal to the Supreme Court. We reject the request.

We have, today, passed a detailed order in H.C.M.P.No. 264 of 1993, dismissing the petition filed by the petitioner herein for a direction to Awai Home to produce his daughter before the Superintendent, Government Kasthuri Bhai Gandhi Hospital, Triplicane, Madras and direct the Hospital authorities to terminate her pregnancy. We have dismissed the petition for the reasons stated in that order. We have stated therein that we will pass a separate order, giving certain directions, which are necessary in the interests of the girl as regards care and attention to be given to her during her pregnancy and for the post-delivery period.

2. Now we have heard learned counsel on both sides as regards the appropriate directions to be issued. We are of the view that the following directions will meet the ends of justice and will be in the interests of the girl. Yesterday (1.12.1993) the 1st respondent has filed a counter-affidavit in H.C.M.P.No. 264 of 1993. While denying the averments contained in the affidavit of the petitioner the 1st respondent has stated that he is working as a driver and earning a salary of Rs. 1,500/- per men sem. It is also stated by him that his wife is in the third month of her pregnancy and there will be

no risk to the life of his wife, if the pregnancy (SIC) tinues. He has stated that he is ready and willing to take care of his wife and also undertook to (SIC) all her medical expenses. He has further stand that all sorts of medical expenses could (SIC) provided by him to his wife at his own expense Learned counsel for the petitioner has pointed out hat the 1st respondent has not disclosed the place where he is working or the particulars of his employer. It is stated by the 1st respondent that he is working in Indian Overseas Bank. The said statement is not found in the counter- affidavit filed by him, but his oral statement, for the present is accepted at its face value.

3. It is contended by learned counsel for the petitioner that the 1st respondent cannot be recognised by this Court as the husband of his daughter and he shall not be permitted either to meet the girl or to provide for the medical or other expenses of the girl. We are of the view that though we do not recognise the status of the 1st respondent as at present and the question has to be decided only in the proceedings before the Metropolitan Magistrate Court, the interests of justice will require a direction being given to the 1st respondent with regard to the above matters, particularly, when he has categorically admitted before us that he is responsible for causing pregnancy of the petitioner's daughter. The petitioner's daughter has also given evidence already that the 1st respondent is her husband and he has caused the pregnancy. No doubt, there is no explicit statement in the counter-affidavit filed by the 1st respondent that he caused the pregnancy. It is very clear from the affidavit that he is the person who caused the pregnancy inasmuch as he has stated repeatedly that the girl in question is his wife and that he undertake to meet all her medical and other expenses. In the circumstances, we give the following directions:

(1) The 1st respondent shall deposit a sum of Rs. 250/- (Rupees Two Hundred and Fifty) every month, in addition to the amount being paid by the petitioner on or before the 10th of the month, with the Avvai Home for the food and medical expenses of the girl in question, viz. Sasikala. The first of such deposits shall be made on or before 10th of December, 1993. We are recording here that the petitioner has stated before us, through his counsel, that he will continue to meet the expenses of his daughter for accommodating her in Avvai Home as at present. It is stated that he will come with appropriate application if he wants any modification in the order already passed. It is also stated by him that he intends to file an appeal before the Supreme Court.

(2) The Warden or Chief Officer, who is in charge of Avvai Home shall make arrangements to take the girl Sasikala immediately to Government Kasthuri Bhai Gandhi Hospital, Triplicane, Madras and get the necessary tests carried out.

(3) The Warden or Chief Officer, who is in charge of the administration of Awai Home shall act in accordance with the directions of the Doctors of the said Hospital.

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(4) The Chief Medical Officer of the said Hospital shall depute a senior Doctor to examine the girl Sasikala and give proper advice to her in the matter of medicine, diet, etc.

(5) The girl Sasikala must be examined by a senior Doctor of the said Hospital atleast once in a week in the third trimester.

(6) At the appropriate time, as may be advised by the Doctors of the said hospital, the authorities of the Awai Home shall get the girl Sasikala admitted in the said Hospital for delivery.

(7) The 1st respondent is permitted to meet the girl Sasikala once in a month in Awai Home in the presence of the Warden/Chief Administrative Officer. But he is not permitted to take the girl Sasikala out of Awai Home.

Learned counsel for the petitioner objects to this direction. He points out that the earlier order passed by the Bench on 20.9.1993 prohibits specifically the meeting of the 1st respondent or his parents with the girl Sasikala during her stay at Awai Home. At that time the pregnancy of the girl was not known. We are of the view that this earlier condition could be modified in the circumstances of the case. We are of the view that it is necessary to make such a provision so that the girl Sasikala will have mental solace inasmuch as it is not in dispute that the pregnancy was caused by the 1st respondent. Otherwise, she may have mental anxiety and worry which may be injurious to her health.

The above directions shall be carried out by the parties concerned. Additional Public Prosecutor is directed to communicate a copy of this order containing the directions to the authorities of Awai Home as well as to the Chief Medical Officer, Government Kasthuribai Gandhi Hospital, Triplicane, Madras

Social Jurist, A Lawyers Group³⁷
Vs
Government of NCT of Delhi and Ors.
AND
Courts on its own motion (Safdarjung Hospital)
Vs
Union of India (UOI) and Ors.

Hon'ble Judges:

Swatanter Kumar and H.R. Malhotra, JJ.

JUDGMENT

Swatanter Kumar, J.

1. The constitutional mandate for assuring the dignity of individual is contained in the very preamble of the Constitution of India. To live with dignity would take within its ambit legitimate expectation of the citizens of the country for being provided with good environment and health care. Unlike right to education, right to health and healthy environment has so far not been incorporated in the fundamental rights of the people of India. However, an obligation in the form of directive principle under Article 47 of the Constitution is casted upon the State to raising of standard of living of its people and improvement of public health among its primary duties. The State has to ensure that this obligation is not rendered nugatory by inaction or inadequate action on the part of the State and its instrumentalities. Leaving aside its dogmatic approach, it must ameliorate by taking recourse to policies and steps and by involving other appropriate forums to achieve the object of better public health. The standards of public health certainly are not the ones which framers of the Constitution desired to incorporate in such definite and unambiguous language. Coordination between different wings and departments of the State is essential and they must act in full coordination with each other so as to implement its policies in this regard. The times have

37. Full text available at 140(2007)DLT698

come when the State has to prescribe a proper course of action and take steps well in time to ensure that private sector which comes up for the assistance of the Government and claims various concessions during the period of establishing their big multi-specialty and super-specialized hospitals, must conform to the conditions of law and the persons in position should not only check the breach of conditions but ensure consequential actions. The Government and various authorities should act ab ante in the event of breach and then ensure actio quaelibet it sua via to achieve its logical end. Lack of interest from any quarter would result in uncharitable profits to the private sector at the cost of deteriorating standards of public health and depriving the poor strata of the society from seeking benefits of the State policies only as a result of poor governance.

2. Moved with the unconcerned attitude of the public authorities and lack of adequate facilities for health care to poorer sections of the society with particular reference to breach of conditions of free treatment to poor in compliance to the condition of allotment of land to such hospitals/medical institutions, Social Jurist, A lawyers Group filed a writ petition being WP(C) No. 2866/2002 praying that conditions of allotment of land to hospitals/nursing homes particularly in regard to free treatment to the poor and indigent persons are complied with and the respondent authorities be directed to take action against those hospitals in accordance with law and to take action on the recommendations of Justice Qureshi Committee. In the petition, prayer was also made for holding a high level enquiry and also a direction that action be taken against the erring officers.

3. The court vide its order dated 7.5.2002 directed the Government to place on record, the status report on the basis of the recommendation made by Justice Qureshi Committee where after the matter proceeded on different aspects of the case and various orders were passed by the court which we would shortly refer and finally the writ petition was heard in relation to 20 hospitals out of number of hospitals to whom the land was allotted either by the DDA or L&DO and according to the authorities concerned conditions of free treatment to poor patients was applicable to all these hospitals. Out of these 20 hospitals, most of the hospitals had, in fact, accepted the condition but two hospitals i.e. Escort Heart Instt & Research Center and Dharam Shila Cancer Foundation & Research Center had contended that the condition of free patient treatment even in its limited aspect was not applicable to them. Arguments were heard and judgment was reserved in that writ petition.

4. Pursuant to the news item which appeared in The Indian Express on 8th July, 2004 stating that in Sardarjung Hospital, 34 infants died in a week and 12 on one day and that too because of shortage of essential medicines, IV fluids, a Division Bench of this Court issued notice on its own motion to the Secretary, Government of India, Ministry of Health, New Delhi and the Superintendent, Safdarjung Hospital, New Delhi. During the pendency of this petition, various orders were passed by the Bench which noticed the appalling conditions including the fact that walls of cathlab and ceiling sport

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splotches of blood, mosquitoes breed in puddles of muck in peak dengue season and the same was referred in regard to the Cardiology Department of the Safdarjung Hospital. The Committee was constituted by the court whose personal visits and directions of the court resulted in varied improvements in the hospital which as of now is stated to be a hospital where patient care is proper. However, till date, it, of course, is on its way to achieve the requisite standards of medical and patient care and hygiene. This petition i.e. WP(C) No. 10697/2004 was also heard along with WP(C) No. 2866/2002.

5. Firstly, we would deal with the matters in issue in WP(C) No. 2866/2002. 20 hospitals according to the Government and the public authorities are those hospitals upon whom the condition of limited percentage of free patient treatment has been imposed while allotting the land to these hospitals on concessional rates. The details of these 20 hospitals with whom we propose to deal in this order are as under:

| S. No. | Name of Society Area with Location | Date of allotment | Date of possession |
|--------|---|--------------------|--------------------|
| 1. | Gujarmal Modi Hospital and Research Center 15 acres/Saket | 30.10.88 | 20.12.80 |
| 2. | Amar Jyoti Charitable Trust 0.85 Acres 726 Sqm./Karkardooma | 20.1.83 | 30.4.83 |
| 3. | Indian Spinal Injuries Center 11.84 Acres/Vasant Kunj | 22.8.85 | 4.5.89 |
| 4. | Deepak Gupta Memorial Ch. Foundation 4840 sq. mts/ Karkardooma | 15.1.85 | 4.2.86 |
| 5. | Ganesh Das Chawala Ch. Trust (Saroj Hospital) 4048 sq. mts/ Rohini | 28.4.86 | 12.5.86 |
| 6. | Araya Vaidasala Kottalaya 9240 sq. mts/Karkardooma | 4.4.85 | 9.3.95 |
| 7. | Venu Charitable Society (Eye Hospital) 2.5 Acres/Saket | 29.3.90 | 10.12.92 |
| 8. | Laxmipat Sighnamia Medical Foundation 2 Acres/Saket | 29.3.90 | 19.7.91 |
| 9. | Dharam Shila Cancer Foundation and Research Center 13175 sq. mts./Dallupura | 30.3.90 17.7.95 | 6.12.90 3.2.98 |
| 10. | Escort Heart Instt and Research Center 0.7 Acres/Okhla | 8.4.82 | 23.11.90 |

| | | | |
|-----|--|-----------------------|-----------|
| 11. | Devki Devi Foundation 1.123 Acre/Saket | 6.2.96 | 5.6.96 |
| 12. | Balaji Medical and Research Center 12000 sq.mt/Mandawali | 24.1.2001 16.10.96 | 21.5.2001 |
| 13. | Jaipur Golden Ch. Trust 2.45 Acres/Rohini | 14.5.85 | 11.9.85 |
| 14. | Mukand Lal Memorial Foundation 6852 sq. mtrs. | 6.4.88 | 7.6.88 |
| 15. | National Heart Institute 743.80 sq. mts/East of Kailash | 16.8.80 | 31.5.2000 |
| 16. | Sarvodaya Health Foundation 1000 sq. mtrs/Rohini | 24.3.99 | 22.6.99 |
| 17. | Mai Kamali Wali Jan Kalyan Ch. Trust 434.50 Sq.mtrs/Rajouri Garden | 15.5.87 20.8.88 | 22.7.97 |
| 18. | Bimla Devi Hospitals(Walia Charitable Trust) 795 sq.mtrs/Mayur Vihar-III | 3.12.97 | 19.2.98 |
| 19. | Vimhans 3.5 Acre/Nehru Nagar | 2.6.1984 | 10.8.84 |
| 20. | Veerawali Hospital 2 Acres/Chanakayapuri | 6.8.73 | |

6. Out of the above 20 hospitals, land has been allotted by DDA to 18 hospitals while in the case of Veerawali and Vimhans hospitals, land has been allotted by the L&DO. To the hospitals to whom the land has been allotted by L&DO, it is the pointed case of the authorities that the land was allotted at concessional rates i.e. much cheaper than the market rates and the condition of free patient treatment was specifically incorporated in the letter of allotment.

7. In the case of Vimhans, land measuring about 3.5 acre in Nehru Nagar, New Delhi was allotted by the L&DO to the Trust and it was specifically pointed out that the allotment is subject to the terms and conditions given in the Memorandum of Agreement and perpetual lease which shall also be inclusive of the other conditions. The condition with regard to free patient care reads as under:

2(xi) At lease 70% of the beds must be available free of charge to deserving patients belonging to economically weaker sections and the charges for the remaining 30 % should also be reasonable and got approved by the Government.

(xii) There should be two nominee of the Govt. on the executive committee of the hospital to look after Government interests with regard to land

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management/utilisation thereof and also to ensure that it is utilised for the purpose laid down in the memorandum of a Article of association of the institution. In case there is no provision for this in the Trust deed or memorandum of article association of the institution, the same should be amended to provide for two Govt. nominees of the body of the institution.

8. Similarly 2 acres of land was allotted in Chanakayapuri, New Delhi to Veerawali hospital to be run by Delhi Hospital Society where the relevant condition reads as under:

11. A clause will be inserted both in the 'Agreement for Lease' and the 'Perpetual Lease' that in the event of dissolution of the society the leased premises with building on that land shall be transferred, with the prior approval of the government to an institution having similar aims and objects failing which it will revert to the Government of India without payment of any compensation what so ever.

13. Out of the proposed 100 beds, 70 will be free beds to be occupied cent percent and remaining 30 will be paying beds.

14. The hospital premises or any part thereof shall not be rented out without obtaining the prior permission in writing of the Lesser.

9. The learned Counsel appearing for Vimhans hospital had clearly stated before the court that they were trying their best to implement the condition of free patient treatment however that had posed great difficulties and they had run in great losses. An affidavit was also filed on their behalf on 22.2.2007 stating that they have been providing treatment to the poor patients more than the recommendations made in Justice Qureshi Committee Report and they had made a representation to the Ministry of Urban Development for reduction of terms of free treatment from 70% and 30% respectively to 10% to 20% in respect of free IPD and free OPD condition. However, they did not dispute that they were bound by the terms of free treatment. However, in a subsequent affidavit filed on 2.3.2007 they had stated that they would abide by the condition of 25% OPD and 10% IPD and free casualty treatment and first aid. It was also averred that their loss till January, 2007 w.e.f. 1996-97 has been Rs. 1,48,92,754/-. The documents were also filed on record to show that they have been complying with the free treatment condition and despite receipt of grant from different sources, the losses have still persisted. The Committee constituted by the court had also visited this hospital and in the status report filed by the Committee on 18th August, 2006, it has been stated that the hospital has failed to give the complete details of the names of patients and their addresses whom they have treated under the free patient clause as contained in their letter of allotment. However, it was noticed that concessional treatment has been provided to 75 patients in whose cases the charges for investigations and medicines are to be paid by the patient though free bed, consultation and free dietary services were being provided. There was a separate

free ward and the hospital had also advertised about availability of the free treatment through insertion in papers. The Committee was also informed by the Medical Superintendent that the bed, diet, treatment, procedures, to charges and fee of the surgeons was not being charged from the patients of free patient care ward but they had to pay for drugs and consumables. In the report, it has been shown that there is some element of compliance though not fully and substantially, particularly to the extent of 70% free patient care.

10. In the case of Veerawali International hospital (Delhi Hospital Society), it may be noticed that the hospital has not disputed that the said condition is applicable to them. However, they have not strictly adhered to the condition. In fact, vide notice dated 3.12.2004, a letter was written by the Dy. Land & Development Officer to them that they had already violated the condition of 70 free beds in the hospital and an order of re-entry was passed. This order of re-entry was withdrawn subject to the undertaking given by the hospital that they would strictly adhere to the said condition but again they were found to be lacking. In reply to this letter, it was stated by them on 10.12.2004 that their hospital was under construction and renovation and was not functional and they were treating free patients and would abide by the terms. It was specifically made clear to the hospital by the authorities that renewal of registration for subsequent years would be subject to fulfillment of the condition. Another status report was filed on behalf of the Union of India on 17.1.2007 where these facts have been referred to and it is also stated that a fresh show cause notice was issued on 5.5.2006 as the hospital had failed to restore the facilities. The permission to complete the construction now stood extended to 21.3.2007 where after the hospital had agreed to abide by the terms.

11. The remaining 18 hospitals were allotted land by the DDA. Out of which, 16 are the ones in whose cases, undisputably, the condition of free patient treatment in relation to free beds as well as OPD was specifically incorporated. On the contrary, during the pendency of this petition, they had either made statements, given undertaking before the court or written to the authorities concerned that they would abide by the condition of free patient treatment as incorporated in their lease deed/letter of allotment. However, the remaining two hospitals who were also allotted land by the DDA, as already noticed, i.e. Escort Heart Institute & Research Center and Dharam Shila Cancer Foundation & Research Center have seriously contested enforcement of this condition against them. According to them, there is no specific condition requiring them to provide free patient care and treatment to the poorer sections of the society and in fact they are super-specialized hospitals and this condition would be incapable of being performed by them. According to them, the condition is impracticable and legally not enforceable against them and at no point of time, they had agreed to abide by such a condition.

12. During the pendency of this petition, the court passed various orders. In the order dated 15th November, 2002, the court referred to Justice Qureshi Committee report

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and after noticing the recommendation and the contentions raised, it was noticed that the High powered committee presided over by the Chief Secretary of NCT of Delhi had considered the recommendation of the Justice Qureshi Committee and the court directed as under:

It appears that the Committee is of the view that free treatment means totally free and not partly free and partly paid. The free IPD patient will not have to pay for anything including medicines and medical consumables as in the case of government hospitals. The Committee has also recommended that all the hospitals which have been allotted government land, should provide totally free treatment to the poor, needy and deserving patients to the extent of 10% of the total number of beds in the IPD and 25% of the total number of patients in OPD uniformly. Certain other recommendations have also been made including the one dealing with proposals for setting Poor Patients Advisory Committee in private hospitals within a period of one month.

It is not disputed that for all these years, the Authorities had not been monitoring the various hospitals with a view to find out as to whether or not they were complying with the condition of providing free medical treatment to 25% of the indoor patients and 40% of the outdoor patients.

On hearing learned Counsel for the parties we are of the view that all the hospitals to whom the Government had allotted land free of cost or at concessional rates should be directed to furnish details of the patients, who were treated free of charge. At the same time the Govt. of NCT of Delhi and the Government of India should appoint a joint committee to go into the records of the hospitals so that they are able to know as to how many patients were treated free in accordance with the stipulation contained in the letters of allotment of lands to them. In case the hospitals have succeeded in breaching the condition, it means cornering of huge amounts of monies, which were not due to them. In case these hospitals have made unwarranted profits by breach of the terms of allotment of lands to them, the amounts should be recovered and a pool should be set up for the health care of the people. We order accordingly.

The aforesaid directions shall be complied with by the Govt. of NCT of Delhi and the Union of India by or before the next date.

13. Again in the order dated 7.4.2003, the court noticed that it was a matter of sorrow that despite the directions given by the court, the Government authorities are not moving an inch and directed complete compliance to the orders of the court and also directed constitution of a special committee. In furtherance to the order of the court, the Government of NCT of Delhi had constituted a Committee and that Committee had been filing reports from time to time. Vide order dated 3.3.2004, the court noticed the lapses on the part of certain hospitals and DDA & L&DO were directed to take

action at the earliest. In different orders of the court, it was noticed that 18 hospitals, indicated above, were willing to comply with the condition. In the order dated 2.12.2005, the court expressed its displeasure for non-compliance of its order by the respondents and in the detailed order, following observations of the court in relation to constitution of a committee and other directions, can usefully be referred at this stage:

...Although, it has been contended before us that the Government of NCT of Delhi has appointed the aforementioned Committee, but no data has been placed before this Court as to what kind of services have been provided to the poor patients. Whether they have been duly provided free beds or they have also been provided consumables as well as medicines and if the said facilities had not been provided in terms of the order passed on 15.11.2002, the amount was to be recovered from such erring hospitals and Nursing Homes and a pool was to be set up for the health and care of the people of Delhi belonging to the poorer and poorest sections of the Society. Nothing has been brought on record to show that any joint Committee has been constituted by the Union of India and the Government of NCT of Delhi. If they have constituted any Committee, as per the report of the Government of NCT of Delhi, they have not done any work pursuant to the directions passed by this Court. It seems that on 4.3.2005, the Court observed that a Monitoring Cell has to be constituted and in this regard, time was given to the respondent for the suggestions to be given to the learned amices curiae. therefore, we direct the Principal Secretary, Government of NCT of Delhi to constitute a Committee with the Director Health Services of Delhi. We direct the Vice Chairman/DDA to have the Commissioner (Land) on the Committee and the Land and Development Officer also on the Committee. The Committee shall also comprise of Mr. Ashok Aggarwal, Mr. Anish dayal, Ms. Maninder Acharya, Dr. Uma Nambiar and Dr. Ranjuna Kumar. The Committee will submits its report in the light of the directions passed on various dates, from time to time.

Keeping in view the order passed on 15.11.2002, if any report is received from the Monitoring Cell, that report be also placed on record and the same will be considered by this Committee.

Ms. Maninder Acharya shall be the Convenor of the said Committee. Renotify on 7.2.2006.

14. Ms. Maninder Acharya Committee has been filing reports after regular intervals and has placed on record, the details supported by data as to compliance and/or violation of the condition of free patient care and treatment at different hospitals particularly the 20 hospitals afore-indicated.

15. In the order dated 21.8.2006, it was noticed by the court on the basis of the report

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submitted by the said Committee that Venu Eye Institute and Research Center was complying with the condition of free patient treatment. The policy decision in regard to acceptance and enforcement of free patient condition was directed to be finalized by the concerned Ministry and Delhi Administration and also to inform the court with regard to position of the corpus to be made by requiring the defaulting hospitals to contribute money to the extent of their default, in terms of order dated 15.11.2002. In the order dated 13.12.2006, it was also noticed that most of the hospitals are in default of compliance to the said condition. In regard to general hospitals, the following information was noticed in the said order:

In order to verify the factual matrix, we had directed the Medical Superintendents of general hospitals to be present in Court. They are present today. We have been informed by them that 20 per cent of the patients are provided free treatment by the general hospitals. This means, according to them, such 20 per cent patients are entitled to treatment which includes free bed, free consultation, free medicines, free investigations and in fact they are called upon to pay nothing for their treatment. While other 80 per cent patients are charged at the minimum rates in relation to costlier investigations like MRI, Ultra Sound or other investigations. Justice A.S. Qureshi's Committee appointed by Government of NCT, Delhi had also decided that the free treatment would be on the lines as suggested by the general hospitals.

We may notice that the letter of allotment issued to the various hospitals contained terms for treating the patients on free term basis, which read as under:

- 2.The Hospital will serve as general public Hospital with at least 30% of beds of free treatment for the weaker section.
- 3.The OPD of the Hospital will provide free services to the patients falling in the indigent category.
- 4.The Hospital shall take part in the National Health Programme for which its services may be called by the Directorate Health Services/Ministry of Health.
- 5.The Hospital shall earmark a separate area for maternity and Child Health Centre which will be available free of cost to the community.

Prima facie and at this stage, we are of the view that free treatment includes providing of investigative consultancy treatment and admission free of any charges to a patient who belongs to a poor strata of the society. Providing a free bed and charging him for everything else would obviously defeat the very object of concessional distribution of lands and apparently would be just an eye wash or a camouflage to cover the default of the concerned hospitals.

In view of this, we direct DDA to issue notices to such defaulting hospitals within two weeks from today. If the notices have already been issued and replies have been received, they should be considered by the competent authority of the DDA and a composite report be placed on record before the next of hearing. Similarly, steps shall be taken by the L&DO as it is commonly conceded before us that no hospital is strictly complying with the condition of free treatment to the patients to the extent of agreed percentage.

16. During the proceedings before the court dated 8.2.2007, counsel appearing for the State had stated that the Government has taken a decision that they would enforce the condition of free treatment in regard to all the 26 hospitals uniformly and would require them to provide 10% indoor patient treatment and 25% OPD patient treatment free of cost in terms of the lease deed and in default would take action against the said hospitals. Thereafter, the arguments were addressed on various dates on behalf of the counsel appearing for different hospitals particularly the ones which were disputing the liability to obey the condition of free patient treatment as afore-referred.

17. It is contended on behalf of Dharam Shila Cancer Foundation & Research Center and Escort Heart Instt & Research Center that the lands were transferred to them under the Government of Grants Act, 1895 and as such, no conditions beyond the lease deed can be imposed upon them. Particularly in relation to Escorts Hospital, it is also contended that for some peaces of land transferred to them, no such condition existed either in the allotment letter or in the lease deed and as such, the question of adhering to the condition would not arise. Further and with some vehemence, it was also argued that the condition which requires the hospital to act as general public hospital to the extent of 25 per cent is a condition incapable of enforcement as the hospitals are super-specialty hospitals and cannot become general hospitals just for the sake of free class.

Dharamshila Hospital

18. Before we proceed further to discuss the merits or otherwise of the above contentions raised before the Court, we may refer to certain facts which emerge from the records before the Court. This hospital was admittedly allotted land twice, firstly, vide letter dated 30.3.1990 whereby the land measuring two acres was allotted for comprehensive cancer care and research centre in East Delhi. The Lease Deed for this land was executed on 6.10.1990. The second allotment in favor of this hospital was allotted by letter dated 17.7.1995 vide which the land measuring about 5840 sq. mtrs. was allotted for the purposes of hospital and the lease deed for this piece of land was executed on 3.2.1998. According to the DDA, the possession of the land was given on 6.12.1990. It is again a matter of record that both the lease deeds executed between the DDA and the Hospital do not contain the clause of free patient treatment giving any percentage. On behalf of the authorities it is contended that the letter of allotment

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remained an integral part of the lease deed and the said letter of allotment contains such a condition. The hospital had filed various documents from time to time and particularly after the second piece of land was allotted to them undertaking to abide by the condition of 'free patient care' and/or any such directions passed by the Court in this regard. The cumulative effect of these documents is that the hospital is bound by such condition and having enjoyed the benefit of concessional rates of land as well as other benefits flowing there from for all this period, the hospital is bound both by contract and in law. Besides, it is obligatory upon the DDA to impose such a condition while allotting land at concessional/institutional rates which in comparison to the market rates of land are very low.

19. On the contrary and in addition to the above noticed contentions, it is also argued by the learned Counsel appearing for the hospital that the rates were in no way concessional but were determined rates as per the policy of the DDA and they have not acquired any advantage out of such allotment and the condition cannot be enforced upon them. There is no dispute to the fact that the first letter of allotment was issued on 30.3.1990 which contained the condition of free patient treatment. The very opening paragraph of the allotment letter along with the relevant clauses can be usefully reproduced at this stage:

With reference to your letter dated 5.1.90 on the subject noted above, I am directed to inform you that it has been decided to allot on perpetual lease hold basis a plot of land measuring 2.0 acres for comprehensive Cancer Care & Research Centre in East Delhi to Dharamshila Cancer Foundation & Research Centre on usual terms and conditions as given in the agreement for lease/perpetual lease which shall also include the following:

xxx xxx xxx xxx xxx xxx

3. The Foundation & Research Centre will serve as general public hospital with at least 25% of the beds reserved for free treatment for the weaker sections of the Society.
4. The OPD of the hospital will provide free services to the patients falling in the indigent category.
5. The Foundation & Research Centre shall take part in the National Health programme for which its services may be called by the Directorate of Health Services/Ministry of Health.
6. The Foundation & Research Centre shall earmark a separate area for Maternity and Child Health Centre which will be available free of cost for the community.

xxx xxx xxx xxx xxx xxx
xxx xxx xxx xxx xxx xxx

12. In case to violation of any of the conditions imposed the Administration/Govt. Of India would be free to resume the title of land.

13. The Foundation & Research Centre shall be bound by the architectural controls as may be prescribed by the Dir. (Planning) Chief Architect, DDA.

The above restrictions have been provided on the analogy of Delhi Admn. policy with regard to allotment to the Societies for construction of Hospital.

If the above terms & conditions are acceptable to the Foundation & Research Centre, the acceptance thereof may please be communicated to this office Along with Bank Draft of Rs. 29,21,250/- (Rupees Twenty nine lacs Twenty one thousands Two hundred and fifty only) (Rs. 28,50,000/- an account of cost of land and Rs. 71,250/- as ground rent @ 2v2% p.a. for one year) for the land measuring 2.0 acres for Comprehensive Cancer Care & Research Centre in favor of DDA within 30 days from the date of issue of this letter so that possession of the plot could be handed over.

In case the payment is not made within the stipulated period, it will be presumed that the Foundation & Research Centre is not interested in allotment of land and the same will be withdrawn.

20. The Lease Deed which was executed between the parties does not indicate that the land was allotted for building a cancer hospital and had made it obligatory upon the hospital to discharge all obligations as stated. The DDA was vested with the right to re-enter. The Lease Deed specifically contemplated that there would be no waiver on the part of the DDA in relation to observance and performance of the conditions of the Lease and Clause 11 of the Lease Deed stated that the lease is granted under the Government Grants Act, 1985. The letter of allotment as afore-noticed clearly provided that the agreement for perpetual lease shall also include the treatments stated in the letter of allotment. In the letter of allotment dated 17.7.1995, Clause 9 had clearly stated that all other conditions as contained in the perpetual lease deed to be executed and any other terms and conditions imposed from time to time by the Central Government/Lt. Governor shall be binding upon the allottee. This clause of the letter of allotment, thus, had put the matter clear and beyond ambiguity and it was obligatory upon the hospital to carry out the conditions imposed by the authorities in terms of these documents. In addition to these specific conditions, the hospital, through its Vice President-cum-Treasurer had given undertaking on different dates clearly stating that they would abide by the conditions. Both the undertakings read as under:

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UNDERTAKING

I, Dr. S. Khanna, Vice President Cum Treasurer, Dharamshila Cancer Foundation and Research Centre, solemnly give an undertaking that we will provide Free IPD treatment up to 25% of indigent patients, below poverty line, issued BPL Cards by Delhi Govt. without Consumables, drugs and disposables.

Final view of the Court/DDA on drugs, disposable and consumables will be binding on us.

Free ship condition will be honoured even after the redemption of the Mortgage.

DEPONENT

VERIFICATION:

I, Dr. S. Khanna, that the contents of the above affidavit/ undertaking are true and correct to the best of my knowledge and belief.

DEPONENT

The Second undertaking reads as under:

UNDERTAKING

I, Dr. S. Khanna, Vice President cum Treasurer, Dharamshila Cancer Foundation and Research Centre, solemnly give an undertaking that we will provide Free IPD treatment up to 25% of indigent patients, below poverty line, issued BPL Cards by Delhi Govt. without Consumables, drugs and disposables.

DEPONENT

VERIFICATION:

I, Dr. S.Khanna, that the contents of the above affidavit/ undertaking are true and correct to the best of my knowledge and belief.

DEPONENT

21. The plea raised by the hospital before the Court do not stand substantiated on fact and law, particularly in view of the stand taken by them in their various letters written to the Delhi Administration and other authorities. Vide their letter dated 29.7.1992 they had clearly admitted to adhere to the conditions and the relevant part of the said letter reads as under:

...We again draw your attention to page 2 para S of Memorandum of our association which says "Research Centres, Laboratories, hospital and other centres shall be established and maintained solely for philanthropic purposes and not for purpose of profit. (Copy attached). We have reserved 25% of the beds for poor patients and would be offering free outdoor and diagnostic services to 40% of the poor population.

We are not planning to take any loans and the hospital will be totally funded by voluntary donations in cash and kind.

As you are aware, the most expensive life saving equipment is being donated to us by Narigis Dutt Foundation, Canada and Dharamshila Cancer Foundation Benefit Society, Allentown, Pennsylvania, U.S.A. In view of this, we appeal to you to kindly direct DDA that Rs. 21.5 lacs with interest be refunded to us urgently, so that we can use the same for construction purposes.

22. Again vide letter dated 2.1.1993, before commencing the operation of the hospital they had reiterated their intent to obey the said condition. Of course, at subsequent stages, the hospital while referring to the cost and estimates in the All India Institute of Medical Sciences and also preparing a comparative statement showing statement of cost of service and cost of medicines tried to justify non-adherence to this condition. But prior thereto, the DDA as well as the NCT, Govt. of Delhi had vide their letter clarified the imposition of enforcement of the condition of free patient treatment upon the hospital.

23. The hospital has also filed a detailed affidavit supporting the above stand and also clearly stating in paragraph 21 of that affidavit that the hospital is committed to provide free medical services to poor patients and willing to give a discount of 10% on drugs and disposals to all poor patients holding BPL Cards. Their claim is primarily founded on the ground of 'Super-Specialty hospital'.

24. According to the DDA, the hospital is not providing free drugs and disposals to the poor patients and is charging Rs. 60/- as registration fee. They have not issued any advertisement in the newspaper and the conduct of the hospital display breach of the conditions of allotment.

25. The Committees appointed by this Court had submitted different reports. In its first report dated 16.4.2003 chaired by the Secretary, Ministry of Urban Development and Poverty Alleviation, it was noticed that this hospital had only kept 10% of the beds for free treatment and which was not in conformity with the terms of the allotment.

26. The Committee in its report dated 16th July, 2003 had noticed that the hospitals including this hospital were not adhering to the conditions, there were no fixed guidelines, income of Rs. 2000/- was taken as the deciding factor, the condition of free serv-

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ice was not publicized and they were not providing free beds and free treatment. The Maninder Acharya Committee amongst others filed another report dated 18th August, 2006 wherein it reported the matter in regard to Dharamshila Cancer Hospital & Research Centre and after discussing the matter in great detail, on facts noticed by them during inspection and otherwise, it noticed that the records produced from 1.4.2002 to 31.3.2005 showed only details of concession given to IPD patients and OPD patients, no board was displayed as per orders of the court and directions issued by the Directorate, no person was being given completely free treatment, the bed strength was 90 and there was no demarcation of free beds. It was specifically noticed that no other steps were taken by the hospital towards informing the public about availability of free treatment.

27. The land in question was allotted to Dharamshila Cancer Foundation & Research Centre at concessional rates at which the land was allotted to them. It is not even the case before the court that the market value of the land was same as concessional rates. The contention raised is that the pre-determined rates of the DDA in regard to allotment to institutions were concessional rates. This argument, at the face of it, has no merit. The land was allotted to the hospitals/institutions at the rates which were obviously much less than the market value of the land. Another additional advantage which all these hospitals have received is that in a place like Delhi where one can hardly think of possessing land in acres, it was certainly a gratuitous act on the part of the State to allot such big pieces of land to the hospitals which was done in public interest and to achieve the obligation placed upon the States for improving the health care for people of Delhi and other areas. At the time when the lands were acquired, even the compensation awarded to the land owners was much less, which ultimately was one of the main factors in determining the institutional rates. Vide letter dated 15.9.1992, the Joint Secretary (Medical), Govt. of NCT of Delhi had written to the Joint Director (Instl.), DDA about categorization of this hospital and further clearly stated that the land was being allotted on highly concessional rates and the following usual conditions in regard to free treatment of patients should be imposed upon them:

At least 25% of the total number of beds will be provided as free beds where no charges will be levied from patients belonging to lower socio-economical groups. Medicine, food, medical/surgical investigation/operations and investigations like X Ray, Ultrasound, CT Scan shall also be free.

The institution will run a separate free OPD and the number of cases handled in the OPD will be at least 40% of the total number of OPD cases attended in the institution. For these cases the entire services including the cost of medicine and investigations shall be entirely free. The institution shall maintain separate records of free as well as paid work carried out by it and make them available to the Dte. Of Health Services at the time of inspection.

28. In view of the above narrated facts, we are unable to understand as to how this hospital can avoid the obligations arising from the condition of free patient treatment imposed upon them under the terms of allotment and under law. The factual matrix of the case clearly shows that the hospital, at all relevant time, had agreed to abide by this condition and their stand before the authorities was only for reduction in the percentage for the same. The undertakings/affidavits filed from time to time and the discussion of authorities prior and subsequent to the allotment of the land at concessional rates and, in any case, at rates which were much less than the prevailing market value of the land, show that there was unambiguous term for enforcement of this condition. The terms of allotment do not admit any ambiguity or confusion of which the hospital can take any advantage. Whenever and wherever the hospital needed any concession and/or benefit, they fully exploited this term claiming themselves to be a trust meant for public welfare and for strict adherence to the clause of free treatment for patients. The conduct of the hospital itself over a long period demonstrates that it took full advantage of the allotment and concession from other authorities while expressing unequivocal desire to adhere to this condition and it would now be estopped from altering their statement to the contrary. We would shortly proceed to discuss the merits or otherwise of the submissions made in law before us on behalf of both the hospitals i.e. Escorts and Dharamshila.

Escorts Heart Institute and Research Centre

29. To this hospital, the land has been allotted by the DDA repeatedly on seven different occasions. Two acres of land was allotted initially on 8.4.1982 for constructing a hospital and in the letter of allotment the condition of 25% free bed was specifically added. Thereafter lands were allotted for staff quarters, rehabilitation services, for hospital again, Referred Centre and for maintaining green area. The details of the lands allotted can be seen at a glance in the following table:

| S.No. | Date of allotment | Area | Purpose | Remarks | Date of possession | Premium |
|-------|-------------------|---------|-----------------|-----------------------------------|--------------------|-----------------|
| 1 | 08/04/82 | 2 Acres | Hospital | 25% free bed | 09/07/82 | 1,97,000 |
| 2 | 15.12.1983 | 3668.72 | Hospital | - | 18.10.84 | 74663 sq.yds. |
| 3 | 03/05/90 | 0.83 | Rehabilitation | 25% free services to the | 23/11/90 | 20,44,875 acres |
| 4 | 28.8.85 | 2 acres | Staff quarters | - | May, 1986 | 12,00,00 |
| 5 | 21.3.1984 | 0.643 | Hospital | - | 30/3/94 | 46,13,525 acres |
| 6 | 31.7.1995 | 0.412 | Referred Centre | - | - | 08/12/95 |
| 7 | 14.6.1996 | 1135.43 | Maintaining | for treatment of Cardiac diseases | - | 10/07/96 |

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23,00,600sq.mtrs. as green
Total Area 6.9 Acre (approx)
Total Premium 1,25,42,163

30. As is evident from the above table that in total 6.9 acres of land was given away at a rate much lesser than the market rate of the land and in the heart of the city. In furtherance to the letters of allotment issued, three lease deeds i.e. lease deed dated 28.5.1985 for construction of nursing and medical staff quarters, lease deed dated 28.5.1985 for hospital and lease deed dated 21.7.1986 for construction of staff quarters were executed. The first letter of allotment dated 8.4.1982 which commenced the project of this hospital clearly stipulated that "...I am directed to inform you that it has been decided to allot on lease hold basis a plot of land measuring 2 acres (9680 sq. yds.) in Okhla Institutional Area near the Holy Family Hospital for the construction of Escort Heart Institute and Research Centre, on usual terms and conditions, as given in the agreement for lease/perpetual lease which shall also include the following:"

31. In addition to stating the price which was @ 10,000/- per acre provisionally in addition to ground rent and annual ground, the letter of allotment included not only the free patient treatment condition but also other conditions in regard to free treatment to indigent category and making a representative of Delhi Administration as a member of the the society. The said conditions read as under:

xxx xxx xxx

2. The Institute shall service as general public hospital with atleast 25% of the total beds reserved for free treatment for weaker sections and other 25% will be subsidised.

3. A representative of the Delhi Administration will be made a member of the registered society responsible for the administration of the Project.

xxx xxx xxx

8. The construction of the hospital and Research Centre will have to be completed within a period of two years from the date of possession of the plot.

32. It is evident that the hospital was to be constructed and was to operate within a period of two years from the date of taking over of possession. The possession was handed over to the hospital on 9th July, 1982 which clearly means that by 8th July, 1984, the hospital was bound to comply with the terms and conditions of allotment. The hospital received the possession of the plot without any protest or subject to any conditions and in fact they made the payment unconditionally without any reservation, within the time of 60 days as provided in the letter of allotment. In other words,

there was complete and full acceptance of the terms and conditions of letter of allotment and which obviously became an enforceable contract between the parties. Thereafter, a lease deed was also executed between the parties. Of course, the lease deed did not contain any condition with regard to free patient treatment. The hospital was allotted land for different purposes including building of staff quarters and for maintaining the green area and allotment letter of these places also did not contain any such condition and rightly so. The lands covered under these letters or lease deeds were obviously not for treatment purposes and the land allotted for maintaining green area or for construction of staff quarter would have no relevancy to providing of free treatment. 0.83 acres of land was given to the hospital for establishment of rehabilitation services to the patients, 0.643 acres for hospital and 0.412 acres for Referred Centre for treatment of Cardiac diseases. In the allotment letter dated 3.5.1990 whereby the land was allotted for the purpose of rehabilitation services to the patients, the afore-reproduced conditions were also there. The letter of allotment dated 21.3.1994 whereby additional land was allotted for the hospital, the conditions of free treatment was not specifically incorporated but it made it obligatory upon the hospital to abide by all the terms and conditions contained in the perpetual lease deed to be executed and any other terms and conditions imposed from time to time by the Central Government/Lieutenant Governor. This letter further had specific clauses being Clauses (ix) and (x), which would have bearing on the controversy involved in the present case and they read as under:

xxx

xxx

xxx

(ix) That all other conditions as contained in the perpetual lease deed to be executed in this behalf and any other terms conditions imposed from time to time by the Central Govt./Lt. Governor shall be binding upon the allottee. The format of Lease Deed can be purchased from the office of the D.D.A.

(x) If the Allottee violates any terms and conducts as mentioned above and in the perpetual lease deed, the allotment shall be cancelled and possession of the land/plot with superstructure standing there if any, will be taken over by the Lesser (President of India)/DDA without any compensation to the Allottee.

33. Most of the letters of allotment relating to the land allotted for hospital purposes, has somewhat similar conditions. We have already noticed that few of these allotment letters do not have this condition. Except one, most of them relate to utilization of the land for non-medical purposes. At this stage, it is pertinent for us to notice that every letter of allotment was a result of certain representations made by the hospital to the DDA. Those representations, negotiations and undertakings were taken into consideration and were the basis of issuance of letter of allotment. In order to ensure that the parties abide by the terms and conditions of their undertakings and representations, every lease deed executed between the parties opened with the following clause:

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WHEREAS THE LESSEE HAS applied to the Lesser for the grant of a Perpetual lease of a piece of land and the Lesser has on the faith of the statements and the representations made by the Lessee agreed to demise the plot of land here in after described and in the manner hereinafter appearing.

34. One of the main factual controversies raised before the court is that as each and every letter of allotment and the lease deed does not contain the specific stipulation in regard to free patient treatment, thus, the said condition cannot be enforced against them fully. We have already noticed that the relevant letters except one for the land allotted for rehabilitation services Centre, contained this condition. In order to further examine this controversy, it is very material for this Court to notice what kind of representations were made by this hospital to the DDA and other authorities prior to even first allotment made in April, 1982. It will be essential to refer to some of the correspondence which is part of the pleading of the parties and has been placed on record with advance copy to each other by the parties appearing before the court. The hospital while addressing a letter to the Director, Indian Council of Medical Research on 20th September, 1980 which had been relied upon by it heavily and which was also relied upon by the DDA enclosing the application form for grant of exemption under Section 35(1)(ii) of the Income Tax Act, 1961, showed their objects and projected growth and the obligation of the hospital to carry out research activity and providing free treatment. The relevant portion of same reads as under:

xxx xxx xxx

4. Objects of the Institution, Objects as per Memorandum of Trust (Copy of Memo. of Assocn. etc. Deed enclosed. to be attached)

5. Research facilities available. Nil at present.

i) Building/Laboratories used i)A 75 Bed Hospital and Research Centre exclusively for research has been planned and most of the beds will be utilized for Research, if needed. This

also includes a 22 Bed CRITICAL CARE AREA, A Free Outpatient Department and a Bio-medical Department.

ii) Number of beds used exclusively ii)30 per cent of the total Bed Strength.for research:

iii) Number of staff employed iii)At present - Nil

exclusively for research (give details) Will advertise and appoint once

(a) Whole-time:Officers/Technical Staff: nearing completion of the Hospital

(b) Part time-Officers/Technical Staff: and Research Centre.

xxx xxx xxx

9 (v) Developing new valve prosthesis v)Most of the equipment necessary to indigenously manufactured. Also to perform open heart surgery is imported develop an infrastructure for obtaining with a great expense of foreign exchange self sufficiency in India for manufacture to the country. By working in close for open heart surgery. co-ordination with industry the development and manufacture of equipment.

INDIGENOUSLY

xxx xxx xxx

11. If the Institution is a hospital state whether it is a free or paying hospital”

i) No. of paying beds The hospital will initially have

ii) No. of free beds a)Total Bed strength 75

b) No. of free beds-will be a minimum of 20% of the Total. If necessary, this may be increased to exceed above figure.

c) paying beds - whatever beds are remaining will be paying beds.

35. In addition to the above, vide their letter dated 25th October, 1980 addressed to the Lt. Governor of Delhi, significant and very moralistic picture was painted by the Hospital stating that it is a public trust being Registered under the Indian Trusts Act and declared it to be a non-profitable unit. This was the letter which constituted a real representation made to the Government and the DDA and it was the very foundation of allotment of land to them. Following relevant extracts of this letter make an interesting reading:

xxx xxx xxx

The Trust will be a non-profit-making body and sponsored by Escorts Limited vide Resolution passed by the Board of Directors of the Escorts Limited in a meeting held on September 22, 1980. The objective of the Trust is wholly charitable and general, public good for providing much needed medical aid, and to create research and training facilities.

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The Trust has accepted their proposal and agreed to build and provide the Heart Institute both for medical aid as well as for teaching and research. The Trust being sponsored by Escorts Limited, shall be supported and funded by donations from Escorts Limited and associates to meet the cost of land, building, furniture, utilities and equipment as may be available in India. These costs are estimated at two to two-and-a-half crore of rupees. A letter to this effect from Escorts Limited is enclosed herewith.

xxx

xxx

xxx

It may be added that the Trust will be prepared to pay the price of the said piece of land at such prescribed rates as may be applicable in the case of recognized medical institutions.

xxx

xxx

xxx

As stated in our application to the Indian Council of Medical Research, the provision regarding free beds in the Heart Institute shall be more than the minimum prescribed with an added scope that the number of free beds would always be possible to be increased to meet any emergent needs.

36. Laudable were the objects and intents of the hospital when it was to seek various benefits from the Government authorities and particularly allotment of land in the heart of the city at such concessional rates and it was to be a charitable hospital on the principle of no profit. It may be noticed that after issuance of the letter of allotment, the possession was taken subject to the conditions stated in the letter of allotment, which by a specific language included the terms and conditions of the lease deed. Conditional allotment in regard to free treatment was the essence and which was rightly accepted unconditionally by the hospital particularly as it was totally in line with the objects of the Trust itself. The hospital really failed to adhere to its commitment which it had made before taking possession of the land and the assurance given by it even thereafter. The letter of allotment at the very beginning of the project contained this stipulation in no uncertain terms. Avoidance of this condition by the hospital on any ground would not be permissible as the hospital has made millions of rupees as per its own version due to its location in South Delhi on a land measuring nearly two acres with all its infrastructure and the same has now spread over to 6.9 acres of land. This progress and profiteering could not have been achieved by the hospital but for the allotment of the land by the DDA in the heart of the city. It may be noticed that in one of the letters they had written to the DDA and the Government that they would not be interested in taking land across Yamuna where even a larger piece of land was proposed to be allotted to them. Therefore, the said proposed location was changed on the basis of the representations made by the hospital and the

DDA agreed to allot them the land at the present site. This itself shows that land was allotted at a much attractive location of South Delhi, rather than in a developing area of East Delhi. Having taken all these advantages over the years together, it would be impermissible for the hospital to plead to the contrary.

37. We may notice now the stand of the hospital in its affidavit filed on record. In principle and in view of the facts above noticed, it is stated that the condition for providing free treatment is not applicable to them, the land of 6.873 acres was allotted at Rs. 3,77,10,870/- and the first allotment was made in the year 1982-83. The case of the hospital further intends to emphasize that it is a super specialty institution and maintenance of beds is very expensive as cost of maintaining the bed was about Rs. 50 to Rs. 100 per day at the time of allotment of land and at present, the cost of setting up a bed is approximately in the range of Rs. 50-60 lakhs and per day cost of maintaining such a bed is Rs. 3500/- to Rs. 4000/-. It is specifically averred in the counter affidavit that the compliance to the condition of 25% beds for free treatment with unlimited free consumables and medicines would result in an annual revenue outflow of approximately Rs. 40 crores and this would wipe out the present pre-tax annual profit figure of Rs. 27 crores and will start eroding free reserves and surplus of the hospital thereby rendering the hospital defunct and inviable. It is also their case that even the Government hospitals do not provide consumables and the patients are required to pay for the same. They had made a proposal for concessional rates and such proposal dated 25.5.2004 is pending with the DDA and, thus, they cannot be compelled to abide by the term of free patient treatment as afore-noticed.

38. It will be useful at this stage to refer as to what is the conduct of this hospital despite such representation and assurances given to the authorities prior to completion of the hospital and the specific term contained in the letter of allotment. There is hardly any dispute that the hospital has not even remotely complied with the conditions imposed in the letter of allotment. We have no doubt in our mind that the conditions of allotment letter are binding upon the hospital and they are expected to adhere to the same unless it was varied by the competent authority. The non-mentioning of such condition in allotment letters relating to allotment of land for the purpose of staff quarters, green area, doctors quarters etc. is inconsequential. Even in the other letter where the condition is missing, the land was allotted for the purpose of looking after the patients who were being treated in the main hospital and the same was in continuation of the project and purpose, in furtherance to the letter of original allotment. The lands were granted as additional pieces of land in continuation to the basic purpose of hospital and where the land was allotted for construction of a rehabilitation centre on 3.5.1990, the condition was reiterated. As already noticed, various committees were appointed by this Court. The first committee chaired by the Secretary of Urban Development had noticed as under:

Escorts Heart Institute has informed that beds cannot be blocked and kept unoccupied. thereforee no free beds have been earmarked. However according

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to the hospital, free/subsidized treatment is provided to the poor patients that include diet, beds, consultations, Nursing Care & various tests etc. The details of free treatment provided to the poor patients has been furnished, and is reflected in Annexure-V.

39. The Maninder Acharya Committee noticed the conduct of this hospital and made the following observations:

14. That is important to mention here that the Committee has not received any reply till date to its letter dated 26.01.2006 by which the Escort hospital was asked to submit to supply the data relating to free treatment. However, on the basis of inspection of the hospital prime facie it is clear that Escorts hospital is not providing any free treatment to patients as neither any data could be shown to use from the computers (except that register) nor any patient availing the free treatment could be shown in the hospital. In the name of free treatment, we were given the copies of the circular relating to free heart checkup camps held by the hospital in rural areas. It is submitted though the said efforts of the hospital are appreciable but the same cannot be termed as "the free treatment" provided in compliance with the condition stipulated in the allotment letter/lease deed of the hospital. In addition to above, names of 3 patients, i.e., Shanti Devi, Sandai Jeet Kaur and Pramwati were provided to us who had been given free treatment on 5.10.2005, 22.6.2005 and 7.10.2005 respectively. These are the only 3 names in respect of whom some records were shown to us. A photocopy of the said register containing 115 names, applications for subsidy by above-mentioned 3 patients and circulars for community outreach programme supplied by Escorts Hospital are annexed herewith and marked as Annexure A-6 (COLLY).

40. The hospital did not comply with the conditions of letter of allotment despite the fact that it was making huge profits annually which fact has been stated by them in its own affidavit. It even did not care to cooperate with the Committees appointed by the court. The interest of the hospital appears to be making profits in complete contradiction to purpose of the trust which was to be a charitable trust and to work on no profits basis. Rather, it ignored specific directions of the authorities to comply with this condition for all this period. Compelled with the persistent breach on the part of the hospital and its conduct, the DDA even issued a show cause notice as to why the allotment and lease be not cancelled for the violations committed by them in regard to free treatment to weaker section vide notice dated 31st October, 2003. Another pertinent factor which relates to the conduct of this hospital is that this so called charitable trust had allegedly transferred the hospital to Fortis for Rs. 650 crores. The authorities are also taking action in that regard as the Trust was converted into a company and then allegedly transferred to Fortis. The DDA has heavily relied upon the meeting held on 23rd March, 1982 wherein the hospital had discussed various issues and had given a firm commitment that they would abide by the condition con-

sequent upon the change of land from East Delhi to the present site. The following extract of the minutes recorded in the meeting held with Lieutenant Governor, can throw light in regard to free treatment to weaker section of the society, which was the basis for allotment of land.

It was not possible for Dr. Trehan to convince us that trans-yamuna area is not the right place for the location of their project. He, however, mentioned that in case their suggestion was not accepted, he would not be interested to participate in this as he termed it a self-defeating venture.

The question, therefore, now boils down to either losing a project or having it in the area indicated by them. Under the circumstances, I have no alternative but to agree to their suggestion. The allotment of land would be made in the South Delhi area as originally proposed by the VC, DDA in his earlier notes. This is, however, subject to the following conditions, which were then accepted in the meeting by both Dr. Trehan and Mr. Handa;

(i) 25% of the total of beds would be free and another 25% will be subsidized;

(ii) A representative of the Delhi Administration will be made a member of the registered society responsible for the administration of the project.

These conditions would be incorporated in the order of allotment which will be issued to Messrs. Escorts Ltd.

A copy of this note would be endorsed to VC, DDA for further necessary action.”

41. Again subject to the determination of legal submissions raised on behalf of the hospital, as they are more or less common to Dharamshila hospital, we have no hesitation in coming to the conclusion that essence of allotment of land in its entirety was compliance to the condition of free treatment to the poorer section as per the percentage specified therein. Having received the benefits of the discussions in the meetings and its own representations before the competent authorities, the hospital cannot be permitted to shirk its responsibility even in the larger public interest. The institutions like the present hospital which are stated to be super-specialty hospitals must envisage their difficulties before they seek the benefit. After having received benefit and having made huge profits, now to turn back and compare themselves to Govt. Hospitals is nothing but travesty of public obligation and social welfare state.

42. A State makes various attempts to discharge its obligations for achieving the constitutional mandate mentioned by us in the very opening paragraphs of the judgment. In a place like Delhi, where the land cost has always been on the increase, wide discretion lies with the authorities to make allotments of land. In regard to allotment of lands, the State is expected to make policies which are not only in conformity with the

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socio-economic principles but are also in conformity with the Constitutional command of equal status and opportunity with dignity of individuals.

LEGAL SUBMISSIONS:

43. Reference to this aspect of law would be essential as the learned Counsel appearing for the parties have made reference to certain statutory provisions and the policies of the government.

44. The emphasis on behalf of the petitioners is placed on the provisions of the Government Grants Act, 1895 and the Lease Deed with reference to the provisions of the Delhi Development Act while the respondents have also relied upon the provisions of the Delhi Development Act, 1957 along with the terms of the letter of allotment, The DDA (Disposal of developed Nazul Land) Rules, 1981 and the guidelines issued by the Government from time to time to regulate the development and disposal of land by the concerned authorities. The emphasis of the petitioners has been that the Lease Deed is a complete and composite grant by the Government and is a document independent and absolute in its terms. This does not vest the authorities with the power to impose such a condition and in any case enforce the same. It is also contended that no term inconsistent with the terms of grants or which is not in tenor with the conditions of a grant can be given effect to. In support of these submissions, reliance has been placed upon the judgments of this Court in the cases of Hajee SVM Mohamed Jamaludeen v. Govt. of Tamil Nadu; Jor Bagh Association v. Union of India; Sunil Vasudeva and Ors. v. Delhi Development Authority 34 (1988) Delhi Law Times 37 and State Bank of India and Anr. v. Mula Sahakari Sakhar Karkhana Ltd.

45. These submissions are primarily refuted by the petitioner and the official respondents on the ground that the letter of allotment is a concluded contract between the parties. The Lease Deed is a part and parcel of the letter of allotment. The provisions of The Government Grants Act, 1895 do not come in conflict with the conditions which are otherwise in conformity with the policy of the State. The attendant circumstances otherwise show that the government would even otherwise have competence to regulate the affairs to prevent commercialization and exploitation by the Institutions. The Institutions/hospitals are bound to comply with the terms and conditions of free treatment as it is the obligation of the State to provide best possible health to its citizens within its means. It is also their contention that mere likelihood of loss or taking of a sympathetic view is no ground for non-compliance to a condition which is imposed contractually and is backed by law. They have relied upon the judgments in the cases of Indu Kakkar v. Haryana State Industrial Development Corporation Ltd. and Anr. Delhi Abhibhavak Mahasangh v. Union of India and Ors. AIR 1999 Delhi 124; Union of India and Anr. v. Jain Sabha, New Delhi and Anr. State of Punjab and Ors. v. Ram Lubhaya Bagga and Ors.

46. The first letter of allotment issued to both these hospitals contained the term of

free treatment to poorer sections. The relevant terms of the letter has been referred by us supra. Without execution of any document, the hospitals had in furtherance to the letter of allotment accepted the terms and conditions of the letter including this condition and

(a) paid the money demanded in terms of the letter of allotment and

(b) took possession thereof, without any protest or reservation.

47. In other words, a party's right had to be controlled in accordance with the terms of letter of allotment and, therefore, a complete contract existed between the parties. The terms and conditions of the letter of allotment empowered the authorities to add or impose such other conditions which the allottee was obliged to agree having taken benefit thereof. The terms and conditions of the Lease Deed certainly does not contain the condition of free treatment to poorer sections of the Society but the same was part of the letter of allotment itself and they would be applicable to the allotments mutates mutandi particularly when there is no conflict between them and they duly are supplement to each other.

48. No doubt, the Lease Deed contained a specific clause, Clause No. (xi) which reads as under:

This Lease is granted under the Government Grants Act, 1895 (Act, XV of 1895)

49. On the strength of this clause, the hospitals want to totally dilute the bindingness of their representations, terms and conditions of the letter of allotment and their undertakings etc. In their submissions, only the lease deed being a grant under the provisions of that Act, they are not bound to comply with the conditions of free patient care and treatment to the indigent and poor. Let us examine the provisions of the Government Grants Act, 1895. In terms of the provisions of that Act, it would extend to the whole of India except to the States specifically excluded, and nothing in the provisions of Transfer of Property Act, 1882 would apply to the grants in terms of Section 3, all previous restrictions, conditions and limitations over-contained in any such grant or transfer as aforesaid shall be valid and the effect according to their tenor, any rule of law, statute or enactment to the Legislature to the contrary notwithstanding. In other words, the terms of Grant are paramount and no provision of law, much less anything else, affecting adversely the grant, would have to be construed strictly in the tenor of the conditions of such grant. In view of the principles enunciated by the Supreme Court in the case of *The State of U.P. v. Zahoor Ahmad and Anr.* it can hardly be said that the parties ever intended to be governed by the provisions of the Government Grants Act, 1895 and the allotment of the property to the hospitals is at all a Government grant. We are of the considered view that this cannot be treated as a 'government grant' in absolute terms. The allotment has to be seen and examined along with the documents like letter of allotment of land; the statutory duty of the

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Delhi Development Authority; the fact that it was a Nazul land controlled by the provisions of the Act and the Rules, and particularly that the letter of allotment was the paramount document containing the terms and conditions and that the Lease Deed was merely a secondary document in furtherance to the stipulations contained in the letter of allotment.

50. Be that as it may, we would still proceed to discuss in some detail the contentions raised on behalf of the hospitals on the presumption that it can be covered under the provisions of that Act.

51. Like a Crown, the Government has an unfettered discretion under the provisions of the Government of Grants Act. All rights, privileges and obligation are to be regulated only according to the terms of the Grant itself even if they are inconsistent with the provisions of law. The most pertinent expression appearing in Section 3 of the Act is 'tenor'. This expression has been explained in the Black's Law Dictionary, Eighth Edition as under:

1. An exact copy of an instrument.
2. The exact words of a legal document, esp. as cited in a pleading.
3. The meaning of a legal document.

52. The Law Lexicon by P. Ramanatha Aiyar, 1997 Edition, defines the term 'tenor' as:

"Tenor" of an instrument imports identity.

1. The exact words of the document; the actual wording of a legal document, what appears on the face of the instrument to be the intention of the parties [Section 10, Negotiable Instruments Act]; 2. the time between the date of issue or acceptance of a note or draft and the maturity date; 3. in ordinary parlance, it means 'purport'....

...By setting forth an instrument according to its tenor in an instrument according to its tenor in an indictment is meant an exact copy of the instrument, while by setting it forth according to its purport and effect the import or substance only is indicated.

TENOR" as used in pleadings alleging that the instruments are set out according to their tenor, binds a party to a strict recital.

53. "Tenor est qui legem dat feuds [It is the tenor of the feudal grant which regulates its effect and extent (Latin for lawyers)] is of great help and assistance in understanding this expression. The judgments relied upon on behalf of the hospitals also proceed

on the same basis that a grant is to be regulated by the terms of the grant. Firstly, the terms of grant have to be clear and capable of being understood. In the light of this legal connotation, the letter of allotment issued to the hospitals at the initial stages was not under the provisions of the Government Grants Act, but was in furtherance to the statutory provisions of the Delhi Development Act, the Rules framed there under and the Nazul Land Rules. We have already noticed that the perpetual lease deed is not the document which came into existence at the inception. The letter of allotment e.g. In the case of Escorts Hospital was issued on 8.4.1982. The payments were made much prior to the expiry of 60 days specified in the letter and the possession of the plot was given just after three months i.e. 9.7.1982 while the Lease Deed was executed between the parties in the year 1986. The terms of the letter of allotment had specifically provided that the allottee shall execute the Lease Deed, the conditions of which shall be deemed to have been included and deemed to be part of the letter of allotment and it was obligatory upon the allottee to go through the terms and conditions of the perpetual proposed lease deed, which according to the respondents was available with the DDA at the time of issuance of the letter of allotment. We are unable to understand the said contention as to how the Lease Deed can be treated as an exclusive document governing the terms and conditions of allotment even if in terms of Clause 11, it is to be treated as a grant. The Act does not postulate any statutory terms and conditions and they are left to the discretion of the government and the government in its wisdom had imposed those conditions which even included the representations and assurances given by the allottee prior to execution of the Lease Deed. That is what the opening clause of the Lease Deed provides and further the conditions to be imposed by the Government would even be binding on the allottee in terms of the Lease Deed. If the Lease Deed is a document by which the grant has been given, then all other documents would be part of such grant with letter of allotment being the basic document which binds the parties. Section 21 of the Delhi Development Act regulates the disposal of the land by the authority subject to any directions given by the Central Government under the provisions of the Act, while Section 22 of the Act deals with the power of the Central Government itself to place at disposal of the authorities, all or any undeveloped lands in Delhi, vested in the Union which will be known as 'Nazul Lands'. The Delhi Development Authority would have a right to dispose of the lands after development or even of an underdeveloped land. The land will be allotted on such terms and conditions that may be specified by the Central Government and furthermore even after the development and allotment of the land, the land will be dealt with in accordance with the Rules made and the directions given by the Central Government noticed above. These provisions place a statutory obligation upon the DDA to develop, deal with and allot the lands, whether they are Nazul lands or lands covered under Section 21 of the Act. Wherever the land is nazul land, they shall be controlled under the provisions of the Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981 (In short 'the Rules'). Under the provisions of these Rules, the policy of the Central Government has been clearly spelled out. The Rules are statutory rules and would have to operate in their own field.

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It will be pertinent to note the relevant Rules which will have a bearing on the controversy before us. Rules 5, 20 and 23 read as under:

5. Rules of premium for allotment of Nazul land to certain public institutions.- The Authority may allot Nazul land to schools, colleges, universities, hospitals, other social or charitable institutions, religious, political, semi-political organisations and local bodies for remunerative, semi-remunerative or unremunerative purposes at the premia and ground rent in force immediately before the coming into force of these rules, or at such rates as the Central Government may determine from time to time.

[Explanation.- For the purpose of this rule the expression “hospitals” do not include the hospitals/dispensaries established by a company, firm or trust as referred to in Sub-rule (2) of Rule (4).]

20. Allotment to certain public institutions.-[***] No allotment of Nazul land to public institution referred to in Rule 5 shall be made unless -

(a) according to the aims and objects of that public institution -

(i) it directly subserves the interests of the population of the Union Territory of Delhi*;

(ii) it is generally conducive to the planned development of the Union Territory of Delhi*;

(iii) it is apparent from the nature of work to be carried out by that public institution, that the same cannot, with equal efficiency be carried out elsewhere than in that Union Territory.

(b) it is a society registered under the Societies Registration Act, 1860 (21 of 1860) or such institution is owned and run by the Government or any Local Authority, or is constituted or established under any law [for the time being in force or it is a company, firm or trust for the purpose of establishment of hospital or dispensary];

(c) it is of non-profit making character;

(d) it is in possession of sufficient funds to meet the cost of land and the construction of buildings for its use; and

(e) allotment to such institution is sponsored or recommended by a [Department of the Government of National Capital Territory of Delhi] or a Ministry of the Central Government:

[Provided that in case of allotment to a company, firm or trust for the purpose of establishment of hospital or dispensary by tenders or auction, as the same may be, such company, firm or trust, as the case may be, shall not be required to be sponsored by a Department of the government of National Capital Territory of Delhi or a Ministry of the Central Government.]

23. Agreements between the co-operative societies and their number.- Where Nazul land has been allotted to a co-operative society, such members of the society who are allotted a plot or flat by such society shall execute a sub-lease in favor of the society in respect of each plot or flat allotted to them. The terms and conditions of such sub-lease shall, as nearly as circumstances permit, be in accordance with Form A and Form B appended to these rule. In addition, such sub-lease may contain such covenants, clauses or conditions, not inconsistent with the provisions of Form A or Form B as may be considered necessary and advisable by the society, having regard to the nature of a particular sub-lease.

54. A bare reading of Rule 5 shows that the lands under these provisions can be allotted to Institutions including the hospitals at the rates which may be determined from time to time. Such allotment is controlled entirely by use of an expression of negative language that no allotment of Nazul land to public institutions be made unless they comply with the conditions of Rule 20, which includes that they would operate on no-profit making character and it directly subserves the interest of the population of Delhi. The legislative intent of public convenience and health endure on the part of the State to achieve its social goal of public equality and individual dignity which is not the hypothesis but is a precept discreetly apparent. Rule 43 of the Rules and even other Rules contemplate execution of a Lease Deed, the terms of which are not be in conflict with the form 'C' of the Form in case of these Rules and obviously and definitely opposed to the substantive Rules. Nothing has been brought during the lengthy argument addressed before us to show that any of the terms and conditions are vocative of Form 'C' or the provisions of Nazul lands. In furtherance to all this, the Government has been framing its guidelines on land management and disposal of Institutional lands. These policies, of course, have been amended from time to time but certain conditions have always formed part of these principles. In relation to the allotment of land to private hospitals, Clause 7.6 of the guidelines are relevant, which reads as under:

Allotment of land to private hospitals:

7.6 On the suggestion of Director General Health Services, Govt. of India and Delhi Admn the following conditions are incorporated for allotment of land to private hospitals at concessional rates as determined by Govt. of India from time to time:

- i) The institute shall serve as general public hospital with at least 25% of

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the total beds reserved for free treatment for weaker sections and other 255 will be subsidized.

ii) A representative of Delhi Administration will be made a member of the registered society responsible for the administration of the project.

55. The condition of 25% free patient treatment to the poor thus is a condition which has been imposed in furtherance to the policy of the Government which in turn is in strict consonance to the spirit contained in Rules 5 and 20 of the Rules and the Constitutional mandate. The DDA had specifically incorporated this condition at/after the time when on the tall representations and negotiations made by the hospitals and their undertaking to abide by such conditions, was repeatedly accepted that it issued the letter of allotment containing these terms. On facts of the case and in law, they cannot abrogate themselves from completely satisfying the condition of 'free patient treatment'.

56. The letter of allotment, thus, is a concluded contract between the parties and the Lease Deed, as per the language of the letter of allotment, is executed in compliance to one of the terms of that letter and as contemplated under the Nazul Land Rules.

57. The hospitals cannot pick up the document of lease in exclusion to preceding and subsequent documents which complete the rights, privileges and obligations between the parties in relation to the allotment. In the case of *Union of India and Anr. v. Jain Sabha, New Delhi* and *Anr. (supra)*, the Supreme Court had clearly held that an offer extended by an allotment letter/revised offer once accepted, would bind the parties and that for reconsideration of the action, the allottee could only make a request to the authorities for a sympathetic consideration and cannot breach the terms of the allotment. The Court specifically observed as under:

...The allotment of land belonging to the people at practically no price is meant for serving the public interest i.e., spread of education or other charitable purposes; it is not meant to enable the allottees to make money or profiteer with the aid of public property.

58. Further, in the case of *Modern School v. Union of India and Ors.* the dictum of the Supreme Court fully supports the case of the official respondents and imposition of such condition. While dealing with the subject of education, approving the concept of reasonable restrictions, the Court in no uncertain terms held that "commercialization of education and diversion of profit surplus for other purposes or use for personal gain was impermissible." The relevant paragraphs read as under:

15. As far back as 1957, it has been held by this Court in the case of *State of Bombay v. R.M.D. Chamarbaugwala* that education is per se an activity that is charitable in nature. Imparting of education is a State, however, having regard

to its financial constraints is not always in a position to perform its duties. The function of imparting education has been to a large extent taken over by the citizens themselves. In the case of *Unni Krishnan , J.P. v. State of A.P.* looking to the above ground realities, this Court formulated a self-financing mechanism/scheme under which institutions were entitled to admit 50% students of their choice as they were self-financed institutions, whereas rest of the seats were to be filled in by the State. For admission of students, a common entrance test was to be held. Provisions for free seats and payment seats were made therein. The State and various statutory authorities including the Medical Council of India, University Grants Commission etc. were directed to make and/or amend regulations so as to bring them on a par with the said Scheme. In the case of *T.M.A. Pai Foundation v. State of Karnataka* the said scheme formulated by this Court in the case of *Unni Krishnan* was held to be an unreasonable restriction within the meaning of Article 19(6) of the Constitution as it resulted in revenue shortfalls making it difficult for the educational institutions. Consequently, all orders and directions issued by the State in furtherance of the directions in *Unni Krishnan* case were held to be unconstitutional. This Court observed in the said judgment that the right to establish and administer an institution included the right to admit students; right to set up a reasonable fee structure; right to constitute a governing body, right to appoint staff and right to take disciplinary action. *T.M.A. Pai Foundation* case for the first time brought into existence the concept of education as an “occupation”, a term used in Article 19(1)(g) of the Constitution. It was held by majority that Articles 19(1)(g) and 26 confer rights on all citizens and religious denominations respectively to establish and maintain educational institutions. In addition, Article 30(1) gives the right to religious and linguistic minorities to establish and administer educational institution of their choice. However, the right to establish an institution under Article 19(1)(g) is subject to reasonable restriction in terms of Clause (6) thereof. Similarly, the right conferred on minorities, religious or linguistic, to establish and administer educational institution of their own choice under Article 30(1) is held to be subject to reasonable regulations which inter alia may be framed having regard to public interest and national interest. In the said judgment, it was observed (vide para 56) that economic forces have a role to play in the matter of fee fixation. The institutions should be permitted to make reasonable profits after providing for investment and expenditure. However, capitation fee and profiteering were held to be forbidden. Subject to the above two prohibitory parameters, this Court in *T.M.A. Pai Foundation* case held that fees to be charged by the unaided educational institutions cannot be regulated. therefore, the issue before us is as to what constitutes reasonable surplus in the context of the provisions of the 1973 Act. This issue was not there before this Court in *T.M.A. Pai Foundation* case.

16.The judgment in *T.M.A. Pai Foundation* case was delivered on 31-10-2002. The Union of India, State Governments and educational institutions understood

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the majority judgment in that case in different perspectives. It led to litigations in several courts. Under the circumstances, a Bench of five Judges was constituted in the case of *Islamic Academy of Education v. State of Karnataka* so that doubts/anomalies, if any, could be clarified. One of the issues which arose for determination concerned determination of the fee structure in private unaided professional educational institutions. It was submitted on behalf of the managements that such institutions had been given complete autonomy not only as regards admission of students but also as regards determination of their own fee structure. It was submitted that these institutions were entitled to fix their own fee structure which could include a reasonable revenue surplus for the purpose of development of education and expansion of the institution. It was submitted that so long as there was no profiteering, there could be no interference by the Government. As against this, on behalf of the Union of India, State Governments and some of the students, it was submitted, that the right to set up and administer an educational institution is not an absolute right and it is subject to reasonable restrictions. It was submitted that such a right is subject to public and national interests. It was contended that imparting education was a state function but due to resource crunch, the States were not in a position to establish sufficient number of educational institutions and consequently the States were permitting private educational institutions to perform State functions. It was submitted that the Government had a statutory right to fix the fees to ensure that there was no profiteering. Both sides relied upon various passages from the majority judgment in *T.M.A. Pai Foundation* case. In view of rival submissions, four questions were formulated. WE are concerned with the first question, namely, whether the educational institutions are entitled to fix their own fee structure. It was held that there could be no rigid fee structure, after taking into account the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. They must be able to generate surplus which must be used for betterment and growth of that educational institution. The fee structure must be fixed keeping in mind the infrastructure and facilities available, investment made, salaries paid to teachers and staff, future plans for expansion and/or betterment of institution subject to two restrictions, namely, non-profiteering and non-charging of capitation fees. It was held that surplus/profit can be generated but they shall be used for the benefit of that educational institution. It was held that profits/surplus cannot be diverted for any other use or purposes and cannot be used for personal gains or for other business or enterprise.

59. The reliance placed by the hospitals upon judgment of this Court in the case of *Jor Bagh Association v. Union of India* (supra) is misplaced in as much as the charge of damages sought to be recovered from the allottee was as a matter of fact found to be beyond any clause of the Lease Deed. The court also held that it was a grant under the Government Grants Act, 1895 and the charges were found to be contrary to such grant. The said judgment even if taken to have enunciated correct law, would have no

application to the facts of the present case. Here the letter of allotment, which is the very foundation of allotment of land to the allottee, even if it is treated as a grant, places a specific obligation upon the allottee to carry out the conditions of 'free patient treatment'. In the case of State of Punjab and Ors. v. Ram Lubhaya Bagga and Ors. (supra), the Supreme Court clearly stated that framing of policies and change in such policies by the State, particularly in relation to reimbursement of medical bills of employees was correct, as the State could change its policies with the changing circumstances and subject to its financial resources. The Supreme Court also stated that such a change in policy or limiting of the expenses, was not vocative of the Article 21 of the Constitution of India as these are jural relations and the rights and duties are co-related. While holding that right of health was an obligation of the State and a command of fundamental rights and directive principles, still individual interest must give way to the rights of the public at large. Reference can be made to the following paragraphs:

26. When we speak about a right, it correlates to a duty upon another, individual, employer, government or authority. In other words, the right of one is an obligation of another. Hence the right of a citizen to live under Article 21 casts obligation on the State. This obligation is further reinforced under Article 47, it is for the State to secure health to its citizen as its primary duty. No doubt the Government is rendering this obligation by opening government hospitals and health centres, but in order to make it meaningful, it has to be within the reach of its people, as far as possible, to reduce the queue of waiting lists, and it has to provide all facilities for which an employee looks for at another hospital. Its upkeep, maintenance and cleanliness has to be beyond aspersion. To employ the best of talents and tone up its administration to give effective contribution. Also bring in awareness in welfare of hospital staff for their dedicated service, give them periodical, medico-ethical and service-oriented training, not only at the entry point but also during the whole tenure of their service. Since it is one of the most sacrosanct and valuable rights of a citizen and equally sacrosanct sacred obligation of the State, every citizen of this welfare State looks towards the State for it to perform its this obligation with top priority including by way of allocation of sufficient funds. This in turn will not only secure the right of its citizen to the best of their satisfaction but in turn will benefit the State in achieving its social, political and economical goal. For every return there has to be investment. Investment needs resources and finances. So even to protect this sacrosanct right finances are an inherent requirement. Harnessing such resources needs top priority.

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35. Learned Counsel for the appellant submits that in the writ petition filed, the respondent did not specifically challenge the new policy of 1995. If that was done the State would have placed all such material in detail to show the finan-

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cial strain. We having considered the submission of both the parties, on the aforesaid facts and circumstances, hold that the appellant's decision to exclude the designated hospital cannot be said to be violative of Article 21 of the Constitution. No right could be absolute in a welfare State. A man is a social animal. He cannot live without the cooperation of a large number of persons. Every article one uses is the contribution of many. Hence every individual right has to give way to the right of the public at large. No Fundamental Right under Part III of the Constitution is absolute and it is to be within permissible reasonable restriction. This principle equally applies when there is any constraint on the health budget on account of financial stringencies. But we do hope that Government will give due consideration and priority to the health budget in future and render what is best possible.

60. The basic principle enunciated in the various judgments relied upon by the parties is that the Government grants would be governed by the tenor of the grant. The tenor, as we have already explained, would mean the terms and conditions of the grant per se. The letter of allotment, the Lease Deed which itself was executed in furtherance to the condition of the letter of allotment, the representations made by the hospitals prior to the execution of the Lease Deed and undertakings given even subsequent thereafter, would have to be looked into and the conditions stated in the letter of allotment could be the conditions of allotment which were undoubtedly and unconditionally accepted and acted upon by the hospitals. The arguments that allotment of additional land for carrying on the main project for which initially the land was allotted, would not take such allotment beyond such condition. The provisions of the DDA Act read with Nazul Land Rules leaves no scope for doubt that the condition of free patient treatment is squarely applicable to all allotments. It is not in dispute before us that the lands allotted to the hospitals are Nazul lands and are covered under the provisions of Nazul Land Rules. This condition is, thus, backed not only by the specific terms and conditions of allotment but by the command of the statutory rules and even the government policies as declared in the guidelines on land management and disposal. Reliance of the hospitals exclusively on the Lease Deed is contrary to the basic rules of interpretation of documents as no secondary document could be relied upon in preference and, in fact, while completely ignoring the principle and basic document, that is the letter of allotment. The language of the Lease Deed and terms of the allotment letter does not help the hospitals to wriggle out of their contractual, statutory and public law obligation. There is no scope for reading and confining the rights and obligations of the parties in isolation. The Lease Deed in no uncertain terms has to be held as ancillary to the letter of allotment. We have already noticed that generally where in the allotment letter such a condition is missing, those were the lands which were provided for other purposes, than for extension of the hospitals or as patient care buildings. They related to green areas, staff quarters etc. Even where the condition is not specifically stated in respect of the hospitals, it being continuation of the original project and in view of the statutory scheme and public policy of the government, the condition would have to be read into such allotment. Any

breach to the contrary would be obstructive of the very object of institutional allotment by DDA and the Government and in fact would be contrary to a very laudable purpose for which these hospitals came into existence as per their own documents. They were contemplated to be public charitable trusts and were to work for the benefit of poorer sections of the society to a much higher percentage than even specified in the letters of allotment.

61. As far as the question of hospital running into losses is concerned, it is an imagination based on self-created data and computation by the hospitals and is of no consequence. Firstly, with their eyes open, the hospitals had accepted the condition in regard to the free patient treatment of indigent persons and accepted the same without any reservations. That was the time when they should have come out with their objections, if any, and requested the government/authorities to deal with and/or not to impose such a condition. We even wonder whether any authority would have such a jurisdiction in face of the statutory provisions. But there is no dispute before us that any of the hospitals, subject matter of the present writ petition, ever approached the authorities at that point of time and particularly before making the payments and/or taking possession of the plot in question. It has been averred and with some emphasis by these hospitals that these are super-specialty hospitals and are not expected to treat patients free, particularly the indoor patients as the cost which they would incur, may not be financially viable and may affect the deposits and assets of the company/hospital. This concept of profiteering is foreign to social policies. The government and authorities allotted them land in the heart of the town at such rates to achieve the social goal of providing best possible health facilities to the residents of Delhi. This condition is the spirit behind the statutory rules, policies and letter of allotment. The Escorts Hospital on its own showing have been making a pre-tax profit of Rs. 27 crores every year and certainly has come up in the city as one of the significant super specialty hospital. If they would have complied with their obligations in a regular phased manner which they have admittedly not, at best their profits might have reduced to some extent. In contrast, a hospital like VIMHANS, which again is a super specialty hospital, relating to neurological problems where the condition for free treatment required them to provide free patient treatment to 70% of the patients as the land was allotted by the L&DO, they have attempted their best to adhere to the condition despite losses. Thus, it hardly lies in the mouth of the Escorts Hospital and even the Dharamshila Hospital to raise such a plea, despite the fact that they have made crores of profit. In any case they are consistently violating this condition for all these years and in face of the report of the Committees, they do not deserve any sympathetic view and must be compelled to adhere to the conditions imposed, failing which the law must take its own course including closure of these hospitals. They cannot thrive at public cost and State expense without fulfilling the minimum conditions imposed upon them to achieve a greater social goal and to look after the interest of the public at large. These are the cases where the individual interest must bend in comity to the public interest even if at some cost.

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62. It was also argued before us that a super specialty hospital is incapable of complying with the terms of the allotment letter and particularly this condition, in as much as that requires the hospitals to be a 'general public hospital' which is impracticable and thus, this condition is not even enforceable. The arguments is that a super specialty hospital dealing with diseases like Cardio, neurology and cancer etc. cannot be expected to open a general hospital to treat 25% free patients in their hospital or even an Out-Patient Door (OPD). This argument is a fantasy of the innovative arguments advanced on behalf of these hospitals. Firstly, the general public hospital is not a term which can be construed as opening of a general hospital but clearly states that the percentage of beds and patients specified in the clauses are meant for general public in that hospital. This approach was fully accepted on behalf of all the parties and the Government. It cannot be said, much less held, that the term requires the hospitals to create a multi-specialty hospital for the purposes of compliance to the conditions of free patient treatment.

63. The purpose and object appears to be that the hospital should be available to the general public with particular reference to poorer sections and not a generalized multi-specialist treatment. Certain enough, all these hospitals essentially must have a first aid or emergency unit so that in the case of emergency relating to any specialty, if a patient particularly in a dire need of medical help is brought to that hospital, they should be in a position to provide the first-aid/emergent treatment and arrange for the patient to be sent to the appropriate hospital for treatment. This limited counter facility is expected to be opened by all these hospitals. But the contention that they are expected to open a multi-specialist or a general hospital in that sense of the term is without any basis. A 'general hospital' would have to be construed in ad jus generam to the terms of the allotment which are primarily to open a super specialty hospital. It could neither be contended on the principle of impossibility of performance nor frustration of contract, and in fact, cannot be justified on any legal premise that super specialization hospitals are incapable or the condition of free patient treatment is impracticable of performance. Most of the hospitals have enriched themselves on the concessions at the cost of discharging their contractual and social obligations over a long period. This argument itself is nothing but another attempt to wriggle out of a solemn term of contract and undertaking given by them at the relevant time.

SCOPE & EXTENT OF THE CONDITION RELATING TO FREE TREATMENT

64. On behalf of some of the hospitals, the contention raised was that neither they are bound by the condition nor the condition was practicably implement able in their cases. We have already rejected both these contentions. In regard to some of the hospitals, particularly the hospitals to whom the land has been allotted by the L& DO (UOI), the percentage of free treatment to be provided to the poorer section of the society is 70%. These hospitals are super-specialty hospitals. For example, VIHMANs which deals with neurological problems. This hospital has placed on record the documents and even had shown to the authorities that it has been running into losses of

crores of rupees every year and finds it very difficult to survive despite heavy donations and contributions given by the different persons or bodies. This aspect can certainly be not ignored in its entirety. The condition besides being reasonable has to be one which can be implemented without frustrating the very object of the scheme. If these super-specialty hospitals are required to treat 70% of the patients free while providing them free admission, bed, nursing care, doctor visits, treatment, surgery and all consumables and non-consumables medicines etc., then in all probability, they would not be able to survive and they may have to shut such hospitals. If that happens, the very object of formulating such a policy would stand defeated. Thus, it is in the interest of all concerned, that this condition should be reasonably construed. The condition enforceable against different hospitals has different percentage. It varies from 10% to 70% for IPD and 25% to 70% for OPD. This immense discrimination as well as the possibility of closing the hospitals, compelled the authorities concerned to reconsider this condition and the scope of its enforcement.

65. The Lieutenant Governor of Delhi had constituted a special committee being Justice Qureshi Committee for this purpose. This committee after taking into consideration various aspects including workability of this condition had recommended that 10% IPD and 25% OPD patients should be treated free in all respects in every such hospital. Such patients belonging to the poor strata of the society should not be required to pay any charges. The relevant part of the report of the committee reads as under:

1. Most of the representative of the hospital submitted that 25% beds earmarked for poor patients were excessive since the cost of medicines was too high. It was agreed that it should not be more than 15% in any case, but 10% would be ideal. thereforee committee recommended 10% indoor beds free for poor patients for all-purpose including medicines and consumables. The free treatment services should be available to 25% of total OPD patients. This condition should be applicable to all the hospitals that have been allotted land by the govt.

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3. The free treatment should be totally free and not partly free and should be uniform for all hospitals that have been allotted land by the Govt.

4. It is also suggested that all those institutions should provide the free services to the extent of 10% also who have not been allotted Govt. land. Even Nursing Homes should provide 5% of their beds for poor and needy patients.

5. In consideration of persistent violation of expressed and implied terms by the institutions, the allotment of land should be cancelled and should be re-allotted by a new lease deed on new and uniform terms and conditions for thirty years,

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on commercial rates of ground rent, to a new management in which Govt. should have at least 3 nominees nominated by Lt. Governor having wide experience of rendering free services. The renewed lease must clearly mention that the lease is not transferable and any contravention would result in automatic cancellation.

66. The above recommendation of the Committee has been accepted by the Government of NCT of Delhi and even before the Court their stand was that the condition suggested by the Qureshi Committee is reasonable and should be enforced. However, it was stated on behalf of the UOI that the matter is under consideration of the Government and despite pendency of this petition for a considerable time, they have not taken a final view in the matter. In fact, it was conceded before us by the learned Counsel appearing for the various parties that the condition of 70% and even 25% indoor free treatment would prove very harsh and incapable of performance in the cases of super-specialty hospitals especially for Neuro, Cardiac, Cancer and other life-threatening diseases as the treatment for the same is very expensive and is to be given to the patient over a long span of time. If the percentage is kept very high, the hospitals would not be able to run without incurring heavy losses. Undoubtedly, in terms of allotment; under the Nazul Land Rules and the scheme of the Government, the hospitals are expected to run on no-profit basis but certainly it cannot be construed as nothing but losses.

67. Even the members of the Committees including the Maninder Acharya Committee had also expressed the similar view that the condition should be reasonable but its implementation should be strictly enforced and in the event of default, strict action should be taken.

68. With some seriousness, it was argued on behalf of these hospitals that the term 'free treatment' for the weaker section of the society as referred to in the condition impugned by the hospitals before us, would mean providing of only free bed, nursing or doctoring attendants but all other consumable or non-consumable expenses on medicines, surgery would have to be paid by the patient. The Qureshi Committee report besides the above suggestions for percentage of free patient treatment had stated that the free treatment should be totally free and not partially free and should be uniform for all hospitals which have allotted land at concessional rates. The recommendations made by the Qureshi Committee had been accepted with some variation in the meeting of the Government of NCT of Delhi presided over by the Chief Secretary on 23rd October, 2002 wherein it was specifically stated as under:

...The free treatment means totally free and not partly free and partly paid. The free IPD patient will not have to pay for anything, including medicines and medical consumables, as in the case of government hospitals.

69. Another suggestion which was made was that all the Government hospitals do not

provide totally free consumables and as such the condition can hardly be applied to the private hospitals. There is an apparent fallacy even in this submission. The Government hospitals provide consumables free but the super-specialty government hospitals may be charging for some consumables, though there is doubt even on that. But still, they provide such care to 100% patients and not partially while the other general hospitals provide it totally free to 100% patients. We are unable to understand the analogy that is sought to be made from such hospitals. The private hospitals which have not only taken the lands at concessional rates but even other concessions by way of exemption in duties etc. from the State are expected to run these hospitals in consonance with the terms of allotment and provisions of law under which they have received such benefits.

70. We are of the considered view that the Qureshi Committee report as accepted by the Government and even otherwise clearly recommended that the free treatment does not need to be given any restricted or a meaning which would frustrate the very purpose of the scheme and the object of introducing such an expression. To illustratively examine this aspect, let us say, a private hospital would give free advice to a poor, indigent person suffering from cardiac problems requiring an open heart surgery but he is expected to pay lakhs of rupees for open heart surgery and the consumables used for such surgery. Such an approach would be destructive not only of the scheme but even of the rosy picture demonstrated by the hospitals at the initial stages. Thus, we find that the term 'free treatment' should be given liberal meaning and meaning understandable in common parlance i.e. providing of treatment, consumables, non-consumables and all other facilities free of any charges to the poorer section of the society.

71. In view of the unanimity of the views of the Committees and particularly the Qureshi Committee report which has even been accepted by the Government as afore-mentioned, we consider it appropriate that the condition of free patient treatment to the indigent strata of the society shall be read and construed as 25% for OPD and 10% for IPD. This percentage of patients will not be liable to pay any expenses in the hospital. In other words, they will be provided free admission, bed, medication, treatment, surgery facility, nursing facility and consumables and non-consumables. The hospitals charging any money from such patients shall be liable to be proceeded against in accordance with law. Besides that, this would be treated as violation of the orders of the court. The Director/Medical Superintendent and Members of the Trust or Society who are running the hospital shall be held liable personally in the event of breach/default. The records to be maintained by the hospital shall reflect the name of the patient, his father's name, his residence, disease from which the patient is suffering, the details of expenses incurred on his treatment, the facilities provided to him, identification of the patient and verification done by the hospital authorities. Furthermore, the records would also contain complete details of reference from Government hospital and reports submitted by the private hospital to the Government hospital. Such records would be produced before the Inspection

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Committee and the Director General of Health Services as and when demanded and in any case, in every three months to be submitted in the first week of the 4th month.

METHODOLOGY FOR REFERENCE OF PATIENTS UNDER THIS CONDITION TO VARIOUS HOSPITALS AND FOR THE MAINTENANCE OF THE RECORDS.

72. Another ancillary but a very important facet of this case is how the patients should be referred and treated at these hospitals in furtherance to the condition for free patient treatment for the poor. From the report of the Committees and even during the course of arguments, no satisfactory records have been produced even in the cases of the hospitals who according to their own version are complying with this condition to show that actually free treatment to the patients belonging to the poorer strata of the Society is being provided. A methodology has thus, to be worked out so as to make reference of needy and poor patients to these hospitals and scope of treatment of those patients in the referral hospitals.

73. Despite such specific directions, there has been hardly any implementation, much less proper adherence of the condition imposed. The committees have submitted their reports which clearly show that large number of hospitals to whom the lands have been allotted by the authorities or the Union of India, are not complying with the condition and few of them, of course, are partially complying with the condition. What is procedure for free treatment and what regular records are being maintained by the hospitals to show compliance/partial compliance of the condition, has been again left to the guess work. Thus, the court has to evolve a procedure which would be not only fair and impartial but also practicable. Having examined this aspect from different point of views and taking opinion of the experts, doctors and the Directorate of Health, we are of the considered view that most appropriate way to ensure implementation of this condition is reference from the Government hospitals (Casualty/OPD patients) to the private hospitals keeping in view their specialty and/or super-specialty. It is a matter of common knowledge that poorer and most poorer categories of persons in our society go for treatment to public or general government hospitals as they cannot afford any other mode of treatment for their sickness. Some stray cases, compelled by their circumstances, who are suffering from life-endangering diseases, do approach these hospitals but are totally dependent on the absolute discretion of the management of the hospital. The purpose of incorporating this condition is not to provide discretion to the hospitals where the medical treatment is already expensive but is to ensure that poorer section of the society is treated by these hospitals without any reservations. Thus, it would be appropriate to direct that every Government hospital having specialty or super-specialty and even if it is general hospital, shall create and establish a 'Special Referral Centres (counters/rooms)'. This Centre shall be part of the casualty as well as the regular OPD of the hospital. The patients in critical conditions who are brought to casualty of the hospital, if necessary, would be referred by the Doctor on duty in consultation with the Chief Medical Officer or the Senior Resident on duty and with the approval of the Professor on duty for immediate treat-

ment to any of the specialty or super-specialty private hospitals to whom the land has been allotted by the State or any authority and in the present case, 20 hospitals which are being dealt with by this judgment.

74. At the time of making a reference, a record in triplicate shall be prepared. One copy thereof will be given to the patient, second copy will be given to the Director General of Health Services and third copy will be maintained by the hospital. The private hospitals shall admit such patients and treat them free of any expense in relation to admission, bed, treatment, surgery etc. including consumables and non-consumables. In other words, such patients would not be required to incur any expenditure for their entire treatment in the hospital.

75. When the patient is treated and is discharged by the hospital, the hospital shall submit a report to the referring hospital with a copy to the Director General of the Health Services indicating the complete details of treatment and the expenditure incurred thereupon.

76. This admission reference shall be continued by all the hospitals for free treatment of the patients belonging to poor strata of the society.

77. Every person who has no income or has income below Rs. 5,000/- per month shall be treated under this category to begin with and unless and until the Committee constituted vide this judgment takes a final view in regard to fixation of criteria of minimum income for receiving benefit under this scheme.

78. In case a patient who is being treated as an indoor or out-door patient in the regular course, needs to be referred to the private hospitals which are specialty or super-specialty hospitals, then the reference would be made by the treating doctors in consultation with and on confirmation by the Head of the Department/Medical Superintendent of that specialty in the general hospital.

79. The private hospitals even would be entitled to admit patients in casualty of their own hospitals and within two days of such admission, they would send intimation of such admission to the Director General of Health Services and the nearest Government General Hospital. The Chief Medical Officer/Head of Department of that specialty shall be under obligation to visit the private hospital and verify the fact in regard to genuineness of poverty of the person, the treatment provided to him and the cost likely to be incurred by the hospital in this regard.

80. Except for the patients admitted in the above manner, no hospital would be entitled to claim compliance of this condition in the cases which are admitted contrary to the above stated procedure.

81. Every general hospital and private hospital shall open such referral centres with-

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in two weeks from the date of pronouncement of this judgment and the Director of the Private Hospitals would be personally liable in the event of default.

82. Creation of such referral centres with samples of record shall be submitted to the Director General of Health Services within one week thereafter.

83. We have already noticed that none of these hospitals have fully complied with the condition of free patient treatment as per percentage provided under the letters of allotment and even otherwise.

84. All the hospitals which were awarded land by DDA and/or L&DO were expected to make hospitals functional within two years from the date they had taken possession of the plots in question. Thus, these hospitals were expected to complete their construction activity within a period of two years of taking possession of plot and immediately start complying with the condition of free patient treatment. The hospitals which have not complied with or have partially complied with the condition in terms of the reports submitted on the record of this file, are at fault and they could not be exempted from complying with the condition in all its strictness. In fact, we must notice that the authorities including DDA and L&DO have failed to perform their public duty and have placed the poor section of the society at great loss. There is no justification whatsoever on the part of the general, specialty or super-specialty hospitals not to comply with the mandate of the condition. Thus, they would be asked to make good of the non-compliance of the condition and they must repay to the authorities and the society at large for the unwarranted profits, at the cost of the poor, made by them for all these years to the extent of the percentage of free patient treatment (in terms of money) proportionate to the number of patients treated by them during the relevant period and they must pay that money to the authorities who shall create a central corpus/pool which shall be utilized for the welfare, health care and treatment of the poorer section of the society in Government hospitals. A Division Bench of this Court in its order dated 7.11.2002 (referred supra) had passed such a direction. Despite orders of this Court from time to time, the hospitals which were in default persisted with the same and showed complete dis-obedience to the orders of the court. The conduct of these hospitals even during the pendency of the writ petition is not worthy of any appreciation. Rather, it would tilt towards denial of relief on equitable grounds. Thus, we direct that a special committee shall be constituted which shall carry out these directions in its best wisdom and which shall ensure that the directions of the court are neither diluted nor rendered ineffective by such steps:

85. The 'Special Committee' shall consist of the Chief Secretary of NCT of Delhi, Finance Secretary, NCT of Delhi, the Director General of Health Services and Medical Superintendent of the general public hospital of that area, the case of which is being considered by the authority.

86. The Committee shall be entitled to appoint Chartered Accountants or any other

officers from the office of the Comptroller General of Accounts for examination of the records, books of accounts and other material of the concerned private hospital which may have bearing on the matters which are being considered by the 'Special Committee.'

87. The officers so appointed by the committee shall submit a report to the Special Committee which after providing hearing to the hospital affected by such report, shall pass orders.

88. The order of the Special Committee shall determine the amount which is payable by the private hospital (20 of the hospitals stated in the judgment) and/or such other hospitals which are similarly situated. The amount payable shall be determined in terms of the above observations keeping in view the period commencing from two years after the date when the possession was taken and the hospital was made functional and expenses of 25% OPD and 10% IPD free patient treatment of the total number of patients treated by the hospital during that period.

89. This process of determination shall be concluded by the Special Committee within six months from the date of passing of this order.

90. Payment of the determined amount shall be made by the hospital concerned within a period of one month from the date on which the order is communicated to them. The order passed by the Committee shall be sent by speed post as well as delivered by the departmental official personally to the in charge of the concerned private hospital. The amount collected shall be deposited in a 'Central Corpus/Pool' to be created by the Director General of Health Services and shall only be utilized for providing of free treatment and upliftment of health standards of the poorer section of the society in Delhi. There shall be annual auditing of the said accounts by the Government Auditors as per rules.

91. In addition to the above specific directions issued under each topic, it is necessary for this Court to issue following general directions as well:

A. All the 20 hospitals stated in this judgment and/or all other hospitals identically situated shall strictly comply with the term of free patient treatment to indigent/poor persons of Delhi as specified above i.e. 25% OPD and 10% IPD patients completely free of charges in all respects.

B. The hospitals who have partially or fully complied with even the condition of higher percentage in the past, would not be entitled to any benefit as they were bound by that condition at the relevant times and would not be entitled to any set off of the expenses or otherwise on that ground.

C. The conditions imposed in this judgment qua those hospitals who have fully

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or partially complied with the condition, shall be prospective.

D. The hospitals which have not complied with the conditions at all and have persisted with the default despite issuance of even show cause notices by the authorities, for them the condition shall operate from the date their hospitals have become functional.

E. We also constitute an Inspection Committee consisting of Ms. Maninder Acharya, Mr. Ashok Aggarwal and the Medical Superintendent of Dr.RML Hospital. This Committee would be at liberty to inspect any or all the 20 hospitals to examine whether the directions issued by the court are being carried out truly and sincerely. The committee would obviously work pro bono publico. They have already put in lot of work and effort in brining this petition to an end.

F. The Inspection Committee would be at liberty to revive this petition or apply to the court for issuance of any directions and wherever necessary even for action being taken against the defaulters under the provision of Contempt of Courts Act read with Article 215 of the Constitution of India.

G. In the event, any hospital is found lacking in complying with the directions or conditions stated in this judgment and fails to pay the amounts as demanded by the authorities in terms of this judgment, the Head of the concerned hospital amongst others would be liable to be proceeded against in accordance with law.

H. Without prejudice to the above action, the competent authority or the Government of India would be entitled to take any steps under the terms and conditions of the letters of allotment as well as under the terms and conditions of lease deed and any law for the time being in force for cancellation of lease, re-entry in the premises and including taking possession of the hospital in accordance with law.

92. The general conditions stated by us would mutates mutandi apply with the special directions given under different heads. They shall be supplementary to each other.

93. Where it is the obligation of the State to provide best possible health facilities to its citizens, there it equally imposes an unquestionable duty on the ones who take advantage of concessional rates of land from the State for development of hospitals to help the State, in terms of the letters of allotment, in achieving that object.

94. No right exists without any obligation and no obligation can be dissected from the duty tagged with it. Right should correlate to a duty. The wider interpretations given to Article 21 read with Article 47 of the Constitution of India are not only meant for

the State but they are equally true for all who are placed at an advantageous situation because of the help or allotment of vital assets. Such assets would be impossible to be gathered in a city like Delhi where the land is not available in feet, much less in acres, which the State at the cost of its own projects had provided land at concessional rates to these hospitals. The principle of equality, fairness and equity would command these hospitals to discharge their obligations of free patient treatment to poor strata of Delhi.

95. The writ petition is disposed of with the above directions with no order as to costs.

WP(C) 10697/2004

96. Now we revert back to WP(C) No. 10697/2004. As already noticed by us that the writ petition was primarily directed against malfunctioning of Safdarjung Hospital in relation to patient care, maintenance and hygiene. Various orders were passed by the Court during the pendency of this petition and a Committee was also appointed, which inspected the said Hospital from time to time and reported back to the Court the improvements, which took place and possibility of taking such other measures, which may be necessary for further improvements.

97. During the course of hearing, it was also brought to our notice that the Government has made out a complete distinct plan for improving the Hospital and large amount is being allocated for this purpose. The Committee consisting of Mr. Sidharth Mridul, Senior Advocate, Ms. Maninder Acharya, Ms. Anjana Gosain and Ms. Monika Garg, who has been appearing for the Safdarjung Hospital, was also constituted, which reported that the specific improvements have taken place in regard to Surgical and Gynecological wards. The Gynaecological Ward has further been improved and standards of patient care have been made more stringent. The maintenance of the kitchen from where the food is supplied to the patients, was also in a bad condition. Some improvements have been made but still there is lot of scope for improvement. Steps have been taken to clean the Labour Room and to make it more hygienic and infection free in order to avoid any infection to the newly born.

98. The direction in relation to increase of holding area in Casualty has been complied with.

99. After hearing the counsel appearing for the parties as well as the officers concerned, we pass the following further directions to ensure consistent positive approach by the authorities for improvement of the Safdarjung Hospital and to make it more patient friendly, easily accessible and improving the standards of patient care:

- (i) The Hospital shall earmark proper space in front of the Casualty for parking of Ambulances as it was contended that there is no space where the

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Ambulances should drop the patients for being taken up to the Casualty Ward as sometimes the delay is fatal to the patients.

(ii) Equally, the space already provided being less, more space shall be provided by the Hospital Authorities for keeping the Trolleys in covered area in front of the Casualty Ward so that without any delay, the patients can be shifted to Trolleys and then brought to the Casualty Room/Ward.

(iii) The Hospital shall create and construct referral counters in terms of the directions contained in WP(C) No. 2866/2002. To avoid inconvenience to the patients, the Hospital Authorities shall ensure that all pathological laboratories are commonly located and in any case, the sample collection for different tests is at one place i.e. one patient should not be asked to go to different places for giving samples of blood/urine etc. Each place, where the samples are being collected, must have more than three counters in order to avoid unnecessary delay and to reduce the waiting period of the sick patients.

(iv) All other steps will be taken by the Hospital Administration for consistently improving the Surgical Word, Operation Theaters, Labour Rooms, Gynecological Ward etc. They will maintain complete cleanliness in the Hospital and ensure complete Hygiene. The Inspecting Committee appointed under WP(C) No. 2866/2002 during the course of inspection of this Hospital would also record their observations in this regard.

100. This writ petition is also disposed of with the above additional directions while leaving the parties to bear their own costs.

Anil Kumar and others³⁸
Vs
State of Haryana and others

Hon'ble Judges:

K.C. Gupta and R.S. Mongia, JJ.

R.S. Mongia, J.

1. The Government of Haryana framed a scheme called 'Reproductive Child Health Scheme' in short 'RCH' and initially the scheme was introduced in districts Faridabad, Panchkula and Bhiwani. The scheme is run by a society known as Reproductive Child Health Society. As per the averments made in the writ petition, the petitioners possess the qualification for appointment as Accountant/Clerk/Steno/typist/Staff Nurses/Lab. Technician/Multi Purpose Health Worker (Female)/A.N.M. Driver. In response to advertisement issued from time to time, petitioners were appointed on different posts mentioned above on purely contractual basis. The appointment letters issued by the Chairman of the Reproductive Child Health Society, Bhiwani, to petitioner Anil Sharma as Lab. Technician dated April 27, 1999, has been appended as Annexure P-6 to the writ petition. Its terms of appointment (relevant extract) may be noticed :-

“Sub :- Appointed for the post of L.T. Lab. Technician on contract basis.

On the recommendation of R.C.H. Selection Committee you are hereby offered contract appointment for the post of Lab. Technician C.H.C. Band Kala under R.C.H. Scheme in the fixed pay Rs. 5085/- p.m. only sanctioned by Distt. R.C.H. Society on contract basis.

Your appointment is purely on contract basis upto 31-3-2000. Your services will be terminated without assigning any reason except in the case of removal for the misconduct for character and incident being reported to be unsatisfactory in which case your services will be terminated without any notice and similarly if

³⁸. Full text available at (2000)33LIC3222P&H

you wish to resign the post you may do so by submitting 24 hours notice.”

2. Similar appointment letters were issued to the other petitioners. A termination letter issued to one of the petitioners, Santosh Kumari, dated May, 4, 2000, copy Annexure P-10, when translated into English reads as under :-

“Subject : Regarding relieving from duties. On the above cited subject you were appointed as Staff Nurse in R.C.H. upto 31-3-2000 and afterwards approval has not been received for your continuation in service. Therefore you deem yourself to be relieved w.e.f. 31-3-2000 and you handover your charge to the A.N.M./any employee.”

3. This writ petition has been filed primarily with a prayer that services of the petitioners, though on contract, basis, cannot be terminated till regular appointments are made and further one contractual appointee cannot be replaced by another contractual appointee. In this regard, an advertisement dated May 21, 2000 issued by the Reproductive Child Health Society, Bhiwani, has been appended as Annexure P11, which invites applications for various posts for appointment on contractual basis on fixed salaries upto March 31, 2000.

4. Learned counsel for the petitioners argued that the petitioners have been selected and appointed on contractual basis after due selection and, therefore, their services cannot be terminated till regular appointments are made and in any case the contractual appointment should be extended and the petitioners cannot be replaced by other contractual appointees.

16. So far as the judgments of the apex Court cited by the learned counsel for the petitioners are concerned, it may be observed that in Piara Singh's case (1992 Lab IC 2168) (supra), which was a case where temporary ad hoc appointments had continued in States of Punjab and Haryana for a number of years, the apex Court had asked the State of Haryana and State of Punjab to come out with certain policies for regularising such ad hoc/temporary employees who had worked as such for sufficiently long period. It was in that context when policies were produced before the apex Court that an observation was made that an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee. He must be replaced by a regularly selected employee. According to us this was an observation made under the circumstances of that case. Supreme Court could not have intended that once an ad hoc employee is appointed for a particular period he is entitled to continue till regular appointments are made. Reliance by the petitioners on observations made in the lines of the judgment by the apex Court in Suresh Kumar Verma's case (1996 Lab IC 1265) (supra) to the effect that one temporary employee cannot be replaced by another temporary employee are being read out of context. That case was a State appeal. In paras 3 and 4 of the judgment of the apex Court, it was observed as under :-

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“3. It is seen that the project in which the respondents were engaged had come to an end and that, therefore, they have necessarily been terminated for want of work. The Court cannot give any directions to re-engage them in any other work or appoint them against existing vacancies. Otherwise, the judicial process would become other mode of recruitment de hors the rules.

4. Mr. Mahabir Singh, learned counsel for the respondents contended that there was an admission in the counter affidavit filed in the High Court that there were vacancies and that, therefore, the respondents are entitled to be continued in service. We do not agree with the contention. The vacancies require to be filled up in accordance with the rules and all the candidates who would otherwise be eligible are entitled to apply for when recruitment, is made and seek consideration of their claims on merit according to the Rules for direct recruitment along with all the eligible candidates. The appointment on daily wages cannot be a conduit pipe for regular appointments which would be a back door entry, detrimental to the efficiency of service and would breed seeds of nepotism and corruption. It is equally settled law that even for Class IV employees recruitment according to rules is a pre-condition. Only work charged employees who perform the duties of transitory nature are appointed not to a post but are required to perform the work of transitory and urgent nature so long as the work exists. One temporary employee cannot be replaced by another temporary employee.”

17. It is apparent that under the circumstances mentioned in paragraphs 3 and 4 (supra), the apex Court in last line of para 4 had observed that temporary employee cannot be replaced by another temporary employee. Thus, according to us, it was not being laid down as a matter of law that once a person is temporarily employed to a post, he can continue till a regular appointment is made and he cannot be replaced by another temporary employee. In Kaushal Kishore Shukla's case (1991 AIR SCW 793) (supra) of the apex Court, as noticed above, it has been held that services of a temporary employee can be dispensed with in terms of appointment.

18. In the present case, there is another peculiar fact. The services of the petitioners were terminated on the ground that the budget had not been sanctioned. We are of the view that if later on w.e.f. a particular date, budget is sanctioned, it does not mean that those ad hoc/temporary employees, who were earlier employed and their services stood terminated, should be recalled. An advertisement has been issued in this case, in which all eligible persons, including the petitioners, can apply.

19. For the foregoing reasons, we find no merit in this writ petition, which is hereby dismissed.

20. Petition dismissed.

Ramakant Rai & Anr.
Vs
Union of India & Ors.

Date: 01.03.2005 This Petition was called on for hearing today.

CORUM:

HON'BLE MRS. JUSTICE RUMA PAL
HON'BLE MR. JUSTICE ARIJIT PASAYAT
HON'BLE MR. JUSTICE C.K. THAKKER

UPON hearing counsel the Court made the following

ORDER

Several states have filed affidavits setting out the steps taken by them to regulate sterilization procedures with regard to the male and female patients in their respective states. However, it is apparent that there is no uniformity with regard to the procedures nor the norms followed for ensuring that the guidelines laid down by the Union of India in this regard are being followed. Taking the best of what is being followed by some states, we direct that the States shall:

- (1) Introduce a system of having an approved panel of doctors and limiting the persons entitled to carry on sterilization procedures in the State to those doctors whose names appear on the panel. The panel may be prepared either state-wise, District-wise or Region-wise basis. The criteria for including the names of the doctors on such panel must be laid down by the Union of India as indicated subsequently. Until the Union of India lays down uniform qualification criterion for the empanelment of doctors, for the time being no doctor without gynecological training for at least 5 years post degree experience should be permitted to carry out the sterilization programmes.

(2) The State Government shall also prepare and circulate a checklist which every doctor will be required to fill in before carrying out sterilization procedure in respect of each proposed patient. The checklist must contain items relating to (a) the age of the patient, (b) the health of the patient, (c) the number of children and (d) any further details that the State Government may require on the basis of the guidelines circulated by the Union of India. The doctors should be strictly informed that they should not perform any operation without filling in this check list

(3) The state Governments shall also circulate uniform copies of the proforma of consent. Until the Union Government certifies such proforma, for the time being, the proforma as utilized in the State of U.P., shall be followed by all the States; and

(4) Each States shall set up a Quality Assurance Committee which should, as being followed by the State of Goa, consist of the Director of Health Services, the Health Secretary and the Chief Medical officer, for the purpose of not only ensuring that the guidelines are followed in respect of pre-operative measures (for example, by way of pathological tests, etc.), operational facilities (for example, sufficient number of necessary equipment and aseptic conditions) and post-operative follow ups. It shall be the duty of the Quality Assurance Committee to collect and publish six monthly reports of the number of persons sterilized as well as the number of deaths or complications arising out of the sterilization.

(5) Each State shall also maintain overall statistics giving a break up of the number of the sterilizations carried out, particulars of the procedure followed (since we are given to understand that there are different methods of sterilization), the age of the patients sterilized, the number of children of the persons sterilized, the number of deaths of the persons sterilized either during the operation or thereafter which is relatable to the sterilization, and the number of persons incapacitated by reason of the sterilization programmes.

(6) The State Government shall not only hold an enquiry into every case of breach of the Union of India guidelines by any doctor or organization but also take punitive action against them. As far as the doctors are concerned, their names shall, pending enquiry, be removed from the list of empanelled doctors.

(7) The state shall also bring into effect an insurance policy according to the format followed by the state of Tamil Nadu until such time the Union of India prescribes a standard format.

(8) The Union of India shall lay down within a period of four weeks from date uniform standards to be followed by the State Governments with regard to the health of the proposed patients, the age, the norms for compensation, the for-

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mat of the statistics, check list and consent proforma and insurance.

(9) The Union of India shall also lay down the norms of compensation which should be followed uniformly by all the states. For the time being until the Union Government formulates the norms of compensation, the States shall follow the practice of the State of Andhra Pradesh and shall pay Rs. 1 lakh in case of the death of the patient sterilized, Rs. 30,000/- in case of incapacity and in the case of post-operative complications, the actual cost of treatment being limited to a sum of Rs. 20,000/-.

All the States have responded except the State of Jammu and Kashmir. Needless to say that the State of Jammu and Kashmir will also follow this order.

Let the matter be placed eight weeks later by which time the Union Government and State Governments should indicate the steps taken by them in compliance of this order.

USHA BHADWAJ

MADHU SAXENA

COURT MASTER

P.S. TO REGISTRAR

Sunil Kumar Rana⁴⁰
Vs
State of Haryana and Ors.

Hon'ble Judges:

Doraiswamy Raju and Shivaraj V. Patil, JJ.

JUDGMENT

D. Raju, J.

1. Special leave granted.
2. The appellant filed his nomination on 7.3.2000 for contesting the election to the Municipal Council, Karnal, as a member from Ward No. 31. After overruling the objections of another candidate (5th respondent) the Returning Officer accepted the same. The 5th respondent filed a revision challenging the acceptance of the nomination before the Deputy Commissioner, Karnal, and by an order dated 11.3.2000, the revision was allowed and the nomination paper of the appellant was ordered to be rejected. The appellant filed C.W.P. No. 3141 of 2000 before the High Court of Punjab and Haryana on 14.3.2000. While the said Writ Petition was pending, the elections were held on 2.4.2000 and the 5th respondent was elected as the member of the Municipal Council from Ward No. 31. As a result of the same, on 7.4.2000 the Haryana State Election Commission notified the results. In view of the said subsequent development, the relief prayed for in the Writ Petition was also sought to be modified. Finally, by an order dated 31.10.2001, the Division Bench of the High Court dismissed the Writ Petition holding that the nomination paper of the appellant was rightly ordered to be rejected.
3. The factual basis, which provided the ground for his disqualification and consequent rejection of the nomination, is that at the time of filing his nomination, the respondent had four children and that of the said four children, two were born after the coming into force of the Haryana Municipal (Amendment) Act, 1994 (Haryana Act

40. Full text available at (2003)2SCC628

No. 15 of 1994) the actual date of birth of them, twins being 11.5.1995, as per the municipal records. The stand of the appellant was and even now before us is that the relevant date for determining the disqualification is the coming into force of the Haryana Municipal (Amendment) Act, 1994 - (Haryana Act No. 15 of 1994) viz., 4.10.1994, the date of publication of the Amendment Act in the Government Gazette and not 5.4.1994, the date of coming into force of the Haryana Municipal (Amendment) Act, 1994 (Haryana Act No. 3 of 1994). The High Court was of the view that into disqualification will operate after 5.4.1995 - on the expiry of the period of one year from 5.4.94, the date of coming into force of the Amendment Act No. 3 of 1994. Per contra, the claim of the appellant was that the disqualification will be attracted only after 4.10.95 the expiry of one year from the date of coming into force of the Amendment Act No. 15 of 1994.

4. Heard the learned counsel appearing on either side. To have a proper appreciation of the respective contentions of the parties on either side, it becomes necessary to refer to the relevant provisions of the Act. The Haryana Municipal Act, 1973 (Haryana Act 24 of 1973) as it originally stood prior to the amendment in question did not provide for any such disqualification. It is only for the first time by the Haryana Act, 3 of 1994, Section 13A came to be inserted, which so far as is relevant for this case, reads as follows:

“13A. Disqualification for membership. (1) A person shall be disqualified for being chosen as and for being a member of a municipality-

(a)

(b)

(c) If he has more than two living children:

Provided (SIC) person having more than two children on or after the expiry of one year of the commencement of this Act shall not be deemed to be disqualified.”

5. Thereafter, or Haryana Act No. 15 of 1994 Clause (C) of Sub-section (1) of Section 13A was amended, as mentioned below:

“2. Amendment of Section 13A of Haryana Act 24 of 1973-in the Proviso to Clause (c) of Sub-section (1) of Section 13A of the Haryana Municipal Act, 1973, (hereinafter called the Principal Act), for the word “after”, the word “upto” shall be substituted.”

6. It is the effect of this amendment that really calls for consideration, in this appeal.

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7. On a careful consideration of the relevant statutory provisions and the submissions of the learned counsel on either side, we are of the view that the High Court could not be said to have erred in the construction adopted, which not only accord with the intention of the legislature but avoid uncertainty and friction as well repugnance, which otherwise would result in accepting the stand of the appellant. The main part of Clause (c) of Sub-section (1) of Section 13A in unmistakable terms introduced a disqualification for being chosen as and for being a member of the Municipality of a person who has more than two living children. The mandate of the legislature is clear and specific and purports to be in public interest. At the same time, in order to protect, apparently cases where child could have by then conceived a reasonable period to relax from the rigour of the disqualification seem to have been thought of and keeping in view perhaps the normal gestation period, a proviso in the form of a deeming clause also appear to have been enacted enjoining at the same time that “a person having more than two children on or after the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified”. [Emphasis supplied]

8. The legislative intent thus to compute the period of one year from the “commencement of this Act” meaning thereby Haryana Act No. 3 of 1994 is equally explicit and clear. There is, therefore, no rhyme or reason or justification in the claim on behalf of the appellant that the one year period has to be calculated from the date of coming into force of the Haryana Act No. 15 of 1994, which merely substituted the word “after” by the word “upto”. The result of substitution, as we could see, was to read the provision as amended by the word, ordered to be substituted. The legislature seem to have realized the need for substitution on becoming aware of the anomalies and absurdities to which the provision without such substitution may lead to, even resulting, at times, in repugnancy with the main provision and virtually defeating the intention of the legislature. The modification of the provision, as carried out by the substitution ordered, when found to be need and necessitated to implement effectively the legislative intention and to prevent a social mischief against which the provision is directed, a purposive construction is a must and the only inevitable solution. The right to contest to an office of member of a municipal body is the creature of statute and not a constitutional or fundamental right. Viewed, thus also, we are convinced that the interpretation placed by the High Court on the provisions concerned is neither arbitrary, nor unreasonable or unjust to call for our interference.

9. The appeal consequently fails and shall stand dismissed. No costs.

Zile Singh⁴¹
Vs
State of Haryana and Ors.

Hon'ble Judges:

R.C. Lahoti, C.J., G.P. Mathur and P.K. Balasubramanyan, JJ.

JUDGMENT

R.C. Lahoti, C.J.

1. Leave granted.

2. Haryana Municipal Act, 1973 (hereinafter, the Principal Act, for short) is a State enactment dealing with local self-government through the municipalities. Chapter III of the said Act deals with composition of municipalities. The Haryana Municipal (Amendment) Act, 1994 (Act No. 3 of 1994) inserted Section 13A in Chapter III of the Principal Act which provision reads as under :-

“13A. Disqualification for membership. (1) A person shall be disqualified for being chosen as and for being a member of a municipality —

XXX XXX XXX

(c) if he has more than two living children :

Provided that a person having more than two children on or after the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified”.

XXX XXX XXX”

41. Full text available at AIR2004SC5100

3. The Amendment Act received the assent of the Governor of Haryana on the 1st April, 1994 which was published in the Haryana Gazette, (Extraordinary), Legislative Supplement, Part I, dated April 5, 1994 and on that date the Amendment Act came into force. The amendment spelled out a disqualification effective from 5.4.1994 on a person for being a member of municipality either by election or by continuing to hold the office even if elected prior to the date of coming into force of the Amendment Act. The substantive provision contained in Clause (c) abovesaid spelling out the disqualification is explicit and specific. However, the proviso appended to Clause (c) turned out to be a trouble-maker on account of its faulty drafting. Anomalous consequences verging on absurdity flew from the proviso. While a person having more than two living children on 5th April, 1994 became disqualified for being a member of municipality on that day and the disqualification continued to operate for a period of one year calculated from 5th April, 1994 yet on the expiry of the period of one year the disqualification ceased to operate. Meaning thereby that the legislative embargo imposed on a person from procreating and giving birth to a third child in the context of holding the office of a member of municipality remained in operation for a period of one year only and thereafter it was lifted. Even those who became disqualified on 5.4.1994, the disqualification ceased to operate and they became qualified once again to contest the election and hold the office of member of a municipality on the expiry of one year from 5.4.1994. Obviously, this is not what the Legislature intended.

4. It took more than six months for the State Legislature to realize its error. The Haryana Municipal (Second Amendment) Act, 1994 (Act No. 15 of 1994) was enacted by the Legislature which received the assent of the Governor of Haryana on 3rd October, 1994 published in Haryana Gazette (Extraordinary) dated 4th October, 1994. Section 2 of the Second Amendment reads as under :-

“2. In the proviso to Clause (c) of Sub-section (1) of Section 13A of the Haryana Municipal Act, 1973 (hereinafter called the principal Act), for the word “after”, the word “upto” shall be substituted.”

5. The Second Amendment brought the text of the relevant part of Section 13A in conformity with the legislative intent which prevailed behind the preceding amendment, that is, the First Amendment.

6. Zile Singh, the appellant was married with one Om Pati in April 1970. The couple had three living children when Om Pati died in April 1991. The appellant then married one Sunita on 20.7.1991. Out of the latter marriage, two children were born to the appellant — a daughter, Puja born in April 1992 and a son Gaurav born on 13.8.1995. The appellant was holding the office of member of Municipality. One Nafe Singh filed a complaint against the appellant bringing it to the notice of the State Government that on a child having been born after 5th April, 1995, i.e., one year after the commencement of the First Amendment Act, the appellant had incurred disqualification for holding the office of member. Clause (f) of Sub-section (1) of Section 14 of

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the Principal Act confers power on the State Government to remove by notification any member of a committee if he has, since his election or nomination become subject to any disqualification which, if it had existed at the time of his election or nomination, would have rendered him ineligible under any law for the time being in force relating to the qualifications of candidates for election or domination or if it appears that he was, at the time of his election or nomination subject to any such disqualification. The factum of the birth of Gaurav on 13.8.1995 is not disputed though the appellant contended that Gaurav was given away in adoption on 10.9.1995. The State Election Commission, Haryana which is the competent authority found the appellant having incurred the disqualification within the meaning of Section 13A(1)(c). The disqualification was notified.

7. Feeling aggrieved the appellant filed a writ petition in the High Court which has been dismissed. This is an appeal by special leave.

8. At the very outset we may state that the retrospectivity in operation of the text as amended by the Second Amendment came up for the consideration of a two-Judges Bench of this Court in **Sunil Kumar Rana v. State of Haryana and Ors.** - (2003) 2 SCC 628. This court held that the legislative intent to compute the period of one year under the proviso is from the “commencement of this Act” meaning thereby from the date of coming into force of Haryana Act 3 of 1994 and not Haryana Act 15 of 1994 which merely substituted the word “after” by the word “upto”. The result of the substitution was to read the provision as amended by the word ordered to be substituted. The Court held — “The legislature seems to have realized, the need for substitution on becoming aware of the anomalies and absurdities to which the provision without such substitution may lead to, even resulting, at times, in repugnancy with the main provision and virtually defeating the intention of the legislature. The modification of the provision, as carried out by the substitution ordered, when found to be needed and necessitated to implement effectively the legislative intention and to prevent a social mischief against which the provision is directed, a purposive construction is a must and the only inevitable solution. The right to contest to an office of a member of a municipal body is the creature of statute and not a constitutional or fundamental right.”

9. In spite of the issue posed for decision before us being squarely covered by the abovesaid decisions, the learned counsel for the appellant does not feel satisfied. In his humble submission **Sunil Kumar Rana’s case** (supra), which is two-judges Bench decision, was not correctly decided and hence needs a reconsideration and an overruling thereafter. In view of the submission so made and forcefully pressed, we proceed to examine and deal with the pleas raised before us independently of the holding in Sunil Kumar Rana’s case (supra).

10. The constitutional validity of ‘two child norm’ as legislatively prescribed, and a departure therefrom resulting in attracting applicability of disqualification for holding

an elective office, has been upheld by this Court as *intra vires* the Constitution repelling all possible objections founded on very many grounds in **Javed and Ors. v. State of Haryana and Ors.** This Court has also held that the disqualification is attracted no sooner a third child is born and is living after two living children and merely because the couple has parted with one child by giving it away in adoption, the disqualification does not come to an end. However, the present case poses a different issue.

11. According to the appellant, the disqualification imposed by Section 13A (1)(c) of the First Amendment remained in operation only for a period of one year and would have in ordinary course ceased to operate on the expiry of the period of one year from April 5, 1994. The citizens were justified in arranging their affairs including the enlargement of their families keeping in view the provision of law as it stood. However, the Second Amendment Act effective from 14.10.1994 made a difference. On that day, the Legislature specifically provided that a person having more than two children on or after the expiry of one year shall stand disqualified. This period of one year, in the submission of the appellant, should be calculated from 4.10.1994 and not 5.4.1994 and if that be done the birth of the child on 13.8.1995 would not attract the disqualification.

12. This plea of the appellant raises a few interesting questions, such as, the nature of amendment, i.e., whether it is at all retrospective in operation, and if not, whether the provision as amended by the Second Amendment applies to the appellant.

13. It is a cardinal principle of construction that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only '*nova constitutio futuris formam imponere debet non praeteritis*' — a new law ought to regulate what is to follow, not the past. (See : Principles of Statutory Interpretation by Justice G.P. Singh, Ninth Edition, 2004 at p.438). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole. (*ibid*, p.440)

14. The presumption against retrospective operation is not applicable to declaratory statutes.....In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is "to explain" an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.....An amending Act

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may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect. (ibid, pp.468-469).

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, Seventh Edition), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the Courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the Statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of , the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated (p.388). The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right (p.392).

.....

22. The State Legislature of Haryana intended to impose a disqualification with effect from 5.4.1994 and that was done. Any person having more than two living children was disqualified on and from that day for being a member of municipality. However, while enacting a proviso by way of an exception carving out a fact-situation from the operation of the newly introduced disqualification the draftsman's folly caused the creation of trouble. A simplistic reading of the text of the proviso spelled out a consequence which the Legislature had never intended and could not have intended. It is true that the Second Amendment does not expressly give the amendment a retrospective operation. The absence of a provision expressly giving a retrospective operation to the legislation is not determinative of its prospectivity or retrospectivity. Intrinsic evidence may be available to show that the amendment was necessarily intended to have the retrospective effect and if the Court can unhesitatingly conclude in favour of retrospectivity, the Court would not hesitate in giving the Act that operation unless prevented from doing so by any mandate contained in law or an established principle of interpretation of statutes.

23. The text of Section 2 of the Second Amendment Act provides for the word "upto" being substituted for the word "after". What is the meaning and effect of the expression employed therein - "shall be substituted".

24. The substitution of one text for the other pre-existing text is one of the known and well-recognised practices employed in legislative drafting. 'Substitution' has to be distinguished from 'supersession' or a mere repeal of an existing provision.

26. In *Javed* (supra) it was held that the right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a statute. The statute which confers the right to contest an election can also provide for the necessary qualifications and disqualifications for holding an elective office. The bar by way of disqualification created against holding the office of a member of a municipality by Clause (c) of Sub-section (1) of Section 13A was absolute. Merely because a disqualification is imposed by reference to certain facts which are referable to a date prior to the enactment of disqualification, the Act does not become retrospective in operation. No vested right was taken away. The First Amendment was not a piece of legislation having any retrospectivity. However, the legislature thought that it would be more reasonable if the disqualification was not applied by reference to a child born within a period of one year from the date of commencement of the Act. The period of one year was appointed keeping in view the period of gestation which is two hundred and eighty days as incorporated in Section 112 of the Indian Evidence Act of 1872 and added to it a little more margin of eighty five days. The proviso spells out this meaning but for the error in drafting. Even if there would have been no amendment (as introduced by the Second Amendment Act) the proviso as it originally stood, if subjected to judicial scrutiny, would have been so interpreted and the word 'after' would have been read as 'upto' or assigned that meaning so as to carry out the legislative intent and not to make a capital out of the draftsman's folly. Or, the proviso - if not read down - would have been declared void and struck down as being arbitrary and discriminatory inasmuch as the persons having more than two living children on the date of enactment of the Act and within one year thereafter and the persons having more than two living children after the date of one year could not have formed two classes capable of being distinguished on a well defined criterion so as to fulfill the purpose sought to be achieved by the legislature. However, the legislature got wiser by realizing its draftsman's mistake and stepped in by substituting the mistaken word 'after' by the correct word 'upto' which should have been there since very beginning. In our opinion the Second Amendment is declaratory in nature. It alters the text of the First Amendment in such manner as to remove the obvious absurdity therefrom and brings it in conformity with what the Legislature had really intended to provide. It explains and removes the obvious error and clarifies what the law always was and shall remain to be. The Second Amendment would operate retrospectively from the date of the First Amendment and in giving such operation no mandate of any law or principle is violated. Else, the evil sought to be curbed continues to exist for some period contrary to legislative intent. The application of rule against retrospectivity stands excepted from Second Amendment Act.

27. In *Javed* (supra) the Court has been at pains to point out how the growth of population of India was alarming and posed a menace to be checked. It was in national interest to check the growth of population by casting disincentives even through legislation. The First Amendment Act targets the evil and seeks to cure it. The legislative competence of the State is not disputed. Thus, keeping in view the general scope and purview of the statute, the remedy sought to be applied, the former state of law, the

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legislative intent and the employment of the expression - “for the word ‘after’ the Word “upto’ shall be substituted” in the text of the Second Amendment, we have no doubt in our mind that the Second Amendment has the effect of amending the text of First Amendment ever since the date of commencement of the First Amendment, i.e., April 5, 1994.

28. We hold that **Sunil Kumar Rana’s case** has been correctly decided. It does not call for any reconsideration. The appeal is wholly devoid of any merit and the same is dismissed. The decision by the High Court is maintained.

Samar Ghosh⁴²
Vs
Jaya Ghosh

B.N. Agarwal, P.P. Naolekar and Dalveer Bhandari, JJ.

JUDGMENT

Dalveer Bhandari, J.

1. This is yet another unfortunate matrimonial dispute which has shattered the twenty two year old matrimonial bond between the parties. The appellant and the respondent are senior officials of the Indian Administrative Service, for short 'IAS'. The appellant and the respondent were married on 13.12.1984 at Calcutta under the Special Marriage Act, 1954. The respondent was a divorcee and had a female child from her first marriage. The custody of the said child was given to her by the District Court of Patna where the respondent had obtained a decree of divorce against her first husband, Debashish Gupta, who was also an I.A.S. officer. The appellant and the respondent knew each other since 1983. The respondent, when she was serving as the Deputy Secretary in the Department of Finance, Government of West Bengal, used to meet the appellant between November 1983 and June 1984. They cultivated close friendship which later developed into courtship.

2. The respondent's first husband, Debashish Gupta filed a belated appeal against the decree of divorce obtained by her from the District Court of Patna. Therefore, during the pendency of the appeal, she literally persuaded the appellant to agree to the marriage immediately so that the appeal of Debashish Gupta may become infructuous. The marriage between the parties was solemnized on 13.12.1984. According to the appellant, soon after the marriage, the respondent asked the appellant not to interfere with her career. She had also unilaterally declared her decision not to give birth to a child for two years and the appellant should not be inquisitive about her child and he should try to keep himself aloof from her as far as possible. According to the appellant, there was imposition of rationing in emotions in the arena of love, affection,

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future planning and normal human relations though he tried hard to reconcile himself to the situation created by the respondent.

3. The appellant asserted that the apathy of the respondent and her inhuman conduct towards him became apparent in no time. In February 1985, the appellant suffered prolonged illness. The respondent's brother was working in Bareilly. Her parents along with her daughter went there for sojourn. The appellant could not go because of high temperature and indifferent health. She left him and went to Bareilly even when there was no one to look after him during his illness. On her return, the respondent remained in Calcutta for about four days, but she did not care to meet the appellant or enquire about his health. According to the appellant, he made all efforts to make adjustments and to build a normal family life. He even used to go to Chinsurah every weekend where the respondent was posted but she showed no interest and was overtly indifferent to him. The appellant usually returned from Chinsurah totally dejected. According to the appellant, he felt like a stranger in his own family. The respondent unilaterally declared that she would not have any child and it was her firm decision. The appellant felt that his marriage with the respondent was merely an eye-wash because immediately after the marriage, serious matrimonial problems developed between them which kept growing.

4. The respondent was transferred to Calcutta in May 1985. Their residential flat at the Minto Park Housing Estate stood allotted to the appellant. The respondent used to come to their flat intermittently. One Prabir Malik, a domestic servant-cum-cook also used to live in the said flat. He used to cook food and carry out household work for the appellant. According to the appellant, the respondent used to say that her daughter was being neglected and that she might even be harmed. The indication was towards Prabir Malik. The appellant and the respondent virtually began to live separately from September, 1985.

5. The appellant was transferred to Murshidabad in May 1986 but the respondent continued to stay in Calcutta. The appellant stayed in Murshidabad up to April 1988 and thereafter he went on deputation on an assignment of the Government of India but there he developed some health problem and, therefore, he sought a transfer to Calcutta and came back there in September 1988. On transfer of the appellant to Murshidabad, the flat in which they were staying in Minto Park was allotted to the respondent as per the standard convention. The appellant and the respondent again began living together in Calcutta from September 1988. The appellant again tried to establish his home with the respondent after forgetting the entire past.

6. According to the appellant, the respondent never treated the house to be her family home. The respondent and her mother taught respondent's daughter that the appellant was not her father. The child, because of instigation of the respondent and her mother, gradually began to avoid the appellant. The respondent in no uncertain terms used to tell the appellant that he was not her father and that he should not talk

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to the child or love her. The appellant obviously used to feel very offended.

7. The appellant also learnt that the respondent used to tell her mother that she was contemplating divorce to the appellant. The respondent's daughter had also disclosed to the appellant that her mother had decided to divorce him. According to the appellant, though they lived under the same roof for some time but the respondent virtually began to live separately from April, 1989 at her parent's house. In April 1990 the appellant's servant Prabir Malik had left for Burdwan on getting a job. The respondent used to come from her parents house to drop her daughter to her school La Martinere. She used to come to the flat at Minto Park from the school to cook food only for herself and leave for the office. The appellant began to take his meals outside as he had no other alternative.

8. According to the appellant, the said Prabir Malik came to the flat on 24th August, 1990 and stayed there at the night. The next two days were holidays. The respondent and her father also came there on 25th August, 1990. On seeing Prabir, the respondent lost her mental equanimity. She took strong exception to Prabir's presence in her flat and started shouting that the appellant had no self-respect and as such was staying in her flat without any right. According to the appellant, he was literally asked to get out of that flat. The respondent's father was also there and it appeared that the act was pre-conceived. The appellant felt extremely insulted and humiliated and immediately thereafter he left the flat and approached his friend to find a temporary shelter and stayed with him till he got a government flat allotted in his name on 13.9.1990.

9. Admittedly, the appellant and the respondent have been living separately since 27th August, 1990. The appellant further stated that the respondent refused cohabitation and also stopped sharing bed with him without any justification. Her unilateral decision not to have any child also caused mental cruelty on the appellant. The appellant was not permitted to even show his normal affection to the daughter of the respondent although he was a loving father to the child. The appellant also asserted that the respondent desired sadistic pleasure at the discomfiture and plight of the appellant which eventually affected his health and mental peace. In these circumstances, the appellant has prayed that it would not be possible to continue the marriage with the respondent and he eventually filed a suit for the grant of divorce. In the suit for divorce filed by the appellant in Alipur, Calcutta, the respondent filed her written statement and denied the averments. According to the version of the respondent, Prabir Malik, the domestic servant did not look after the welfare and well-being of the child. The respondent was apprehensive that Prabir Malik may not develop any affection towards the respondent's daughter.

10. According to the version of the respondent, the appellant used to work under the instructions and guidance of his relations, who were not very happy with the respondent and they were interfering with their family affairs. The respondent stated that

the appellant has filed the suit for divorce at the behest of his brothers and sisters. The respondent has not denied this fact that from 27th August, 1990 they have been continuously living separately and thereafter there has been no interaction whatsoever between them.

11. The appellant, in support of his case, has examined himself as witness No. 1. He has also examined Debabrata Ghosh as witness No. 2, N. K. Raghupatty as witness No. 3, Prabir Malik as witness No. 4 and Sikhabilas Barman as witness No. 5. Debabrata Ghosh, witness No. 2 is the younger brother of the appellant. He has stated that he did not attend the marriage ceremony of the appellant and the respondent. He seldom visited his brother and sister-in-law at their Minto Park flat and he did not take any financial assistance from his brother to maintain his family. He mentioned that he noticed some rift between the appellant and the respondent. The appellant also examined N. K. Raghupatty, witness No. 3, who was working as the General Secretary at that time. He stated that he knew both the appellant and the respondent because both of them were his colleagues. He was occupying a suite in the Circuit House at Calcutta. He stated that two weeks before the Puja vacation in 1990, the appellant wanted permission to stay with him because he had some altercation with the respondent. According to this witness, the appellant was his close friend, therefore, he permitted him to stay with him. He further stated that the appellant after a few days moved to the official flat allotted to him.

12. Prabir Malik was examined as witness No. 4. He narrated that he had known the appellant for the last 8/9 years. He was working as his servant-cum-cook. He also stated that since April 1990 he was serving at-the Burdwan Collectorate. He stated that after getting the job at Burdwan Collectorate, he used to visit the Minto Park flat of the appellant on 2nd and 4th Saturdays. He stated that the relationship between the appellant and the respondent was not cordial. He also stated that the appellant told him that the respondent cooks only for herself but does not cook for the appellant and he used to eat out and sometimes cooked food for himself. He stated that the brothers and sisters of the appellant did not visit Minto Park flat. He also stated that the daughter of the respondent at times used to say that the appellant was not her father and that she had no blood relationship with him. He stated that on 4th Saturday, in the month of August, 1990, he came to the flat of the appellant. On seeing him the respondent got furious and asked him for what purpose he had come to the flat? She further stated that the appellant had no residence, therefore, she had allowed him to stay in her flat. She also said that it was her flat and she was paying rent for it. According to the witness, she further stated that even the people living on streets and street beggars have some prestige, but these people had no prestige at all. At that time, the father of the respondent was also present. According to Prabir Malik, immediately after the incident, the appellant left the flat. The appellant also examined Sikhabilas Barman as witness No. 5, who was also an IAS Officer. He stated that he had known the appellant and his wife and that they did not have cordial relations. He further stated that the appellant told him that the respondent cooks for herself and

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leaves for office and that she does not cook for the appellant and he had to take meals outside and sometimes cooked food for himself. He also stated that the respondent had driven the appellant out of the said flat.

13. The respondent has examined herself. According to her statement, she indicated that she and the appellant were staying together as normal husband and wife. She denied that she ill-treated Prabir Malik. She further stated that the brothers and sisters of the appellant used to stay at Minto Park flat whenever they used to visit Calcutta. She stated that they were interfering in the private affairs, which was the cause of annoyance of the respondent. She denied the incident which took place after 24.8.1990. However, she stated that the appellant had left the apartment on 27.8.1990. In the cross-examination, she stated that the appellant appeared to be a fine gentleman. She admitted that the relations between the appellant and the respondent were not so cordial. She denied that she ever mentioned to the appellant that she did not want a child for two years and refused cohabitation. The respondent also examined R. M. Jamir as witness No. 2. He stated that he had known both of them and in the years 1989-90 he visited their residence and he found them quite happy. He stated that in 1993 the respondent enquired about the heart problem of the appellant. The respondent also examined her father A. K. Dasgupta as witness No. 3. He stated that his daughter neither insulted nor humiliated her husband in presence of Prabir Malik nor asked him to leave the apartment. He stated that the appellant and the respondent were living separately since 1990 and he never enquired in detail about this matter. He stated that the appellant had a lot of affection for the respondent's daughter. He stated that he did not know about the heart trouble of the appellant. He stated that he was also unaware of appellant's bye-pass surgery.

14. The learned Additional District Judge, 4th Court, Alipur, after examining the plaint, written statements and evidence on record, framed the follows issues:

1. Is the suit maintainable?
2. Is the respondent guilty of cruelty as alleged?
3. Is the petitioner entitled to decree of divorce as claimed?
4. To what other relief or reliefs the petitioner is entitled?

15. Issue No. 1 regarding maintainability of the suit was not pressed, so this issue was decided in favour of the appellant. The trial court, after analyzing the entire pleadings and evidence on record, came to the conclusion that the following facts led to mental cruelty:

1. Respondent's refusal to cohabit with the appellant.

2. Respondent's unilateral decision not to have children after the marriage.

3. Respondent's act of humiliating the appellant and virtually turning him out of the Minto Park apartment. The appellant in fact had taken shelter with his friend and he stayed there till official accommodation was allotted to him.

4. Respondent's going to the flat and cooking only for herself and the appellant was forced to either eat out or cook his own meals.

5. The respondent did not take care of the appellant during his prolonged illness in 1985 and never enquired about his health even when he underwent the by-pass surgery in 1993.

6. The respondent also humiliated and had driven out the loyal servant-cum-cook of the appellant, Prabir Malik.

16. The learned Additional District Judge came to the finding that the appellant has succeeded in proving the case of mental cruelty against the respondent, therefore, the decree was granted by the order dated 19.12.1996 and the marriage between the parties was dissolved. The respondent, aggrieved by the said judgment of the learned Additional District Judge, filed an appeal before the High Court. The Division Bench of the High Court vide judgment dated 20.5.2003 reversed the judgment of the Additional District Judge on the ground that the appellant has not been able to prove the allegation of mental cruelty. The findings of the High Court, in brief, are recapitulated as under:

I. The High Court arrived at the finding that it was certainly within the right of the respondent-wife having such a high status in life to decide when she would like to have a child after marriage.

II. The High Court also held that the appellant has failed to disclose in the pleadings when the respondent took the final decision of not having a child.

III. The High Court held that the appellant also failed to give the approximate date when the respondent conveyed this decision to the appellant.

IV. The High Court held that the appellant started living with the respondent, therefore, that amounted to condonation of the acts of cruelty.

V. The High Court disbelieved the appellant on the issue of respondent's refusing to cohabit with him, because he failed to give the date, month or the year when the respondent conveyed this decision to him.

VI. The High Court held that the appellant's and the respondent's sleeping in sepa-

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rate rooms did not lead to the conclusion that they did not cohabit.

VII. The High Court also observed that it was quite proper for the respondent with such high status and having one daughter by her previous husband, not to sleep in the same bed with the appellant.

VIII. The High Court observed that refusal to cook in such a context when the parties belonged to high strata of society and the wife also has to go to office, cannot amount to mental cruelty.

IX. The High Court's findings that during illness of the husband, wife's not meeting the husband to know about his health did not amount to mental cruelty.

17. The High Court was unnecessarily obsessed by the fact that the respondent was also an IAS Officer. Even if the appellant had married an IAS Officer that does not mean that the normal human emotions and feelings would be entirely different. The finding of the Division Bench of the High Court that, considering the position and status of the respondent, it was within the right of the respondent to decide when she would have the child after the marriage. Such a vital decision cannot be taken unilaterally after marriage by the respondent and if taken unilaterally, it may amount to mental cruelty to the appellant. The finding of the High Court that the appellant started living with the respondent amounted to condonation of the act of cruelty is unsustainable in law. The finding of the High Court that the respondent's refusal to cook food for the appellant could not amount to mental cruelty as she had to go to office, is not sustainable. The High Court did not appreciate the evidence and findings of the learned Additional District Judge in the correct perspective. The question was not of cooking food, but wife's cooking food only for herself and not for the husband would be a clear instance of causing annoyance which may lead to mental cruelty.

18. The High Court has seriously erred in not appreciating the evidence on record in a proper perspective. The respondent's refusal to cohabit has been proved beyond doubt. The High Court's finding that the husband and wife might be sleeping in separate rooms did not lead to a conclusion that they did not cohabit and to justify this by saying that the respondent was highly educated and holding a high post was entirely unsustainable. Once the respondent accepted to become the wife of the appellant, she had to respect the marital bond and discharge obligations of marital life. The finding of the High Court that if the ailment of the husband was not very serious and he was not even confined to bed for his illness and even assuming the wife under such circumstances did not meet the husband, such behaviour can hardly amount to cruelty, cannot be sustained. During illness, particularly in a nuclear family, the husband normally looks after and supports his wife and similarly, he would expect the same from her. The respondent's total indifference and neglect of the appellant during his illness would certainly lead to great annoyance leading to mental cruelty. It may be pertinent to mention that in 1993, the appellant had a heart problem leading

to bye-pass surgery, even at that juncture, the respondent did not bother to enquire about his health even on telephone and when she was confronted in the cross-examination, she falsely stated that she did not know about it.

19. Mr. A. K. Dasgupta, father of the respondent and father-in-law of the appellant, was examined by the respondent. In the cross-examination, he stated that his daughter and son-in-law were living separately and he never enquired about this. He further said that the appellant left the apartment, but he never enquired from anybody about the cause of leaving the apartment. He also stated that he did not know about the heart trouble and bye-pass surgery of the appellant. In the impugned judgment, the High Court has erroneously placed reliance on the evidence submitted by the respondent and discarded the evidence of the appellant. The evidence of this witness is wholly unbelievable and cannot stand the scrutiny of law.

20. The High Court did not take into consideration the evidence of Prabir Malik primarily because of his low status in life. The High Court, in the impugned judgment, erroneously observed that the appellant did not hesitate to take help from his servant in the matrimonial dispute though he was highly educated and placed in high position. The credibility of the witness does not depend upon his financial standing or social status only. A witness which is natural and truthful should be accepted irrespective of his/her financial standing or social, status. In the impugned judgment, testimony of witness No. 4 (Prabir Malik) is extremely important being a natural witness to the incident. He graphically described the incident of 27.8.1990. He also stated that in his presence in the apartment at Minto Park, the respondent stated that the appellant had no place of residence, therefore, she allowed him to stay in her flat, but she did not like any other man of the appellant staying in the flat. According to this witness. she said that the flat was hers and she was paying rent for it. According to this witness, the respondent further said that even people living on streets and street beggars have some prestige, but these people have no prestige at all. This witness also stated that immediately thereafter the appellant had left the flat and admittedly since 27.8.1990, both the appellant and the respondent are living separately. This was a serious incident and the trial court was justified in placing reliance on this evidence and to come to a definite conclusion that this instance coupled with many other instances led to grave mental cruelty to the appellant. The trial Court rightly decreed the suit of the appellant. The High Court was not justified in reversing the judgment of the trial Court.

21. The High Court also failed to take into consideration the most important aspect of the case that admittedly the appellant and the respondent have been living separately for more than sixteen and half years (since 27.8.1990). The entire substratum of the marriage has already disappeared. During this long period, the parties did not spend a single minute together. The appellant had undergone bye-pass surgery even then the respondent did not bother to enquire about his health even on telephone. Now the parties have no feelings and emotions towards each other.

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22. The respondent appeared in person. Even before this Court, we had indicated to the parties that irrespective of whatever has happened, even now, if they want to reconcile their differences then the case be deferred and they should talk to each other. The appellant was not even prepared to speak with the respondent despite request from the Court. In this view of the matter, the parties cannot be compelled to live together. The learned Additional District Judge decreed the appellant's suit on the ground of mental cruelty. We deem it appropriate to analyze whether the High Court was justified in reversing the judgment of the learned Additional District Judge in view of the law declared by a catena of cases. We deem it appropriate to deal with the decided cases.

23. Before we critically examine both the judgments in the light of settled law, it has become imperative to understand and comprehend the concept of cruelty. The Shorter Oxford Dictionary defines 'cruelty' as 'the quality of being cruel; disposition of inflicting suffering; delight in or indifference to another's pain; mercilessness; hard-heartedness'.

The term "mental cruelty" has been defined in the Black's Law Dictionary [8th Edition, 2004] as under:

Mental Cruelty - As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical health, or mental health of the other spouse.

The concept of cruelty has been summarized in Halsbury's Laws of England [Vol.13, 4th Edition Para 1269] as under:

The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exists.

In 24 American Jurisprudence 2d, the term “mental cruelty” has been defined as under:

Mental Cruelty as a course of unprovoked conduct toward one’s spouse which causes embarrassment, humiliation, and anguish so as to render the spouse’s life miserable and unendurable. The plaintiff must show a course of conduct on the part of the defendant which so endangers the physical or mental health of the plaintiff as to render continued cohabitation unsafe or improper, although the plaintiff need not establish actual instances of physical abuse.

In the instant case, our main endeavour would be to define broad parameters of the concept of ‘mental cruelty’. Thereafter, we would strive to determine whether the instances of mental cruelty enumerated in this case by the appellant would cumulatively be adequate to grant a decree of divorce on the ground of mental cruelty according to the settled legal position as crystallized by a number of cases of this Court and other Courts.

24. This Court has had an occasion to examine in detail the position of mental cruelty in **N.G. Dastane v. S. Dastane** reported in observed as under:

The enquiry therefore has to be whether the conduct charges as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent....

25. In the case of **Sirajmohmedkhan Janmohamadkhan v. Haizunnisa Yasinkhan and Anr.** reported in this Court stated that the concept of legal cruelty changes according to the changes and advancement of social concept and standards of living. With the advancement of our social conceptions, this feature has obtained legislative recognition, that a second marriage is a sufficient ground for separate residence and maintenance. Moreover, to establish legal cruelty, it is not necessary that physical violence should be used. Continuous ill-treatment, cessation of marital intercourse, studied neglect, indifference on the part of the husband, and an assertion on the part of the husband that the wife is unchaste are all factors which lead to mental or legal cruelty.

26. In the case of **Shobha Rani v. Madhukar Reddi** reported in this Court had an occasion to examine the concept of cruelty. The word ‘cruelty’ has not been defined in the Hindu Marriage Act. It has been used in Section 13(1)(i)(a) of the Act in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or

27. In **Rajani v. Subramonian** the Court aptly observed that the concept of cruelty depends upon the type of life the parties are accustomed to or their economic and

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social conditions, their culture and human values to which they attach importance, judged by standard of modern civilization in the background of the cultural heritage and traditions of our society.

28. Again, this Court had an occasion to examine in great detail the concept of mental cruelty. In the case of **V. Bhagat v. D. Bhagat (Mrs.)** , the Court observed, in para 16 at page 347, as under:

16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such unintentional. If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment. conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.

29. This Court aptly observed in **Chetan Dass v. Kamla Devi**, para 14 at pp.258-259, as under:

Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute

framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of “irretrievably broken marriage” as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case.

30. In **Savitri Pandey v. Prem Chandra Panadey** the Court stated as under:

Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. “Cruelty”, therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other.

31. This Court in the case of **Gananath Pattnaik v. State of Orissa** observed as under:

The concept of cruelty and its effect varies from individual to individual, also depending upon the social and economic status to which such person belongs. “Cruelty” for the purposes of constituting the offence under the aforesaid section need not be physical. Even mental torture or abnormal behaviour may amount to cruelty and harassment in a given case.

32. The mental cruelty has also been examined by this Court in **Parveen Mehta v. Inderjit Mehta** which reads as under:

Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour

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in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other.

In this case the Court also stated that so many years have elapsed since the spouses parted, company. In these circumstances it can be reasonably inferred that the marriage between the parties has broken down irretrievably.

33. In **A. Jayachandra v. Aneel Kaur** the Court observed as under:

The expression “cruelty” has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse, same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

To constitute cruelty, the conduct complained of should be “grave and weighty” so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than “ordinary wear and tear of married life”. The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is dif-

difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent.

34. This Court in **Vinita Saxena v. Pankaj Pandit** aptly observed as under:

As to what constitutes the required mental cruelty for the purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home.

If the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would, otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer.

35. In **Shobha Rani's case** (supra) at pp. 108-09, para 5, the Court observed as under:

5. Each case may be different. We deal with the conduct of human beings who are no

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generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful (sic) realm of cruelty.

In this case, the Court cautioned the lawyers and judges not to import their own notions of life in dealing with matrimonial problems. The judges should not evaluate the case from their own standards. There may be a generation gap between the judges and the parties. It is always prudent if the judges keep aside their customs and manners in deciding matrimonial cases in particular.

36. In a recent decision of this Court in the case of **Rishikesh Sharma v. Saroj Sharma**, this Court observed that the respondent wife was living separately from the year 1981 and the marriage has broken down irretrievably with no possibility of the parties living together again. The Court further observed that it will not be possible for the parties to live together and therefore there was no purpose in compelling both the parties to live together. Therefore the best course was to dissolve the marriage by passing a decree of divorce so that the parties who were litigating since 1981 and had lost valuable part of life could live peacefully in remaining part of their life. The Court further observed that her desire to live with her husband at that stage and at that distance of time was not genuine.

37. This Court observed that under such circumstances, the High Court was not justified in refusing to exercise its jurisdiction in favour of the appellant who sought divorce from the Court. "Mental cruelty" is a problem of human behaviour. This human problem unfortunately exists all over the world. Existence of similar problem and its adjudication by different courts of other countries would be of great relevance, therefore, we deem it appropriate to examine similar cases decided by the Courts of other jurisdictions. We must try to derive benefit of wisdom and light received from any quarter.

ENGLISH CASES:

38. William Latey, in his celebrated book 'The Law and Practice in Divorce and Matrimonial Causes' (15th Edition) has stated that there is no essential difference between the definitions of the ecclesiastical courts and the post-1857 matrimonial courts of legal cruelty in the marital sense. The authorities were fully considered by the Court of Appeal and the House of Lords in **Russell v. Russell** (1897) AC 395 and the principle prevailing in the Divorce Court (until the Divorce Reform Act, 1969 came in force), was as follows:

Conduct of such a character as to have caused danger to life, limb, or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger, {see: **Russell v. Russell** (1895) P. 315 (CA)}.

39. In England, the Divorce Reform Act, 1969 came into operation on January 1, 1971. Thereafter the distinction between the sexes is abolished, and there is only one ground of divorce, namely that the marriage has broken down irretrievably. The Divorce Reform Act, 1969 was repealed by the Matrimonial Causes Act, 1973, which came into force on January 1, 1974. The sole ground on which a petition for divorce may be presented to the court by either party to a marriage is that the marriage has broken down irretrievably.

40. Lord Stowell's proposition in **Evans v. Evans** (1790) 1 Hagg Con 35 was approved by the House of Lords and may be put thus: before the court can find a husband guilty of legal cruelty towards his wife, it is necessary to show that he has either inflicted bodily injury upon her, or has so conducted himself towards her as to render future cohabitation more or less dangerous to life, or limb, or mental or bodily health. He was careful to avoid any definition of cruelty, but he did add: The causes must be grave and weighty, and such as to show an absolute impossibility that the duties of married life can be discharged'. But the majority of their Lordships in **Russell v. Russell** (1897) (supra) declined to go beyond the definition set out above. In this case, Lord Herschell observed as under:

It was conceded by the learned Counsel for the appellant, and is, indeed, beyond controversy, that it is not every act of cruelty in the ordinary and popular sense of that word which amounted to saevitia, entitling the party aggrieved to a divorce; that there might be many wilful and unjustifiable acts inflicting pain and misery in respect of which that relief could not be obtained.

41. Lord Merriman, in **Waters v. Waters** (1956) 1 All. E.R. 432 observed that intention to injure was not necessary ingredient of cruelty.

42. Sherman, J. in **Hadden v. Hadden**, The Times, December 5, 1919, (also reported in Modern Law Review Vol.12, 1949 at p.332) very aptly mentioned that he had no intention of being cruel but his intentional acts amounted to cruelty. In this case, it was observed as under:

'It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances would consider that the conduct complained of is such that this spouse should not be called upon to endure it.'

43. Lord Simon in **Watt (or Thomas) v. Thomas** (1947) 1 All E.R. 582 at p. 585 observed as under:

... the leading judicial authorities in both countries who have dealt with this subject

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are careful not to speak in too precise and absolute terms, for the circumstances which might conceivably arise in an unhappy married life are infinitely various.

Lord Stowell in *Evans v. Evans* 1790 (1) Hagg Con 35 avoids giving a “direct definition”. While insisting that “mere austerity of temper, petulance of manners, rudeness of language, want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty.

44. In ***Simpson v. Simpson*** (1951) 1 All E.R. 955, the Court observed that:

When the legal conception of cruelty is described as being conduct of such a character as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger, it is vital to bear in mind that it comprises two distinct elements: first, the ill-treatment complained of, and, secondly, the resultant danger or the apprehension thereof. Thus, it is inaccurate, and liable to lead to confusion, if the word “cruelty” is used as descriptive only of the conduct complained of, apart from its effect on the victim.

45. Lord Reid, concurring, reserved opinion as to cases of alleged cruelty in which the defender had shown deliberate intention, though he did not doubt that there were many cases where cruelty could be established without its being necessary to be satisfied by evidence that the defender had such an intention. Lord Tucker, also concurring, said:

‘Every act must be judged in relation to its attendant circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse and the offender’s knowledge of the actual or probable effect of his conduct on the other’s health are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies.’

46. In ***Pritchard v. Pritchard*** (1864) 3 S&T 523, the Court observed that repeated acts of unprovoked violence by the wife were regarded as cruelty, although they might not inflict serious bodily injury on the husband.

47. Wilde, J.O. in ***Power v. Power*** (1865) 4 SW & Tr. 173 aptly observed that cruelty lies in the cumulative ill conduct which the history of marriage discloses.

48. In ***Bravery v. Bravery*** (1954) 1 WLR 1169, by majority, the Court held as under:

‘If a husband submitted himself to an operation for sterilization without a medical reason and without his wife’s knowledge or consent it could constitute cruelty to his wife. But where such an operation was performed to the wife’s knowledge, though without her consent and she continued to live with him for thirteen years, it was held that the operation did not amount to cruelty.’

49. Lord Tucker in **Jamieson v. Jamieson** (1952) 1 All E.R. 875 aptly observed that “Judges have always carefully refrained from attempting a comprehensive definition of cruelty for the purposes of matrimonial suits, and experience has shown the wisdom of this course”.

50. In **Le Brocq v. he Brockq** [1964] 3 All E.R. 464, at p. 465, the court held as under:

I think...that ‘cruel’ is not used in any esoteric or ‘divorce court’ sense of that word, but that the conduct complained of must be something which an ordinary man or a jury...would describe as ‘cruel’ if the story were fully told.

51. In **Ward v. Ward** (1958) 2 All E.R. 217, a refusal to bear children followed by a refusal of intercourse and frigidity, so that the husband’s health suffered, was held to be cruelty; so also the practice by the husband of coitus interruptus against the wish of his wife though she desired to have a child. (*Also see: White (otherwise Berry) v. White* [1948] 2 All E.R. 151; *Walsham v. Walsham* [1949] 1 All E.R. 774; *Cackett (otherwise Trice) v. Cackett* [1950] 1 All E.R. 677; *Knott v. Knott* [1955] 2 All E.R. 305.

52. Cases involving the refusal of sexual intercourse may vary considerably and in consequence may or may not amount to cruelty, dependent on the facts and circumstances of the parties. In **Sheldon v. Sheldon** [1966] 2 All E.R. 257, Lord Denning, M.R. stated at p. 259:

The persistent refusal of sexual intercourse may amount to cruelty, at any rate when it extends over a long period and causes grave injury to the health of the other. One must of course, make allowances for any excuses that may account for it, such as ill-health, or time of life, or age, or even psychological infirmity. These excuses may so mitigate the conduct that the other party ought to put up with it. It after making all allowances however, the conduct is such that the other party should not be called upon to endure it, then it is cruelty.

53. Later, Lord Denning, at p. 261, said that the refusal would usually need to be corroborated by the evidence of a medical man who had seen both parties and could speak to the grave injury to health consequent thereon. In the same case, Salmon, L. J. stated at p. 263:

For my part, I am quite satisfied that if the husband’s failure to have sexual intercourse had been due to impotence, whether from some psychological or physical cause, this petition would be hopeless. No doubt the lack of sexual intercourse might in such a case equally have resulted in a breakdown in his wife’s health. I would however regard the husband’s impotence as a great misfortune which has befallen both of them.

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There can be cruelty without any physical violence, and there is abundant authority for recognizing mental or moral cruelty, and not infrequently the worst cases supply evidence of both. It is for the judges to review the married life of the parties in all its aspects. The several acts of alleged cruelty, physical or mental, should not be taken separately. Several acts considered separately in isolation may be trivial and not hurtful but when considered cumulatively they might well come within the description of cruelty. (see: *Jamieson v. Jamieson* [1952] 1 All E.R. 875; *Waters v. Waters* [1956] 1 All E.R. 432. "The general rule in all questions of cruelty is that the whole matrimonial relations must be considered." (per Lord Normand in *King v. King* [1952] 2 All E.R. 584).

54. In **Warr v. Warr** [1975] 1 All ER 85), the Court observed that "Section 1(2)(c) of the Matrimonial Causes Act, 1973 provides that irretrievable breakdown may be proved by satisfying the court that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition."

AMERICAN CASES:

55. In **Jem v. Jem** (1937) 34 Haw. 312, the Supreme Court of Hawaii aptly mentioned that cruel treatment not amounting to physical cruelty is mental cruelty.

56. While dealing with the matter of extreme cruelty, the Supreme Court of South Dakota in the case of **Hybertson v. Hybertson** (1998) 582 N.W. 2d 402 held as under:

Any definition of extreme cruelty in a marital setting must necessarily differ according to the personalities of the parties involved. What might be acceptable and even common place in the relationship between rather stolid individuals could well be extraordinary and highly unacceptable in the lives of more sensitive or high-strung husbands and wives. Family traditions, ethnic and religious backgrounds, local customs and standards and other cultural differences all come into play when trying to determine what should fall within the parameters of a workable marital relationship and what will not.

57. In **Rosenbaum v. Rosenbaum** (1976) 38 Ill.App.3d. 1 the Appellate Court of Illinois held as under:

To prove a case entitling a spouse to divorce on the ground of mental cruelty, the evidence must show that the conduct of the offending spouse is unprovoked and constitutes a course of abusive and humiliating treatment that actually affects the physical or mental health of the other spouse, making the life of the complaining spouse miserable, or endangering his or her life, person or health.

58. In the case of **Fleck v. Fleck** 79 N D. 561, the Supreme Court of North Dakota dealt with the concept of cruelty in the following words:

The decisions defining mental cruelty employ such a variety of phraseology that it would be next to impossible to reproduce any generally accepted form. Very often, they do not purport to define it as distinct from physical cruelty, but combine both elements in a general definition of 'cruelty,' physical and mental. The generally recognized elements are:

- (1) A course of abusive and humiliating treatment;
- (2) Calculated or obviously of a nature to torture, discommode, or render miserable the life of the opposite spouse; and
- (3) Actually affecting the physical or mental health of such spouse.

59. In **Donaldson v. Donaldson** (1917) 31 Idaho 180, 170 P. 94, the Supreme Court of Idaho also came to the conclusion that no exact and exclusive definition of legal cruelty is possible. The Court referred to 9 RCL p. 335 and quoted as under:

It is well recognized that no exact inclusive and exclusive definition of legal cruelty can be given, and the courts have not attempted to do so, but generally content themselves with determining whether the facts in the particular case in question constitute cruelty or not. Especially, according to the modern view, is the question whether the defending spouse has been guilty of legal cruelty a pure question of fact to be resolved upon all the circumstances of the case.

CANADIAN CASES:

60. In a number of cases, the Canadian Courts had occasions to examine the concept of 'cruelty'. In **Chouinard v. Chouinard** 10 D.L.R. (3d) 263], the Supreme Court of New Brunswick held as under:

Cruelty which constitutes a ground for divorce under the Divorce Act, whether it be mental or physical in nature, is a question of fact. Determination of such a fact must depend on the evidence in the individual case being considered by the court. No uniform standard can be laid down for guidance; behaviour which may constitute cruelty in one case may not be cruelty in another. There must be to a large extent a subjective as well as an objective aspect involved; one person may be able to tolerate conduct on the part of his or her spouse which would be intolerable to another. Separation is usually preceded by marital dispute and unpleasantness. The court should not grant a decree of divorce on evidence of merely distasteful or irritating conduct on the part of the offending spouse. The word 'cruelty' denotes excessive suffering, severity of pain, mercilessness; not mere displeasure, irritation, anger or dissatisfaction; furthermore, the Act requires that cruelty must be of such a kind as to render intolerable continued cohabitation.

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61. In **Knoll v. Knoll** 10 D.L.R. (3d) 199, the Ontario Court of Appeal examined this matter. The relevant portion reads as under:

Over the years the courts have steadfastly refrained from attempting to formulate a general definition of cruelty. As used in ordinary parlance “cruelty” signifies a disposition to inflict suffering; to delight in or exhibit indifference to the pain or misery of others; mercilessness or hard-heartedness as exhibited in action. If in the marriage relationship one spouse by his conduct causes wanton, malicious or unnecessary infliction of pain or suffering upon the body, the feelings or emotions of the other, his conduct may well constitute cruelty which will entitle a petitioner to dissolution of the marriage if, in the court’s opinion, it amounts to physical or mental cruelty “of such a kind as to render intolerable the continued cohabitation of the spouses.

62. In **Luther v. Luther** (1978) 5 R.F.L. (2d) 285 : 26 N.S.R. (2d) 232 : 40 A.P.R. 232], the Supreme Court of Nova Scotia held as under:

7. The test of cruelty is in one sense a subjective one, namely, as has been said many times, is this conduct by this man to this woman, or vice versa, cruelty? But that does not mean that what one spouse may consider cruel is necessarily so. Cruelty must involve serious and weighty matters, which, reasonably considered, may cause physical or mental suffering. It must furthermore — an important additional requirement — be of such a nature and kind as to render such conduct intolerable to a reasonable person.

The Supreme Court further held as under:

9. To constitute mental cruelty, conduct must be much more than jealousy, selfishness or possessiveness which causes unhappiness, dissatisfaction or emotional upset. Even less can mere incompatibility or differences in temperament, personality or opinion be elevated to grounds for divorce.

63. In another case **Zalesky v. Zalesky** 1 D.L.R. (3d) 471, the Manitoba Court of Queen’s Bench observed that where cohabitation of the spouses become intolerable that would be another ground of divorce. The Court held as under:

There is now no need to consider whether conduct complained of caused ‘danger to life, limb, or health, bodily or mentally, or a reasonable apprehension of it’ or any of the variations of that definition to be found in the Russell case.

In choosing the words ‘physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses’ Parliament gave its own fresh complete statutory definition of the conduct which is a ground for divorce under Section 3(d) of the Act.

AUSTRALIAN CASES:

64. In **Dunkley v. Dunkley** (1938) SASR 325, the Court examined the term “legal cruelty” in the following words:

‘Legal cruelty’, means conduct of such a character as to have caused injury or danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of danger. Personal violence, actual or threatened, may alone be sufficient; on the other hand, mere vulgar abuse or false accusations of adultery are ordinarily not enough; but, if the evidence shows that conduct of this nature had been persisted in until the health of the party subjected to it breaks down, or is likely to break down, under the strain, a finding of cruelty is justified.

65. In **La Rovere v. La Rovere** 4 FLR 1, the Supreme Court of Tasmania held as under:

When the legal conception of cruelty is described as being conduct of such a character as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger, it is vital to bear in mind that it comprises two distinct elements: first, the ill-treatment complained of, and, secondly, the resultant danger or the apprehension thereof. Thus it is inaccurate and liable to lead to confusion, if the word ‘cruelty’ is used as descriptive only of the conduct complained of, apart from its effect on the victim.

We have examined and referred to the cases from the various countries. We find strong basic similarity in adjudication of cases relating to mental cruelty in matrimonial matters. Now, we deem it appropriate to deal with the 71st report of the Law Commission of India on “Irretrievable Breakdown of Marriage”.

66. The 71st Report of the Law Commission of India briefly dealt with the concept of irretrievable breakdown of marriage. This Report was submitted to the Government on 7th April, 1978. In this Report, it is mentioned that during last 20 years or so, and now it would be around 50 years, a very important question has engaged the attention of lawyers, social scientists and men of affairs, should the grant of divorce be based on the fault of the party, or should it be based on the breakdown of the marriage? The former is known as the matrimonial offence theory or fault theory. The latter has come to be known as the breakdown theory. It would be relevant to recapitulate recommendation of the said Report.

67. In the Report, it is mentioned that the germ of the breakdown theory, so far as Commonwealth countries are concerned, may be found in the legislative and judicial developments during a much earlier period. The (New Zealand) Divorce and Matrimonial Causes Amendment Act, 1920, included for the first time the provision that a separation agreement for three years or more was a ground for making a peti-

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tion to the court for divorce and the court was given a discretion (without guidelines) whether to grant the divorce or not. The discretion conferred by this statute was exercised in a case **Lodder v. Ladder** 1921 New Zealand Law Reports 786. Salmond J., in a passage which has now become classic, enunciated the breakdown principle in these words:

The Legislature must, I think, be taken to have intended that separation for three years is to be accepted by this Court, as prima facie a good ground for divorce. When the matrimonial relation has for that period ceased to exist de facto, it should, unless there are special reasons to the contrary, cease to exist de jure also. In general, it is not in the interests of the parties or in the interest of the public that a man and woman should remain bound together as husband and wife in law when for a lengthy period they have ceased to be such in fact. In the case of such a separation the essential purposes of marriage have been frustrated, and its further continuance is in general not merely useless but mischievous.

68. In the said Report, it is mentioned that restricting the ground of divorce to a particular offence or matrimonial disability, causes injustice in those cases where the situation is such that although none of the parties is at fault, or the fault is of such a nature that the parties to the marriage do not want to divulge it, yet such a situation has arisen in which the marriage cannot survive. The marriage has all the external appearances of marriage, but none in reality. As is often put pithily, the marriage is merely a shell out of which the substance is gone. In such circumstances, it is stated, there is hardly any utility in maintaining the marriage as a facade, when the emotional and other bonds which are of the essence of marriage have disappeared.

69. It is also mentioned in the Report that in case the marriage has ceased to exist in substance and in reality, there is no reason for denying divorce, then the parties alone can decide whether their mutual relationship provides the fulfilment which they seek. Divorce should be seen as a solution and an escape route out of a difficult situation. Such divorce is unconcerned with the wrongs of the past, but is concerned with bringing the parties and the children to terms with the new situation and developments by working out the most satisfactory basis upon which they may regulate their relationship in the changed circumstances.

70. Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties.

Law of divorce based mainly on fault is inadequate to deal with a broken marriage.

Under the fault theory, guilt has to be proved; divorce courts are presented concrete instances of human behaviour as bring the institution of marriage into disrepute.

71. This Court in **Naveen Kohli v. Neelu Kohli** dealt with the similar issues in detail. Those observations incorporated in paragraphs 74 to 79 are reiterated in the succeeding paragraphs.

74. We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised that the matrimonial bond is beyond repair. The marriage becomes a fiction, though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties.

75. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

76. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist.

77. Some jurists have also expressed their apprehension for introduction of irretrievable breakdown of marriage as a ground for grant of the decree of divorce. In their opinion, such an amendment in the Act would put human ingenuity at a premium and throw wide open the doors to litigation, and will create more problems than are sought to be solved.

78. The other majority view, which is shared by most jurists, according to the Law Commission Report, is that human life has a short span and situations causing misery cannot be allowed to continue indefinitely. A halt has to be called at some stage. Law cannot turn a blind eye to such situations, nor can it decline to give adequate response to the necessities arising therefrom.

79. When we carefully evaluate the judgment of the High Court and scrutinize its findings in the background of the facts and circumstances of this case, it becomes obvious that the approach adopted by the High Court in deciding this matter is far from satisfactory.

72. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive def-

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inition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

73. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

74. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting

physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

75. When we take into consideration aforementioned factors along with an important circumstance that the parties are admittedly living separately for more than sixteen and half years (since 27.8.1990) the irresistible conclusion would be that matrimonial bond has been ruptured beyond repair because of the mental cruelty caused by the respondent.

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76. The High Court in the impugned judgment seriously erred in reversing the judgment of the learned Additional Sessions Judge. The High Court in the impugned judgment ought to have considered the most important and vital circumstance of the case in proper perspective that the parties have been living separately since 27th August, 1990 and thereafter, the parties did not have any interaction with each other. When the appellant was seriously ill and the surgical intervention of bye-pass surgery had to be restored to, even on that occasion, neither the respondent nor her father or any member of her family bothered to enquire about the health of the appellant even on telephone. This instance is clearly illustrative of the fact that now the parties have no emotions, sentiments or feelings for each other at least since 27.8.1990. This is a clear case of irretrievable breakdown of marriage. In our considered view, it is impossible to preserve or save the marriage. Any further effort to keep it alive would prove to be totally counterproductive.

77. In the backdrop of the spirit of a number of decided cases, the learned Additional District Judge was fully justified in decreeing the appellant's suit for divorce. In our view, in a case of this nature, no other logical view is possible. On proper consideration of cumulative facts and circumstances of this case, in our view, the High Court seriously erred in reversing the judgment of the learned Additional District Judge which is based on carefully watching the demeanour of the parties and their respective witnesses and the ratio and spirit of the judgments of this Court and other Courts. The High Court erred in setting aside a well-reasoned judgment of the trial court based on the correct analysis of the concept of mental cruelty. Consequently, the impugned judgment of the High Court is set aside and the judgment of the learned Additional District Judge granting the decree of divorce is restored.

78. This appeal is accordingly disposed of but, in the facts and circumstances of the case, we direct the parties to bear their own costs.

Dr. Aniruddha Malpani & Anr.⁴³
Vs
Dr. Jaywant Anant Khandare & Anr.

CORAM: A.M. KHANWILKAR, J.

23rd December 2004

01. Heard Counsel for the parties. Rule. Rule made returnable forthwith by consent. Ms. Puranik waives notice for Respondent No. 1 Mr. Shinde, A.P.P., waives notice for Respondent No. 2. Petition taken up for final disposal forthwith by consent.

02. The short question that arises in this petition is whether the Respondent No. 1 – Dr. Jayant Anant Khandare, Medical Officer of Health “A” Ward of Municipal Corporation of Greater Mumbai, was competent to institute criminal action against the Applicants in relation to offences punishable under section 22, read with Rules 6 (2), 4 (I) (ii) and 9 (1), of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as “the Act”), as filed before the Court of Metropolitan Magistrate, 37th Court, Esplanade, Mumbai, being Case No. 34/S/2003. This question is agitated in the context of mandate of section 17 of the Act. the relevant extract of section 17 of the Act reads as follows:

“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.

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(3) “

03. The Applicants assert that no notification has been published in the Official Gazette appointing the Respondent No. 1 as the Appropriate Authority as is required by section 17 of the Act. It is submitted that it is only on such publication of the notification, the Respondent No. 1 can assume authority or acquire competence to initiate criminal action as the Appropriate Authority. Reliance is also placed on the mandate of section 28 of the Act, which postulates that no Court shall take cognizance of offence under this Act except on a complaint made by the Appropriate Authority concerned.

04. Whereas, according to the Respondent No. 1, he has already been notified as the Appropriate Authority and, therefore, the complaint as instituted by him was valid and permissible in law and the trial court has legitimately acted on that complaint. Reliance was placed on the purported Notification dated 27th December 2001 issued by the Public Health Department, Government of Maharashtra, in this behalf. It is, however, fairly accepted that this Notification has not been published in the “Official Gazette”.

05. The question, therefore, is: In absence of publication of the said Notification in the Official Gazette, is it open to the Respondent No. 1 to claim that he has been notified as the Appropriate Authority within the meaning of section 17 of the Act? In my opinion, the answer should be plainly in the negative. When the statute requires the Notification to be published in the Official Gazette and that act is not undertaken, the Notification issued in any other manner is of no consequence for the purposes of section 17 of the Act. a person is clothed with the power of the Appropriate Authority only upon publication of the Notification in the Official Gazette, naming such person as such. In other words, publication of notification in the Official Gazette is the sine qua non. The contention pressed into service on behalf of the Applicants is supported by the exposition of the Apex Court in *I.T.C. Bhadrachalam Paperboards v. Mandal Revenue officer*, reported in (1996) 6 S.C.C. 634 (see paras 13 to 15). A priori, in law, the Respondent No. 1 was not competent to initiate criminal action; nor the Court could take cognizance of the complaint filed by person other than Appropriate Authority in view of the mandate of section 28 of the Act.

06. To get over this position, Mr. Sakhare contends that although the Notification in question was issued by the concerned Department, but the same has remained to be published in the Official Gazette due to some lapses which is being soon remedied as per the instructions already issued by the Secretary of the Family Welfare Department, Government of Maharashtra, to forthwith publish the said Notification in the Official Gazette. However, Mr. Sakhare is not in a position to point out any legal provision, which would permit the authority to appoint a person as Appropriate Authority with retrospective effect.

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Inasmuch as, the Notification in question will come into effect only from the date of its publication in the Official Gazette. If it is so, the publication of the Notification in question in the Official Gazette in posterity can be of no consequence to decide the point in issue. So understood, the fact that steps are now being taken for publication of the subject Notification in the Official Gazette need not detain us. In the present case, suffice it to observe that, on the date of institution of the subject complaint by the Respondent No. 1 against the Applicants, no Notification published in the Official Gazette authorizing the Respondent No. 1 to exercise that power was in existence.

07. Mr. Sakhare then contends that the Applicants have already carried the matter before the Apex Court against the decision of the Division Bench of this Court pertaining to the issue of “suspension of the licence” of the Applicants. It is, however, fairly accepted that in the matter pending before the Apex Court, being S.L.P. (Civil) No. 21471/ 2004, the issue is entirely different than the one raised in the present case, especially in the context of authority to initiate criminal action under the Act. In the circumstances, pendency of that matter is of no avail to the Respondent No. 1.

08. In the circumstances, this petition should succeed in terms of prayer clause (a). Ordered accordingly.

09. It is, however, made clear that this decision is not an expression of opinion on the remedy as may be available to the Respondent No. 1 or any other authorised person after publication of the Notification in the Official Gazette. That aspect is left open.

(A.M. KHANWILKARM, J)

M/s. Malpani Infertility Clinic Pvt. Ltd. & others⁴⁴

Vs

Appropriate Authority PNDT Act & others.

CORAM: H.L. GOKHALE & SMT. NISHITA MAHTRE, JJ.

DATED: 17TH September 2004

ORAL ORDER: (Per H.L. Gokhale, J.)

1. Heard Mr. Anturkar for the Petitioners. Mr. Sakhare Senior Advocate with Mr. Patil appears for Respondent No. 1 and Mrs. Pawar, Additional Government Pleader for Respondent No. 2.

2. This Petition seeks to challenge the order dated 7th August 2003 issued by Respondent No. 1 under the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short, "the PNDT Act) which suspends the registration of the 1st Petitioner's Diagnostic Centre under the PNDT Act. this is an Act which has been passed by the Parliament to deal with the Problem of pre-natal sex determination leading to female foeticide. A Public Interest Petition bearing Writ Petition (Civil) No. 301 of 2001 was filed in the Apex Court by an N.G.O. CEHAT (Centre for Enquiry into Health and Allied Themes) wherein a grievance was made that inspite of passing the said Act, the activities, which are prohibited under this Act, are going on. The Petitioners herein intervened in that matter inasmuch as they were carrying on a Centre called as a Diagnostic Centre, whose activities could be said to be prohibited under the said Act. they joined as Respondent No. 38 in the proceedings before the Apex Court. In the Apex Court, in fact, the Petitioners filed an affidavit and defended the sex determination test on the ground of "family balancing" by filing an affidavit, though subsequently another affidavit was filed wherein an apology was tendered and it was stated that only wrong committed by them was to continue the advertisement of such an

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activity on web site. The Apex Court gave appropriate directions for the implementation of the Act and thereby the Petition was disposed of.

3. It is material to note that the above-referred affidavit containing apology was filed in the Apex Court in July 2003. As a part of the implementation of the directions of the Supreme Court, the Respondents stated the prosecution of the Petitioner under section 22 (3) of the said Act on 22nd July 2003 and then came the impugned order, which is issued by the appropriate Authority on 7th August 2003. This order in the reference column refers to two items viz. (i) Case No. 34/S/ of 2003 filed against the Petitioners in the court of Metropolitan Magistrate, 37th Court, Esplanade, Health Services. Thereafter, the order states in second paragraph as follows:

“As per the reference given above you are hereby informed that said Registration is suspended/ cancelled with effect from 07.08.2003 in the Public interest till further orders from the court, which please note.”

The registration mentioned therein is the registration of the Petitioners to carry on certain activities as permitted under the said Act for a period of five years and which is issued to the Petitioners sometimes in January 2002.

4. Mr. Anturkar, learned Counsel appearing for the Petitioners, submitted that this order was uncalled for. He further submitted that the only section to which this order can be related, is Section 20 of the said Act. Sub-section (1) of Section 20 of the said Act requires a show cause notice to be given to the person concerned or to the Centre concerned on a complaint being received or on a suo motu basis by the appropriate Authority. Thereafter, under sub-section (2) of Section 20 of the said Act, a hearing is contemplated and thereafter if the Authority is satisfied that there is a breach of the provisions of this Act or the rules that it may, without prejudice to any criminal action, suspend the registration. Mr. Anturkar submitted that, in the present case, no notice has been given to the Petitioners nor has there been any hearing and, therefore, the impugned order is bad in law. He further submitted that, according to the disputed activities and the only mistake committed by them was not to update the web site, which, according to him, has now been done.

5. Mr. Sakhare, learned senior Counsel appearing for Respondent No. 1 and Mrs. Pawar, learned Additional Government Pleader appearing for Respondent No. 2, submitted that the Petition ought not to be entertained for the reason that an Appeal is available under Section 21 of the said Act to the Appellate Authority. As far as this submission is concerned, Mr. Anturkar submitted that against the order of the appropriate authority, an Appeal is available to the Additional Director of Health Services and since it is that officer, who has written a letter leading to the suspension, the Appeal will be meaningless. It was

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suggested to Mr. Anturkar that an Appeal may be preferred to the Principal Secretary of the Health Department since under Section 21 of the said Act, the Appeal lies to the State Government. Mr. Anturkar, however, submitted that the then Principal Secretary one Mr. Manmohan Singh had written a letter in July 2003 taking certain position on this controversy. He, therefore, submitted that it will be difficult to expect a fair hearing from this Secretary. Ms. Pawar, learned Additional Government Pleader appearing for Respondent No. 2, pointed out that Mr. Manmohan Singh is now no longer the Principal Secretary is one Mr. Navin Kumar. However, inspite of this, Mr. Anturkar submitted that it would be better that this Court itself may go into the aspect of this matter.

6. Mr. Sakhare, learned senior counsel appearing for Respondent No. 1, submitted that an Appeal having been provided, it ought to be first exhausted. As far as this submission is concerned, undoubtedly there is some merit therein. However, the principle of exhaustion of internal remedies is a rule of self restriction as far as the powers of the High Court are concerned. That being so, if a party feels that there is no use in resorting to the remedy inasmuch as it is like going from Caesar and if the party wants the grievance to be redressed in the High Court, the High Court cannot prevent the party from doing so.

7. In view of this position, we have heard Mr. Anturkar. As stated above, he has referred to the provisions of sub-section (1) and (2) of Section 20. As against this, it is material to note that sub-sections (3) of Section 20, provides for a suspension of the registration and that power can be exercised notwithstanding anything contained in sub-sections (1) and (2) for the reasons to be recorded in writing. Mr. Anturkar submitted that even if this sub-section (3) is pressed into service, that sub-section requires reasons to be given in writing. In our view, there is a clear reference to the prosecution lodged against the Petitioners in the reference clause. The Petitioners very much knew that a Public Interest Petition was filed in the Apex Court. They have filed an affidavit in that proceedings. Thereafter, they had tendered an apology as stated above in July 2003. Thereafter on 22nd July 2003, they knew that they were prosecuted. This being the position, if the appropriate Authority refers to that prosecution and issues an order of suspension, in our view, there is a sufficient mention of the reasons fro the Authority which have led it to take the action.

8. Mr. Anturkar submitted that in the affidavit filed by the Authority, they have stated that this is an action of cancellation. Inasmuch as sub-section (3) of Section 20 does not provide for a cancellation, this order cannot be considered as an order of cancellation. It can only be treated as an order of suspension which will mean suspension till the hearing and disposal of the prosecution which has been mentioned in the order. in our view, such an action has to be permitted to the Authority concerned. If the Authority has some material before it, which, prima facie, it had, at the relevant time, it ought to have such a power

to suspend the activities of such a nature. If such power is not read into the section, the provisions of a welfare enactment will be rendered nugatory. It is only a particular kind of activity which has been stopped and two machines have been seized by the Authority concerned. The 2nd and 3rd Petitioners are Gynaecologists and their practice as Gynaecologists is not prevented in any manner whatsoever. In a situation like this, where there is a conflict of private interest to carry on a particular activity which the public Authority considers as damaging to the social interests, surely, the power under the Statute has to be read as an enabling power. In the instant case, in our view, sub-section (3) of Section 20 provides an adequate power to the Authority concerned to suspend the licence.

9. Mr. Sakhare appearing for Respondent No. 1 and Ms. Pawar, Additional Government Pleader for Respondent No. 2, have referred to two affidavits filed by the Respondents' officers, which mention violation of various rules including Rule 6 (2) 4 (i) (ii) and 9 (i) of the Rules framed under the said Act as well as Section 23 (i) which empowers the prosecution. They drew our attention to a statement of one of the patients attending the Clinic pointing out the purpose for which she went there and the assurance given to her. Inasmuch as such prosecution has been lodged, if the Public Authority forms an opinion that pending that prosecution, a particular activity should be suspended, we do not think that there is any error on its part and it is not necessary that when the reasons are required to be given in writing, there ought to be a detailed discussion. A reference to the prosecution is sufficient as the reason for the action and the same is provided in the order.

10. In the circumstances, there is no substance in the Petition and the same is dismissed. The interim order passed earlier is vacated. Mr. Anturkar applies for extension of the stay for a period of four weeks. However, in view of the circumstances leading to the impugned order, we are not inclined to extend the stay.

11. Authenticated copy of this order be made available to the parties.

Suo Motu⁴⁵ Vs State of Gujarat

Hon'ble Judges:

M.S. Shah, D.H. Waghela and Akil Kureshi, JJ.

JUDGMENT

D.H. Waghela, J.

1. By these References, learned single Judge has referred the following issues for consideration and opinion:

(i) Whether under the provisions of Section 28 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, a Court can take cognizance of an offence under the Act on a complaint made by any officer authorised in this behalf by the Appropriate Authority?

(ii) Whether the provisions of the proviso to Sub-section (3) of Section 4 of the PNDDT Act require that the complaint should contain specific allegations regarding the contravention of the provisions of sections 5 and 6 of the Act?

(iii) Whether the burden lies on the authority to prove that there was contravention of the provisions of Section 5 or 6 of the PNDDT Act?

(iv) Whether any deficiency of inaccuracy in filing Form-F as required under the statutory provisions is merely a procedural lapse?

2. Above issues have come to be referred on account of the learned single Judge not agreeing with the following observations and conclusions expressed by another learned single Judge in Dr. Manish C. Dave v. State of Gujarat 2008 (1) GLH 475:

45. 2009CriLJ721

10.Therefore, the complaint should be filed by Appropriate Authority or any officer authorised in this behalf by the Central Government or State Government and the 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. Admittedly, the complaints were not filed by Appropriate Authority or any officer authorised in this behalf. There is nothing on record to show that the persons who have filed the complaints have given notice as per Section 28(b) of the Act. In view of these facts, I am of the view that the complaints become bad in law.

....

15. From a bare perusal of the complaints, it is apparent that it is not the case of the authority that provisions of Section 5 or 6 are applicable inasmuch as the authority has not been able to show or even alleged that (i) any pregnant woman or her relative or any other person has been communicated the sex of foetus by the petitioners or (ii) at any place and by any person, including the person conducting ultrasonography, there has been either sex determination or sex selection. In absence of such specific allegations in the complaint, it cannot be said that provisions of sections 5 and 6 of the Act would be attracted.

16. Reading the proviso to Section 3, it is to be presumed that the deficiency or inaccuracy in the record would amount to contraventions of the provisions of Section 5 or Section 6 of the Act. As a natural consequence, in view of such deficiency or inaccuracy, there should be allegation of contravention of provisions of sections 5 and 6 of the Act. In the present case, there are no specific allegations in the complaint pertaining to the provisions of sections 5 and 6. Apart from that, the language of sections 5 and 6 is prohibitory in nature and therefore the burden of proof will be on the authority to prove that there was contravention and thereupon to rely on the provisions of Statutory Form-F for filing criminal complaint.

....

18. As far as Section 4(3) is concerned, it is the case of the petitioners that the register is maintained with all the columns which fall within the four corners of the duties and functions of the petitioners. Apart from that, no opportunity is afforded to the petitioners to prove contrary and put up their case. Further, such deficiency or inaccuracy, at least so far as the present proceedings are concerned, is merely a procedural lapse, which do not in any manner contravene the provisions of sections 5 and 6 of the Act.

19. In view of the above, when it is not established that there is contravention of the provisions of Sections 5 or 6, the contention regarding any inaccuracy or deficiency in Form-F will not be applicable and therefore the complaints themselves are not maintainable. I am, therefore, of the view that the complaints do not prima facie

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establish any alleged offence against the petitioners.

The questions referred in Reference No. 4 of 2008 include the issue referred in Reference No. 3 of 2008 and they are heard and disposed as references under Rule 5 of the Gujarat High Court Rules, 1993.

3. The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short “the Act”) is enacted for the avowed purpose of prohibiting sex selection, before or after conception, and for regulation of pre-natal 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. Relevant statutory provisions of the Act, as amended by the Act 14 of 2003, read as under:

2 Definitions:

In this Act, unless the context otherwise requires:

(a) “Appropriate Authority” means the Appropriate Authority appointed under Section 17;

(i) “pre-natal diagnostic procedures” means all gynaecological 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;

(j) “Pre-natal diagnostic techniques” includes all pre-natal diagnostic procedures and pre-natal diagnostic tests;

(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;

(l) “prescribed” means prescribed by rules made under this Act.

CHAPTER III

REGULATION OF PRE-NATAL DIAGNOSTIC TECHNIQUES

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) haemoglobinopathies;

(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 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 a family history of mental retardation or physical deformities such as, spasticity or any other genetic disease;

(v) any other conditions 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 pro-

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visions 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.

6. Determination of sex prohibited:

On and from the commencement of this Act:

(a) no Genetic Counselling Centre or Genetic Laboratory or Geneteic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Cinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;

(b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus.

(c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

CHAPTER V

APPROPRIATE AUTHORITY AND ADVISORY COMMITTEE

17. Appropriate Authority and Advisory Committee:

(1) The Central Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for each of the Union Territories for the purposes of this Act.

(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 Prevention 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.

(4) the Appropriate Authority shall have the following functions, namely:

(a) to grant, suspend or cancel registration of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic;

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(b) to enforce standards prescribed for the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic;

(c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action;

(d) to seek and consider the advice of the Advisory Committee, constituted under Sub-section (5), on application for registration and on complaints for suspension or cancellation of registration;

(e) to take appropriate legal action against the use of any sex selection technique by any person at any place, suo motu or brought to its notice and also to initiate independent investigation in such matter;

(f) to create public awareness against the practice of sex selection or pre-natal determination of sex;

(g) to supervise the implementation of the provisions of the Act and rules;

(h) to recommend to the Board and State Boards modifications required in the rules in accordance with changes in technology or social conditions;

(i) to take action on the recommendations of the Advisory Committee made after investigation of complaint for suspension or cancellation of registration.

CHAPTER VII

OFFENCES AND PENALTIES

22.

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 shall be reported by the

Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.

(3) Any person who seeks the aid of any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or ultrasound clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging specialist or registered medical practitioner or any other person for sex selection or for conducting pre-natal diagnostic techniques on any pregnant woman for the purposes other than those specified in Sub-section (2) of Section 4, he shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees.

(4) For the removal of doubts, it is hereby provided, that the provisions of Sub-section (3) shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection.

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 authorised 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 for his intention to make a complaint to the court.

Explanation.- For the purpose of this clause, "person" includes a social organisation.

CHAPTER VIII

MISCELLANEOUS

29. Maintenance of records:

(1) All records, charts, forms, reports, consent letters and all the documents required to be maintained under this Act and the rules shall be preserved for a period of two years or for such period as may be prescribed:

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Provided that, if any criminal or other proceedings are instituted against any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, the records and all other documents of such Centre, Laboratory or Clinic shall be preserved till the final disposal of such proceedings.

(2) All such records shall, at all reasonable times, be made available for inspection to the Appropriate Authority or to any other person authorised by the Appropriate Authority in this behalf.

3.1 In exercise of the powers conferred by Section 32 of the Act, the Central Government has made the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (for short, "the Rules") of which following provisions, as amended by notification [G.S.R.109 (E)] dated 14.02.2003, may be relevant:

9. Maintenance and preservation of records:

(1) Every Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre shall maintain a register showing, in serial order, the names and addresses of the men or women given counselling, subjected to pre-natal diagnostic procedures or pre-natal diagnostic tests, the names of their spouses or fathers and the date on which they first reported for such counselling, procedure or test.

(2) The record to be maintained by every Genetic Counselling Centre, in respect of each woman counselled shall be as specified in Form D.

(3) The record to be maintained by every Genetic Laboratory, in respect of each man or woman subjected to any pre-natal diagnostic procedure/technique/test, shall be as specified in Form E.

(4) The record to be maintained by every 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.

(5) The Appropriate Authority shall maintain a permanent record of applications for grant or renewal of certificate of registration as specified in Form H. Letters of intimation of every change of employee, place, address and equipment installed shall also be preserved as permanent records.

(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, Genetic Clinic, Ultrasound 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 record shall be preserved till final disposal of legal proceedings, or till the expiry of the said period of two years, whichever is later.

(7) In case the Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic or Ultrasound Clinic or Imaging Centre 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.

(8) Every Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic, Ultrasound Clinic and Imaging Centre 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 5th day of the following month to the concerned Appropriate Authority.

10. Conditions for conducting pre-natal diagnostic procedures:

(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:

Provided that where a Genetic Clinic has taken a sample of any body tissue or body fluid and sent it to a Genetic Laboratory for analysis or test, it shall not be necessary for the Genetic Laboratory to obtain a fresh consent in Form G.

(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.

(2) All the State Governments and Union territories may issue translation of Form G in languages used in the State or Union Territory and where no official translation in a language understood by the pregnant woman is available, the Genetic Clinic may translate Form G into a language she understands.

14. Conditions for analysis or test and pre-natal diagnostic procedures:

(1) No Genetic Laboratory shall accept for analysis or test any sample, unless referred to it by a Genetic Clinic.

(2) Every pre-natal diagnostic procedure shall invariably be immediately preceded by

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locating the foetus and placenta through ultrasonography, and the pre-natal diagnostic procedure shall be done under direct ultrasonographic monitoring so as to prevent any damage to the foetus and placenta.

18. Code of conduct to be observed by persons working at Genetic Counselling Centres, Genetic Laboratories, Genetic Clinics, Ultrasound Clinics, Imaging Centre, etc.

All persons including the owners, employee or any other persons associated with Genetic Counselling Centres, Genetic Laboratories, Genetic Clinics, Ultrasound Clinics, Imaging Centres registered under the Act/these Rules shall:

(i) not conduct or associate with, or help in carrying out detection or disclosure of sex of foetus in any manner;

(ii) not employ or cause to be employed any person not possessing qualifications necessary for carrying out pre-natal diagnostic techniques/procedures and tests including ultrasonography;

(iii) not conduct or cause to be conducted or aid in conducting by himself or through any other person any techniques or procedure for selection of sex before or after conception or for detection of sex of foetus except for the purposes specified in Sub-section (2) of Section 4 of the Act;

(iv) not conduct or cause to be conducted or aid in conducting by himself or through any other person any techniques or test or procedure under the Act at a place other than a place registered under the Act/these Rules;

(v) ensure that no provision of the Act and these rules are violated in any manner;

(vi) ensure that the person, conducting any techniques, test or procedure leading to detection of sex of foetus for purposes not covered under Section 4(2) of the Act or selection of sex before or after conception, is informed that such procedures lead to violation of the Act and these rules which are punishable offences;

(vii) help the law enforcing agencies in bringing to book the violators of the provisions of the Act and these Rules;

(viii) display his/her name and designation prominently on the dress worn by him/her;

(ix) write his/her name and designation in full under his/her signature;

(x) on no account conduct or allow/cause to be conducted female foeticide;

(xi) not commit any other act of professional misconduct.

3.2 Form-F prescribed for maintaining the records under Rule 9(4) and Rule 10 (1A) is as under:

FORM F

(See proviso to Section 4(3), Rule 9(4) and Rule 10(1A)

FORM FOR MAINTENANCE OF RECORD IN RESPEPCT OF PREGNANT
WOMAN BY GENETIC CLINIC/ULTRASOUND CLINIC/IMAGING CENTRE.

1. Name and address of the Genetic Clinic/Ultrasound Clinic/Imaging Centre.
2. Registration No.
3. Patient's name and her age
4. Number of children with sex of each child
5. Husband's/Father's name
6. Full address with Tel. No. , if any.
7. Referred by (full name and address of Doctor(s)/Genetic Counselling Centre (referral note to be preserved carefully with the case papers)/self referral.
8. Last menstrual period/weeks of pregnancy
9. History of genetic/medical disease in themselves family (specify)

Basis of diagnosis:

- (a) Clinical
 - (b) Bio-chemical
 - (c) Cytogenetic
 - (d) Other (e.g. radiological, ultrasonography etc., specify)
10. Indication for pre-natal diagnosis

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A. Previous child/children with:

- (i) Chromosomal disorders
- (ii) Metabolic disorders
- (iii) Congenital anomaly
- (iv) Mental retardation
- (v) Haemoglobinopathy
- (vi) Sex linked disorders
- (vii) Single gene disorder
- (viii) Any other (specify)

B. Advanced maternal age (35 years)

C. Mother/father/sibling has genetic disease (specify)

D. Other (specify)

11. Procedures carried out (with name and registration No. of Gynaecologist/Radiologist/Registered Medical Practitioner who performed it).

Non-Invasive

(i) Ultrasound (specify purpose for which ultrasound is to be done during pregnancy)

(list of indications for ultrasonography of pregnant women are given in the note below).

Invasive

- (ii) Amniocentesis
- (iii) Chorionic Villi aspiration
- (iv) Foetal biopsy
- (v) Cordocentesis

(vi) Any other (specify)

12. Any complication of procedure-please specify

13. Laboratory tests recommended

(i) Chromosomal studies

(ii) Biochemical studies

(iii) Molecular studies

(iv) Preimplantation genetic diagnosis

14. Result of

(a) pre-natal diagnostic procedure (give details)

(b) Ultrasonography Normal/Abnormal (specify abnormality detected, if any)

15. Date(s) on which procedures carried out.

16. Date of which consent obtained (In case of invasive)

17. The result of pre-natal diagnostic procedure were conveyed to... on...

18. Was MTP advised/conducted?

19. Date on which MTP carried out.

Name, Signature and Registration number of the Gynaecologist/Radiologist/Director of the Clinic.

Date ...

Place ...

DECLARATION OF PREGNANT WOMAN

I, Ms...(name of the pregnant woman), declare that by undergoing ultrasonography/image scanning etc. I do not want to know the sex of my foetus.

Signature/Thumb impression of pregnant woman

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DECLARATION OF DOCTOR/PERSON CONDUCTING ULTRASONOGRAPHY/IMAGE SCANNING

I, ...(name of the person conducting ultrasonography/image scanning) declare that while conducting ultrasonography/image scanning on Ms... (name of the pregnant woman), I have neither detected nor disclosed the sex of her foetus to anybody in any manner.

Name and signature of the person conducting the sonography/image scanning/Director or owner of genetic clinic/ultrasound clinic/imaging centre.

Important Notes:-

(i) Ultrasound is not indicated/advised/performed to determine the sex of foetus except for diagnosis of sex-linked diseases such as Duchenne Muscular Dystrophy, Haemophilia A& B etc.

(ii) During pregnancy Ultrasonography should only be performed when indicated. The following is the representative list of indications for ultrasound during pregnancy:

(1) to (23)

4. It was argued by learned Public Prosecutor Mr. Sunit Shah that the Appropriate Authority for the State being a multi-member body, delegation of authority for filing a complaint was essential and explicit in the provisions of Section 28 of the Act. He also submitted that in view of increasing incidence of female foeticide and adverse sex-ratio in the society, the legislature has advisedly made stringent provisions for preventing misuse of the pre-natal diagnostic techniques. The maintenance and preservation of records particularly in case of pregnant women undergoing ultrasonography, under the pain of heavy penalties, was part of a strategy to curb the misuse of diagnostic techniques and without such compulsion to keep the records in the prescribed manner, it would be well nigh impossible to trace and prove the offences under the Act. The requirement of maintaining the records was itself an effective check against commission of other offences, according to the submission. Per contra, it was submitted that the provisions of Sub-section (3) of Section 4 were procedural and any lapse in maintaining the record could not be equated with substantive offences of contravention of the provisions of Section 5 or 6. It was submitted that even a minor, formal, technical or accidental slip in filling the forms or keeping the record cannot be the basis of allegation of inaccuracy or deficiency and should not be allowed to expose the person conducting ultrasonography on a pregnant woman to prosecution for serious offences and cast upon him an impossible burden of proving all the ingredients of Sections 5 and 6 of the Act.

5. A conjoint reading of the above provisions would clearly indicate a well-knit legisla-

tive scheme for ensuring a strict and vigilant enforcement of the provisions of the Act directed against female foeticide and misuse of pre-natal diagnostic techniques. In fact, the use of those techniques are restricted to the purpose of detection of any of the abnormalities or diseases enumerated in Sub-section (2) of Section 4 of the Act. The provisions are stricter in case of conduct of pre-natal diagnostic techniques on a pregnant woman, requiring her written consent and determination of sex of a foetus is prohibited by the provisions of Sections 5 and 6. Constitution of 'Appropriate Authority' under Section 17 is clearly meant to ensure proper and vigorous implementation of the Act; and it is expressly prescribed as one of its functions to take legal action against the use of any sex-selection technique. That authority, where appointed for the whole of a State or Union Territory, has to consist of three members. And when it is appointed for a part of the State or a Union Territory, it could consist of an officer of such rank as the Government concerned may deem fit.

6. The provisions of Section 28 clearly provide for taking cognizance of an offence under the Act only upon a complaint being made by any of the four categories of complainants, viz:

(1) the Appropriate Authority concerned;

(2) any officer authorised in that behalf by the Central Government or State Government;

(3) any officer authorised in that behalf by the Appropriate Authority; and

(4) a person, which includes a social organisation, who has given notice as prescribed in Section 28(1)(b).

Use of the words "Appropriate Authority" twice, at the beginning and end of Clause (a) of Sub-section (1) of Section 28, clearly conveys that complaint could be made by an officer who is authorised in that behalf by the Central Government, the State Government or the Appropriate Authority, besides the Appropriate Authority itself. The power to delegate and authorise an officer to make a complaint is clearly conferred upon all the three authorities under the provisions of Section 28, and, therefore, a Court can take cognizance of an offence under the Act on a complaint made by any officer authorised in that behalf by the Appropriate Authority. The first issue is answered accordingly.

7. As seen earlier, the Act and the Rules made thereunder provide for an elaborate scheme to ensure proper implementation of the relevant legal provisions and the possible loop-holes in strict and full compliance are sought to be plugged by detailed provisions for maintenance and preservation of records. In order to fully operationalise the restrictions and injunctions contained in the Act in general and in Sections 4, 5 and 6 in particular, to regulate the use of pre-natal diagnostic technique, to make the

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pregnant woman and the person conducting the pre-natal diagnostic tests and procedures aware of the legal and other consequences and to prohibit determination of sex, the Rules prescribe the detailed forms in which records have to be maintained. Thus the Rules are made and forms are prescribed in aid of the Act and they are so important for implementation of the Act and for prosecution of the offenders, that any improper maintenance of such record is itself made equivalent to violation of the provisions of Sections 5 and 6, by virtue of the proviso to Sub-section (3) of Section 4 of the Act. It must, however, be noted that the proviso would apply only in cases of ultrasonography conducted on a pregnant woman. And any deficiency or inaccuracy in the prescribed record would amount to contravention of the provisions of Sections 5 and 6 unless and until contrary is proved by the person conducting such ultrasonography. The deeming provision is restricted to the cases of ultrasonography on pregnant women and the person conducting ultrasonography is, during the course of trial or other proceeding, entitled to prove that the provisions of Sections 5 and 6 were, in fact, not violated.

8. It needs to be noted that improper maintenance of the record has also consequences other than prosecution for deemed violation of Section 5 or 6. Section 20 of the Act provides for cancellation or suspension of registration of Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic in case of breach of the provisions of the Act or the Rules. Therefore, inaccuracy or deficiency in maintaining the prescribed record shall also amount to violation of the prohibition imposed by Section 6 against the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and expose such clinic to proceedings under Section 20 of the Act. Where, by virtue of the deeming provisions of the proviso to Sub-section (3) of Section 4, contravention of the provisions of Section 5 or 6 is legally presumed and actions are proposed to be taken under Section 20, the person conducting ultrasonography on a pregnant woman shall also have to be given an opportunity to prove that the provisions of Section 5 or 6 were not violated by him in conducting the procedure. Thus the burden shifts on to the person accused of not maintaining the prescribed record, after any inaccuracy or deficiency is established, and he gets the opportunity to prove that the provisions of Sections 5 and 6 were not contravened in any respect. Although it is apparently a heavy burden, it is legal, proper and justified in view of the importance of the Rules regarding maintenance of record in the prescribed forms and the likely failure of the Act and its purpose if procedural requirements were flouted. The proviso to Sub-section (3) of Section 4 is crystal clear about the maintenance of the record in prescribed manner being an independent offence amounting to violation of Section 5 or 6 and, therefore, the complaint need not necessarily also allege violation of the provisions of Section 5 or 6 of the Act. A rebuttable presumption of violation of the provisions of Section 5 or 6 will arise on proof of deficiency or inaccuracy in maintaining the record in the prescribed manner and equivalence with those provisions would arise for punishment as well as for disproving their violation by the accused person. That being the scheme of these provisions, it would be wholly inappropriate to quash the complaint alleging inaccuracy or deficiency in maintenance of the prescribed record only on the ground that

violation of Section 5 or 6 of the Act was not alleged or made out in the complaint. It would also be improper and premature to expect or allow the person accused of inaccuracy or deficiency in maintenance of the relevant record to show or prove that provisions of Section 5 or 6 were not violated by him, before the deficiency or inaccuracy were established in court by the prosecuting agency or before the authority concerned in other proceedings.

9. Upon above analysis and appreciation of the scheme and provisions of the Act and Rules made thereunder, opinion on issues referred to the larger bench is as under:

(i) Under the provisions of Section 28 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (“the PNDT Act”), a Court can take cognizance of an offence under the Act on a complaint made by any officer authorised in that behalf by the Appropriate Authority.

(ii) The proviso to Sub-section (3) of Section 4 of the PNDT Act does not require that the complaint alleging inaccuracy or deficiency in maintaining record in the prescribed manner should also contain allegation of contravention of the provisions of Section 5 or 6 of the PNDT Act.

(iii) In a case based upon allegation of deficiency or inaccuracy in maintenance of record in the prescribed manner as required under Sub-section (3) of Section 4 of the PNDT Act, the burden to prove that there was contravention of the provisions of Section 5 or 6 does not lie upon the prosecution.

(iv) Deficiency or inaccuracy in filling Form F prescribed under Rule 9 of the Rules made under the PNDT Act, being a deficiency or inaccuracy in keeping record in the prescribed manner, it is not a procedural lapse but an independent offence amounting to contravention of the provisions of Section 5 or 6 of the PNDT Act and has to be treated and tried accordingly. It does not, however, mean that each inaccuracy or deficiency in maintaining the requisite record may be as serious as violation of the provisions of Section 5 or 6 of the Act and the Court would be justified, while imposing punishment upon conviction, in taking a lenient view in cases of only technical, formal or insignificant lapses in filling up the forms. For example, not maintaining the record of conducting ultrasonography on a pregnant woman at all or filling up incorrect particulars may be taken in all seriousness as if the provisions of Section 5 or 6 were violated, but incomplete details of the full name and address of the pregnant woman may be treated leniently if her identity and address were otherwise mentioned in a manner sufficient to identify and trace her.

(v) The judgment in *Dr. Manish C. Dave v. State of Gujarat* reported in 2008 (1) GLH 475 stands overruled to the extent it is inconsistent with the above opinion. The references stand disposed accordingly.

Dr. Manish C. Dave⁴⁶
Vs
State of Gujarat and Anr.

Hon'ble Judges:

K.S. Jhaveri, J.

JUDGMENT

K.S. Jhaveri, J.

1. Common questions of fact and law arise in the above petitions, and therefore, they are disposed of by the present common judgment.

The petitioners have prayed to quash and set aside Criminal Complaint Nos. 1677 of 2006, 1558, 7210, 6534, 6535 of 2005, Criminal Case Nos. 4762, 42, 1707, 1216, 1136, 4656, 1689 of 2006 pending before the Metropolitan Magistrate, Court No. 15, Ahmedabad.

2. The petitioners are Radiologists possessing requisite qualification and doing practice in Ahmedabad. The petitioners, for the purpose of diagnosis, use Sonography machine in their premises. The competent authority carried out inspection at the respective places and allegedly found certain irregularities. During the diagnosis the petitioners are required to fill up certain forms. The allegation in substance is that certain details were not provided in the proforma. The concerned authority has, therefore, filed complaints against the petitioners for the alleged commission of offences punishable under Sections 4 and 5 of the Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. The petitioners have challenged the aforesaid complaints on various grounds.

3. Learned Advocate for the petitioners submitted that as far as non-filling up of certain columns is concerned, the petitioners are not required to note the same as the petitioners have nothing to do with such particulars in view of the fact that ultimate-

⁴⁶. (2008)1GLR239

ly the report which is indicated in the sonography report is just to be handed over to the patient concerned.

4. Learned Advocate further submitted that looking to the provisions of the Act, the petitioners have not committed any irregularity and the respondent authority even prima facie failed to establish that the pregnant woman or her relative or any other person has been communicated the sex of foetus or there has been either sex determination or sex selection by the petitioners at any point of time. He, therefore, submitted that the complaint do not disclose any offence being committed by the petitioners even on prima facie basis, and therefore, they are required to be quashed and set aside.

5. Learned Advocate for the petitioners further submitted that the complainants are not maintainable inasmuch as the complaints have not been filed by the persons who are competent to file such complaints.

6. Learned Advocate for the respondent authorities opposed the petitions and submitted that the petitioners have failed to fill up the forms as required under the Act, and therefore, there is prima facie case against the petitioners and this Court may not interfere in the present petitions.

7. Having heard the rival contentions, the only question required to be considered is whether the complaint is filed by the authorised person or not and the petitioners have prima facie committed any offence under the Act as alleged in the aforesaid complaints or not.

8. The definition of “appropriate authority” under Section 17(2) reads as under:

(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 purpose of this Act having regard to the intensity of the problem of prenatal sex determination leading to female foeticide.

9. Section 28 of the Act pertains to cognizance of offences, which reads as under:

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

(a) the appropriate authority concerned, or any officer authorised 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

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make a complaint to the Court.

Therefore, the complaint should be filed by Appropriate Authority or any officer authorised in this behalf by the Central Government or State Government and the 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. Admittedly, the complaints were not filed by Appropriate Authority or officer authorised in this behalf. There is nothing on record to show that the persons who have filed the complaints have given notice as per Section 28(b) of the Act. In view of these facts I am of the view that the complaints become bad in law.

10. As far as the complaints are concerned, Section 4 of the Act is required to be noted, which reads as under:

4. Regulation of pre-natal diagnostic techniques:- On and from the commencement of this Act-

(1) no place including a registered Geneting 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 purpose 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) haemoglobinopathies ;

(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 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 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 the provisions of Sections 5 or 6 unless contrary is proved by the person conducting such ultrasonography;

(4) no person including a relative or husband or 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.

11. According to the aforesaid proviso to Sub-section (3) of Section 4, the Act and the relevant rules the petitioners are required to fill in Form-F. The criminal complaints are based on the alleged infirmities found in filling up Form-F. Therefore, this Court is required to consider whether, by the so-called infirmities, any offence has been committed by the petitioners. The language of the proviso is to the effect that "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. The phrase "unless contrary is proved by the person conducting such ultrasonography" connotes that if there is any allegation the person conducting can prove otherwise. In the present case, there is no allegation by the respondent authority that provisions of Sections 5 and 6 of the Act are attracted and hence there is no question of proving otherwise.

12. Further, if the alleged infirmities are proved, then it would amount to contravention of the provisions of Section 5 or 6 of the Act. The said sections read as under:

5. Written consent of pregnant woman and prohibition of communicating the sex of foetus: (1) No person referred to Clause (2) of Section 3 shall conduct the pre-natal diagnostic procedures unless —

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(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.

6. Determination of sex prohibited: On and from the commencement of this Act-

(a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, prenatal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;

(b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus.

(c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

13. A reading of the aforesaid provisions would show that no person should be communicated the sex of foetus, the test should not be conducted for the purpose of determining the sex of a foetus nor can there be a test for selection of sex before conception. If the test is done for the aforesaid purpose there is a contravention of the provisions of the Act.

14. From a bare perusal of the complaints it is apparent that it is not the case of the authority that provisions of Sections 5 or 6 are applicable inasmuch as the authority has not been able to show or even alleged that (i) any pregnant woman or her relative or any other person has been communicated the sex of foetus by the petitioners or (ii) at any place and by any person, including the person conducting ultrasonography, there has been either sex determination or sex selection. In absence of such specific allegations in the complaint it cannot be said that provisions of Sections 5 and 6 of the Act would be attracted.

15. Reading the proviso to Section (3) it is to be presumed that the deficiency or inaccuracy in the record would amount to contraventions of the provisions of Section 5 or Section 6 of the Act. As a natural consequence, in view of such deficiency or inaccu-

racy, there should be allegation of contravention of provisions of Sections 5 and 6 of the said Act. In the present case there are no specific allegations in the complaint pertaining to the provisions of Sections 5 and 6. Apart from that the language of Sections 5 and 6 is prohibitory in nature, and therefore, the burden of proof will be on the authority to prove that there was contravention and thereupon to rely on the provisions of Statutory Form-F for filing criminal complaint.

16. In the present case, without alleging the contravention to provisions of Sections 5 and 6, the complaint has been filed merely on the alleged deficiency or inaccuracy. In short, when there is an allegation of the alleged deficiency or inaccuracy, it should follow contravention of provisions of Sections 5 and 6. Such is not the case in the complaints in question.

17. As far as Section 4(3) is concerned, it is the case of the petitioners that the register is maintained with all the columns which fall within the four corners of the duties and functions of the petitioners. Apart from that no opportunity is afforded to the petitioners to prove contrary and put up their case. Further, such deficiency or inaccuracy, at least so far as the present proceedings are concerned, is merely a procedural lapse, which do not in any manner contravene the provisions of Sections 5 and 6 of the Act.

18. In view of the above, when it is not established that there is contravention of the provisions of Section 5 or 6, the contention regarding any inaccuracy or deficiency in in Form-F will not be applicable, and therefore, the complaints themselves are not maintainable. I am, therefore, of the view that the complaints do not prima facie establish any alleged offence against the petitioners.

19. In the premises aforesaid, the Criminal Case Nos. 1558, 7210, 6534, 6535 of 2005, Criminal Case Nos. 4762, 42, 1707, 1216, 1136, 4656, 1689 and 1677 of 2006 pending in the Court of Metropolitan Magistrate, Ahmedabad, are hereby quashed and set aside. Rule is made absolute accordingly.

Dr. Varsha Gautam W/o Dr. Rajesh Gautam⁴⁷
Vs
State of U.P. through its Principal Secretary, Homes,
The S.H.O. and The Chief Medical Officer/Prescribed
Authority, P.P.N.D.T. Act

Hon'ble Judges:

Imtiyaz Murtaza and Amar Saran, JJ.

JUDGMENT

Amar Saran, J.

1. This writ petition has been filed with a prayer for quashing of the first information report dated 11.4.2006 lodged at case crime No. 192 of 2006, under Sections 312 and 511 IPC read with the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, hereinafter called 'the Act.'

2. The allegations in the FIR lodged by the C.M.O., Agra on 11.4.06 at P.S. Hari Parvat, Agra was that a sting operation shown on television by the Rastriya Sahara Channel revealed that a pregnant woman wanted to get her abortion done because there was a girl child in her womb. She approached the petitioner Dr. Varsha Gautam at her hospital, who agreed to perform the abortion although it was an offence to perform such an operation and even determination of the sex by doctors using ultrasound technique was illegal. The petitioner is said to have engaged in getting abortions done in her hospital in collusion with doctors, who determined the sex of the foetus by conducting ultrasound tests. Her clinic was not even registered under the Act and she was not entitled to conduct pre-natal diagnostic procedures therein.

3. We have heard Shri V.C. Mishra and Sri Kamal Krishna, learned Counsel for the petitioner and learned Additional Government Advocate.

47. Criminal Misc. Writ Petition No. 5086 of 2006, Decided On: 26.05.2006

4. Firstly, it was contended that there is a bar on investigation in view of Section 28 of the Act, which prohibits cognizance by any court of an offence except on a complaint made by the concerned appropriate authority.

5. In our view the said prohibition does not apply at the stage of investigation and only relates to the stage when cognizance is sought to be taken by the concerned court. In this regard when dealing with the question of a bar under Section 195(1)(b)(ii), it has been held in *M. Narayan Das v. State of Karnataka* AIR 2004 SC 768, that the said bar only applies at the time when the court takes cognizance of an offence, and not at the stage of investigation. The material Paragraph 8 reads as follows:

We are unable to accept the submissions made on behalf of the Respondents. Firstly it is to be seen that the High Court does not quash the complaint on the ground that Section 195 applied and that the procedure under Chapter XXVI had not been followed. Thus such a ground could not be used to sustain the impugned judgment. Even otherwise there is no substance in the submission. The question whether Sections 195 and 340 of the Criminal Procedure Code affect the power of the police to investigate into a cognizable offence has already been considered by this Court in the case of *State of Punjab v. Raj Singh* reported in. In this case it has been that as follows :

2. We are unable to sustain the impugned order of the High Court quashing the FIR lodged against the respondents alleging commission of offences under Sections 419, 420, 467 and 468, I.P.C. by them in course of the proceeding of a civil suit, on the ground that Section 195(1)(b)(ii), Cr. P. C. prohibited entertainment of and investigation into the same by the police. From a plain reading of Section 195, Cr. P.C. it is manifest that it comes into operation at the stage when the Court intends to take cognizance of an offence under Section 190(1), Cr. P. C; and it has nothing to do with the statutory power of the police to investigate into an FIR which discloses a cognizable offence, in accordance with Chapter XII of the Code even if the offence is alleged to have been committed in, or in relation to, any proceedings in Court. In other words, the statutory power of the police to investigate under the Code is not in any way controlled or circumscribed by Section 195, Cr. P. C. It is of course true that upon the charge-sheet (challan), if any, filed on completion of the investigation into such an offence the Court would not be competent to take cognizance thereof in view of the embargo of Section 195(1)(b), Cr. P. C., but nothing therein deters the Court from filing a complaint for the offence on the basis of the FIR (filed by the aggrieved private party) and the materials collected during investigation, provided it forms the requisite opinion and follows the procedure laid down in Section 340, Cr. P. C. The judgment of this Court in *Gopala-krishna Menon v. Raja Ready* on which the High Court relied, has no manner of application to the facts of the instant case for there cognizance was taken on a private complaint even though the offence of forgery was committed in respect of a money receipt produced in the civil Court and hence it was held that the Court could not take cognizance on such a complaint in view of Section 195, Cr. P.C.

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Not only are we bound by this judgment but we are also in complete agreement with the same. Sections 195 and 340 do not control or circumscribe the power of the police to investigate, under the Criminal Procedure Code. Once investigation is completed then the embargo in Section 195 would come into play and the Court would not be competent to take cognizance. However that Court could then file a complaint for the offence on the basis of the FIR and the material collected during investigation provided the procedure laid down in Section 340, Criminal Procedure Code is followed. Thus no right of the Respondents, much less the right to file an appeal under Section 341, is affected.

6. Secondly, it was urged that no offence under Section 312 read with Section 511 IPC is made out as mere consent to commit the offence of performing the abortion on the woman is only an expression of an intention to commit an offence and it could at the highest only be considered as preparation to commit an offence and would not amount to any attempt to commit offence, which is punishable under the Penal Code.

7. There is no clear dividing line between the stage of preparation and the stage of attempt and these questions of fact can properly be determined by the Court at the appropriate stage. In *Abhyanand Mishra v. State of Bihar*, it has been held that obtaining forged mark sheets for the purpose of appearing in the M.A. examinations was not regarded as only a preparation to commit an offence, but was considered an attempt to cheat, even though the accused in that case had already been acquitted of committing forgery. Paragraphs 11 and 12 may be quoted here with advantage:

11. Another contention for the appellant is that the facts proved do not go beyond the stage of preparation for the commission of the offence of 'cheating', and do not make out the offence of attempting to cheat. There is a thin line between the preparation for and an attempt to commit an offence. Undoubtedly, a culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. This is clear from the general expression 'attempt to commit an offence' and is exactly what the provisions of Section 511, I.P.C. require. The relevant portion of Section 511, I.P. C., is:

Whoever attempts to commit an offence punishable by this Code...or to cause such an offence to be committed and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt be punished....

These provisions require that it is only when one, firstly, attempts to commit an offence and, secondly, in such attempt, does any act towards the commission of the offence, that he is punishable for that attempt to commit the offence. It follows, therefore, that the act which would make the culprit's attempt to commit an offence punishable, must be an act which, by itself or in combination with other acts, leads to the commission of the offence. The first step in the commission of the offence of cheating, therefore, must be an act which would lead to the deception of the person sought to be cheated. The moment a person takes some step to deceive the person sought to be cheated, he has embarked on a course of conduct which is nothing less than an attempt to commit the offence, as contemplated by Section 511. He does the act with the intention to commit the offence and the act is a step towards the commission of the offence.

12. It is to be borne in mind that the question whether a certain act amounts to an attempt to commit a particular offence is a question of fact dependent on the nature of the offence and the steps necessary to take in order to commit it. No exhaustive precise definition of what would amount to an attempt to commit an offence is possible. The cases referred to make this clear.

8. Again the observations in paragraph 16 of the said law reports further clarifies that attempt does not only relate to the penultimate stage of the offence:

16. In the matter of the petition of R. Mac Crea ILR 15 All 173 it was held that whether any given act or series of acts amounted to an attempt which the law would take notice of or merely to preparation, was a question of fact in each case and that Section 511 was not meant to cover only the penultimate act towards the completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence, and were done with the intent to commit it and done towards its commission. Knox J., said at page 179: "Many offences can easily be conceived where, with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may be the interposition of inquiries and other acts upon his part. The acts whereby those preparations may be brought to bear upon her mind may be several in point of number, and yet the first act after preparations completed will, if criminal in itself, be beyond all doubt, equally an attempt with the ninety and ninth act in the series.

Again, the attempt once begun and a criminal act done in pursuance of it towards the commission of the act attempted, does not cease to be a criminal attempt, in my opinion, because the person committing the offence does or may repeal before the attempt

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is completed". Blair, J., said at page 181:

It seems to me that the section (Section 511) uses the word 'attempt' in a very large sense; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is, conducive to its commission, is itself punishable, and though the act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the section. It says expressly that whosoever in such attempt, obviously using the word in the larger sense, does any act, and c., shall be punishable. The term 'any act' excludes the notion that the final act short of actual commission is alone punishable.

We fully approve of the decision and the reasons therefor.

9. It was also argued by learned Counsel for the petitioner that no offence under the Act was disclosed, and that the FIR itself mentioned that sex determination of the woman had already been conducted elsewhere, when she approached the petitioner who agreed to perform the operation. Now according to learned Counsel the offence would only arise at the stage when an illegal abortion was performed on the woman, which would constitute an offence under Section 312 IPC and not under the Act.

10. In this connection the definition of sex selection in Section 2(o) of the Act may usefully be perused:

Section 2(o) "Sex selection includes any procedure, technique, test or administration or prescription or provision of anything for the purpose of ensuring or increasing the probability that an embryo will be of a particular sex.

11. Section 3A prohibits sex selection by providing that no person including a specialist in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man. Section 3A of the Act reads as under:

3-A. Prohibition of sex selection:.. No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them.

12. It is thus clear from a reading of Section 3A of the Act that prohibition of sex selection (i.e. an act for increasing the probability that an embryo will be of a particular sex) has been given a wide meaning under the said provisions and the restriction is on every person including a specialist on conducting or even causing to be conducted or

aiding in conducting by himself or by any other person sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either of both of them. Therefore, both conducting sex selection oneself or by aiding another person to engage in sex selection, has been brought within the purview of this section.

13. The contention of the learned Counsel for the petitioner that sex selection only amounts to determination of the sex of the embryo, which was conducted by an outside agency and thereafter determination of the pregnancy would constitute only an offence under Section 312 IPC, which, for the reasons mentioned by the learned Counsel had not reached the stage of attempt, cannot therefore be accepted.

14. Sex determination includes not only determination of the sex, but also includes anything done from fertilization until birth, which increases the probability that the embryo will be of a particular sex. Therefore, sex selection cannot only be confined to the determination of the sex of the foetus.

15. That such a comprehensive and extended meaning of sex selection has been given is also clear from an examination of Sections 6(b) and Section 6(c) of the Act, which read as under:

6(b) "No person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus;

6(c) No person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

16. It is noteworthy that Section 6(c) as also the other provisions relating to the aspect of sex selection have been introduced by the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 (14 of 2003) with effect from 14.2.2004. Prior to that date only determination of sex by ultrasonography etc was prohibited, but after the said amendment, any step taken by a specialist or any other person to cause or even to allow to be caused selection of sex before or after conception was made punishable.

17. It appears that this amendment was introduced also for ensuring that all aspects of sex selection, starting from the initial activity of determination of the sex by pre-natal diagnostic procedures and thereafter all the steps taken by any person or specialist for facilitating sex selection before or after conception would be brought under the ambit of this amendment.

18. Even the title of the Act was amended and whereas in the earlier title the long title was for "An Act to provide for the Regulation of the use of Pre-natal Diagnostic Techniques for.... after the amendment Act No. 14 of 2003 the initial line reads as "An

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Act to provide for the prohibition of sex selection, before or after conception and for regulation of prenatal diagnostic techniques...the purpose of pre-natal sex determination leading to female foeticide...

19. The statement of objects and reasons of the amendment Act No. 14 of 2003 also indicated the inadequacy of the 1994 Act and the need for expanding the scope of the Act so as to include a ban on sex selection techniques and procedures. The statement of Objects and Reasons of Act No. 14 of 2003 reads 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 the 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 prenatal 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.

20. We also observed that admittedly there was no registration of the petitioner's clinic under the Act, which amounts to an offence under Section 3(1) of the Act. The said provisions reads as under:

Section 3(1) " No Genetic Counseling Centre, Genetic laboratory or Genetic Clime

unless registered under this Act, shall conduct or associate with, or help in, conducting activities relating to prenatal diagnostic techniques.

21. The said provisions also clarifies that no Genetic Counseling Centre, Laboratory or clinic unless it is registered under the Act can conduct or even associate with or help in conducting the activities relating to pre-natal diagnostic techniques. Therefore, even association or helping with activities for sex selection would be prohibited under the Act.

22. In this background, we also find no force in another contention raised by the learned Counsel for the petitioner that as the offence of engaging or aiding any sex selection is punishable for three years under Section 23 of the Act, and as the present offence would only be a case of attempt to commit, whose maximum punishment would be half or 1 1/2 years, hence an offence of sex selection, would become non-cognizable in view of the last clause of Schedule 1, of the Code of Criminal Procedure dealing with 'Classification of Offences against other laws'. Here it may be pointed that there is a direct provision under the Act, viz. Section 27 which clearly provides that every offence under this Act shall be cognizable, non-bailable and non-compoundable. Therefore this special provision in the Act would prevail over the general provision in view of Section 5 of the Code of Criminal Procedure.

23. The last submission raised by the learned Counsel for the petitioner by means of a supplementary affidavit that while preparing a certain Parcha of the case diary on 20.4.2006, the investigating officer had exonerated the petitioner from an offence under the Act.

24. We cannot consider or appreciate the value of such an entry in the case diary at this stage in the present petition under Article 226, and it is for the court to apply its mind and consider whether an offence under a particular provision is made out or not at the appropriate stage. In this connection it has been held in *Supdt. of Police, CBI v. Tapan Kumar Singh*, that the FIR need not even mention all the ingredients of an offence, and the same may be brought out on the conclusion of the investigation:

22. The High Court has also quashed the GD entry and the investigation on the ground that the information did not disclose all the ingredients of the offence, as if the informant is obliged to reproduce the language of the section, which defines "criminal misconduct" in the Prevention of Corruption Act, In our view the law does not require the mentioning of all the ingredients of the offence in the first information report. It is only after a complete investigation that it may be possible to say whether any offence is made out on the basis of evidence collected by the investigating agency.

25. It has further been mentioned in paragraph 22 of the aforesaid law report that the mere mention or non-mention of a particular section in the FIR is not conclusive, and it is for the Court to determine at the appropriate stage as to the offence for which the

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charge may be framed. The relevant lines read as under:

Similarly, the mentioning of a particular section in the FIR is not by itself conclusive as it is for the court to frame charges having regard, to the material on record. Even if a wrong section is mentioned in the FIR, that does not prevent the court from framing appropriate charges.

26. As any activity for sex selection as pointed out above has very grave social consequences as it can disturb the balance in the male-female ratio. With the female-male ratio having already declined to 933 per 1000 males, we are sitting on a virtual time bomb, which can spell social disaster. Instances of villages where there are no eligible females for marriages are being reported, or where girls are being purchased from backward areas for servicing several brothers as brides. Whilst the earlier primitive methods of female foeticide were still relatively confined to a limited section of the population, however by using the modern scientific and relatively covert methods which the Act seeks to bring under its purview, sex selection has become a rampant phenomena which has affected every strata of society.

27. In view of the laxity in implementing the provision of the Act, and the continuing sex-selection and discriminatory practices against the female child compared to the male child, the apex Court has issued directions in Centre for Enquiry Into Health And allied Themes (CEHAT) and Ors. v. Union of India and Ors. calling for the effective implementation of the Act and for complying with its earlier order. The Center/State Govts. and Union Territories were further directed to issue advertisements to create awareness in public that there should not be any discrimination between male and female child. The reports of appropriate authorities were to be published annually for information of public. The National Monitoring and Inspection Committee was to continue to function till the Act was effectively implemented. Certain States were directed to appoint State Supervisory Boards and multi-membered appropriate authorities.

28. In view of what has been indicated hereinabove, we find no ground to quash the FIR or to stay the arrest of the petitioner. The petition has no force. It is accordingly dismissed.

**Center for Enquiry Into Health and Allied Themes
(CEHAT) and Ors⁴⁸.**

Vs

Union of India (UOI) and Ors.

Hon'ble Judges:

M.B. Shah and Ashok Bhan, JJ.

JUDGMENT

Shah, J.

1. It is an admitted fact that in India Society, discrimination against girl child still prevails, may be because of prevailing uncontrolled dowry system despite the Dowry Prohibition Act, as there is no change in the mind-set or also because of insufficient education and/or tradition of women being confined to household activities. Sex selection/sex determination further adds to this adversity. It is also known that number of persons condemn discrimination against women in all its forms, and agree to pursue, by appropriate means, a policy of criminating discrimination against women, still however, we are not in a position to change mental set-up which favours a male child against a female. Advance technology is increasingly used for removal of fetus (may or may not be seen as commission of murder) but it certainly affects the sex ratio. The misuse of modern science and technology by preventing the birth of girl child by sex determination before birth and thereafter abortion is evident from the 2001 Census figures which reveal greater decline in sex ratio in the 0-6 age group in States like Haryana, Punjab, Maharashtra and Gujarat, which are economically better off.

2. Despite this, it is unfortunate that law which aims at preventing such practice is not implemented and, therefore, Non-Governmental Organisations are required to approach this Court for implementation of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 renamed after amendment as "The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection)

48. AIR2003SC3309

Act” (hereinafter referred to as ‘the PNDD Act’) which is the normal function of the Executive.

3. In this petition, it was inter alia prayed that as the Pre-natal Diagnostic Techniques contravene the provisions of the PNDD Act, the Central Government and the State Governments be directed to implement the provisions of the PNDD Act (a) by appointing appropriate authorities at State and District levels and the Advisory Committees; (b) the Central Government be directed to ensure that Central Supervisory Board meets every 6 months as provided under the PNDD Act; and (c) for banning of all advertisements of pre-natal sex selection including all other sex determination techniques which can be abused to selectively produce only boys either before or during pregnancy.

4. After filing of this petition, notices were issued and thereafter various orders from time to time were passed to see that the Act is effectively implemented.

5.A) On 4th May 2001, following order was passed:—

“It is unfortunate that for one reason or the other, the practice of female infanticides still prevails despite the fact that gentle touch of a daughter and her voice has soothing effect on the parents. One of the reasons may be the marriage problems faced by the parents coupled with the dowry demand by the so-called educated and/or rich persons who are well placed in the society. The traditional system of female infanticide whereby female baby was done away with after birth by poisoning or letting her choke on husk continues in a different form by taking advantage of advance medical techniques. Unfortunately, developed medical science is misused to get rid of a girl child before birth. Knowing full well that it is immoral and unethical as well as it may amount to an offence, fetus of a girl child is aborted by qualified and unqualified doctors or compounders. This has affected overall sex ratio in various States where female infanticide is prevailing without any hindrance.

For controlling the situation, the Parliament in its wisdom enacted the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as “the PNDD Act”). The Preamble, inter alia, provides that the object of the Act is to prevent the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide and for matters connected therewith or incidental thereto. The Act came into force from 1st January, 1996.

It is apparent that to a large extent, the PNDD Act is not implemented by the Central Government or by the State Governments. Hence, the petitioners are required to approach this Court under Article 32 of the Constitution of India. One of the petitioners is the center for Enquiry Into Health and Allied Themes (CEHAT) which is a research center of Anusandhan Trust based in Pune and Mumbai. Second petitioner is Mahila Sarvangeen Utkarsh Mandal (MASUM) based in Pune and Maharashtra and

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the third petitioner is Dr. Sabu M. Georges who is having experience and technical knowledge in the field. After filing of this petition, this Court issued notices to the concerned parties on 9.5.2000. It took nearly one year for the various States to file their affidavits in reply/written submissions. ***Prima facie it appears that despite the PNDT Act being enacted by the Parliament five years back, neither the State Governments nor the Central Government has taken appropriate actions for its implementation.*** Hence, after considering the respective submissions made at the time of hearing of this matter, as suggested by the learned Attorney General for India, Mr. Soli J. Sorabjee following directions are issued on the basis of various provisions for the proper implementation of the PNDT Act:-

I. Directions to the Central Government

1. The Central Government is directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through appropriate releases programmers in the electronic media. This shall also be done by Central Supervisory Board ("CSB" for short) as provided under Section 16(iii) of the PNDT Act.
2. The Central Government is directed to implement with all vigor and zeal the PNDT Act and the Rules framed in 1996. Rule 15 provides that the intervening period between two meetings of the Advisory Committees constituted under Sub-section (5) of Section 17 of the PNDT Act to advise the appropriate authority shall not exceed 60 days. It would be seen that this Rule is strictly adhered to.

II. Directions to the Central Supervisory Board (CSB)

1. Meetings of the CSB will be held at least once in six months. [Re. Proviso to Section 9(1)] The constitution of the CSB is provided under Section 7. It empowers the Central Government to appoint ten members under Section 7(2)(e) which includes eminent medical practitioners including eminent social scientists and representatives of women welfare organizations. We hope that this power will be exercised so as to include those persons who can genuinely spare some time for implementation of the Act.
2. the CSB shall review and monitor the implementation of the Act. [Re. Section 16(ii)].
3. The CSB shall issue directions to all State/UT. Appropriate Authorities to furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:-
 - (i) Survey of bodies specified in Section 3 of the Act.
 - (ii) Registration of bodies specified in Section 3 of the Act.

(iii) Action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records.

(iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.

(v) Number and nature of awareness campaigns conducted and results flowing therefrom.

4. The CSB shall examine the necessity to amend the Act keeping in mind emerging technologies and difficulties encountered in implementation of the Act and to make recommendations to the Central Government. [Re. Section 16]

5. The CSB shall lay down a code of conduct under Section 16(iv) of the Act to be observed by persons working in bodies specified therein and to ensure its publication so that public at large can know about it.

6. The CSB will require medical professional bodies/associations to create awareness against the practice of pre-natal determination of sex and female foeticide and to ensure implementation of the Act.

III. Directions to State Government/UT Administrations

1. All State Government/UT Administrations are directed to appoint by notification, fully empowered Appropriate Authorities at district and sub-district levels and also Advisory Committees to aid and advise the Appropriate Authority in discharge of its functions [Re. Section 17(5)]. For the Advisory Committee also, it is hoped that members of the said Committee as provided under Section 17(6)(d) should be such persons who can devote some time for the work assigned to them.

2. All State Governments/UT Administrations are directed to publish a list of the Appropriate Authorities in the print and electronic media in its respective State/UT.

3. All State Governments/UT Administrations are directed to create public awareness against the practice of pre-natal determination of sex and female foeticide through advertisement in the print and electronic media by hoarding and other appropriate means.

4. All State Governments/UT Administrations are directed to ensure that all State/UT appropriate Authorities furnish quarterly returns to the CSB giving a report on the implementation and working of the Act. These returns should inter alia contain specific information about:-

(i) Survey of bodies specified in Section 3 of the Act.

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(ii) Registration of bodies specified in Section 3 of the Act.

(iii) Action taken against non-registered bodies operating in violation of Section 4 of the Act, inclusive of search and seizure of records.

(iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.

(v) Number and nature of awareness campaigns conducted and results flowing therefrom.

IV. Directions to Appropriate Authorities

1. Appropriate Authorities are directed to take prompt action against any person or body who issues or causes to be issued any advertisement in violation of Section 22 of the Act.

2. Appropriate Authorities are directed to take prompt action against all bodies specified in Section 3 of the Act as also against persons who are operating without a valid certificate of registration under the Act.

3. All State/UT Appropriate Authorities are directed to furnish quarterly returns to the CSB giving report on the implementation and working of the Act. These returns should inter alia contain specific information about:-

(i) Survey of bodies specified in Section 3 of the act.

(ii) Registration of bodies specified in Section 3 of the Act including bodies using ultrasound machines.

(iii) Action taken against non-registered bodies operating in violation of Section 3 of the Act, inclusive of search and seizure of records.

(iv) Complaints received by the Appropriate Authorities under the Act and action taken pursuant thereto.

(v) Number and nature of awareness campaigns conducted and results flowing therefrom.

The CSB and the State Governments/Union Territories are directed to report to this Court on or before 30th July 2001. List of the matter on 6.8.2001 for further directions at the bottom of the list.”

6. B] In spite of the above order, certain States UTs did not file their affidavits. Matter

was adjourned from time to time and on 19th September, 2001, following order was passed:—

“Heard the learned counsel for the parties and considered the affidavits filed on behalf of the various States. From the said affidavits, it appears that the directions issued by this Court are not complied with.

1. At the outset, we may state that there is total slackness by the Administration in implementing the Act. Some learned counsel appointed out that even though the Genetic Counselling center, genetic Laboratories or Genetic Clinics are not registered, no action is taken as provided under Section 23 of the Act, but only a warning is issued. In our view, those centers which are not registered are required to be prosecuted by the Authorities under the provisions of the Act and there is no question of issue of warning and to permit them to continue their illegal activities.

It is to be stated that the Appropriate Authorities or any officer of the Central or the State Government authorised in this behalf is required to file complaint under Section 28 of the Act for prosecuting the offenders.

Further wherever at District Level, appropriate authorities are appointed, they must carry out the necessary survey of Clinics and take appropriate action in case of non-registration or non-compliance of the statutory provisions including the Rules. ***Appropriate authorities are not only empowered to take criminal action, but to search and seize documents, records, objects etc. of unregistered bodies under Section 30 of the Act.***

2. It has been pointed out that the States/Union Territories have not submitted quarterly returns to the Central Supervisory Board on implementation of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as “the Act”). Hence it is directed that the ***quarterly returns to Central Supervisory Board should be submitted giving the following information:-***

- (a) Survey of centers, Laboratories/Clinics,
- (b) Registration of these bodies,
- (c) Action taken against unregistered bodies,
- (d) Search and Seizure,
- (e) Number of awareness campaigns, and
- (f) Results of campaigns”

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7. C] On 7th November, 2001, learned counsel for the Union of India stated that the Central Government has decided to take concrete steps for the implementation of the Act and suggested to set up National Inspections and Monitoring Committee for the implementation of the Act. It was ordered accordingly.

8. D] On 11th December, 2001, it was pointed out that certain State Governments have not disclosed the names of the members of the Advisory Committee. Consequently, the State Governments were directed to publish the names of advisory committee in various districts so that if there is any complaint, any citizen can approach them. The Court further observed thus:—

“For implementation of the Act and the rules, it appears that it would be desirable if the Central Government frames appropriate rules with regard to sale of ultrasound machines to various clinics and issue directions not to sell machines to unregistered clinics. Learned counsel Mr. Mahajan appearing for Union of India submitted that appropriate action would be taken in this direction as early as possible.”

9. E] On March 31, 2003, it was pointed out that in conformity with the various directions issued by this Court, the Act has been amended and titled as “The Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act”. It was submitted that people are not aware of the new amendment and, therefore, following reliefs were sought:—

a) direct the Union of India, State Governments UTs and the authorities constituted under the PNDT Act to prohibit sex selection techniques and its advertisement throughout the country;

b) direct that the appropriate authorities shall also include “vehicles” with ultra sound machines etc., in their quarterly reports hereinafter as defined under Section 2(d);

c) any person or institution selling Ultra Sound machine should provide information to the appropriate State Authority in furtherance of Section 3-B of the Amended Act;

d) direct that State Supervisory Boards be constituted in accordance with the amended Section 16A in order to carry out the functions enumerated therein;

e) direct appropriate authorities to initiate suo moto legal action under the amended Section 17(iv)(e);

f) direct that the Central Supervisory Board shall publish half yearly consolidated reports based on the quarterly reports obtained from the State bodies. These reports should specifically contain information on:

1) Survey of bodies and the number of bodies registered.

- 2) Functioning of the regulatory bodies providing the number and dates of meetings held.
- 3) Action taken against non-registered bodies inclusive of search and seizure of records.
- 4) Complaints received and action taken pursuant thereto.
- 5) Nature and number of awareness programmes.
- 6) Direct that the Central Supervisory Board shall carry out all the additional functions as given under the amended Section 16 of the Act, in particular, to oversee the performance of various bodies constituted under the Act and take appropriate steps to ensure its proper and effective implementation.

As against this, Mr. Mahajan learned counsel appearing for the Union of India submits that on the basis of the aforesaid amendment, appropriate action has already been taken by Union of India for implementation and almost all State Governments UTs are informed to implement the said Act and the Rules and the State Governments UTs are directed to submit their quarterly report to the Central Supervisory Board.

Considering the amendment in the Act, in our view, it is the duty of the Union Government as well as the State Governments UTs to implement the same as early as possible.”

10 F] At the time of hearing, learned counsel for the petitioners substituted that appropriate directions including the steps which are required to be taken on the basis of PNDT Act and the suggestion as given in the written submission be issued.

11. On this aspect, learned counsel for the parties were heard.

12. In view of the various directions issued by this Court, as quoted above, no further directions are required except that the directions issued by this Court on 4th May, 2001, 7th November, 2001, 11th December, 2001 and 31st March, 2003 should be complied with. The Central Government/State Governments UTs are further directed that:—

a) For effective implementation of the Act, information should be published by way of advertisements as well as on electronic media. This process should be continued till there is awareness in public that there should not be any discrimination between male and female child.

b) Quarterly reports by the appropriate authority, which are submitted to the Supervisory Board should be consolidated and published annually for information of

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the public at large.

c) Appropriate authorities shall maintain the records of all the meetings of the Advisory Committees.

d) The National Monitoring and Inspection Committee constituted by the Central Government for conducting periodic inspection shall continue to function till the Act is effectively implemented. The reports of this Committee be placed before the Central Supervisory Board and State Supervisory Board for any further action.

e) As provided under Rule 17(3), public would have access to the records maintained by different bodies constituted under the Act.

f) Central Supervisory Board would ensure that the following States appoint the State Supervisory Board as per the requirement of Section 16A.

1. Delhi 2. Himachal Pradesh 3. Tamil Nadu 4. Tripura 5. Uttar Pradesh.

g) As per requirement of Section 17(3)(a), the Central Supervisory Board would ensure that the following States appoint the multi-member appropriate authorities:

1. Jharkhand 2. Maharashtra 3. Tripura 4. Tamil Nadu 5. Uttar Pradesh

13. It will be open to the parties to approach this Court in case of any difficulty in implementing the aforesaid directions.

The Writ Petition is disposed of accordingly.

14. In view of the aforesaid order, pending IAs have become infructuous and are disposed of accordingly.

State of Haryana & Ors.⁴⁹

Vs

Smt. Santra

Hon'ble Judges:

S.Saghir Ahmed and D.P. Wadhwa, JJ.

ORDER

1. Leave granted.

2. Medical Negligence plays its game in strange ways. Sometimes it plays with life; sometimes it gifts an "Unwanted Child" as in the instant case where the respondent, a poor labourer woman, who already had many children and had opted for Sterilisation developed pregnancy and ultimately gave birth to a female child in spite of sterilization operation which, obviously, had failed.

3. Smt. Santra, the victim of the medical negligence, filed a suit for recovery of Rs. 2 lakhs as damages for medical negligence; which was decreed for a sum of Rs. 54,000/- with interest at the rate of 12 per cent per annum from the date of institution of the suit till the payment of the decretal amount. Two appeals were filed against this decree in the court of District Judge, Gurgaon, which were disposed of by Adl. District Judge, Gurgaon, by a common judgment dated 10.5.1999. Both the appeals - one filed by the State of Haryana and the other by Smt. Santra were dismissed. The second appeal filed by the State of Haryana was summarily dismissed by the Punjab & Haryana High Court on 3.8.1999. It is in these circumstances that the present Special Leave Petition has been filed in this Court.

4. "Sterilisation Scheme", admittedly, was launched by the Haryana Govt. and taking advantage of that scheme. Smt. Santra approached the Chief Medical Officer, Gurgaon, for her Sterilisation in 1988. The, Sterilisation operation was performed on her and a certificate to that effect was also issued to her on 4.2.1988 under the sig-

49. AIR2000SC217

natures of the Medical Officer, General Hospital, Gurgaon. Smt. Santra was assured that full, complete and successful Sterilisation operation had been performed upon her and she would not conceive a child in future. But despite the operation, she conceived. When she contacted the Chief Medical Officer and other Doctors of the General Hospital, Gurgaon, she was informed that she was not pregnant. Two months later when the pregnancy became apparent, she again approached those Doctors who then told her that her Sterilisation operation was not successful. Dr. Sushil Kumar Goyal, who was examined as DW-2, stated that the operation related only to the right Fallopian Tube and the left Fallopian Tube was not touched, which indicates that 'complete Sterilisation' operation was not done. She requested for an abortion, but was advised not to go in for abortion as the same would be dangerous to her life. She ultimately gave birth to a female child. Smt. Santra already - has seven children and the birth of a new child put her to unnecessary burden of rearing up the child as also all the expenses involved in the maintenance of that child, including the expenses towards her clothes and education.

5. It was in these circumstances that the suit was filed by Smt. Santra which was contested by the Stated, who, besides taking up the technical pleas relating to non-maintainability of the suit on various grounds, denied in the written statement that there was any negligence on the part of the Medical Officer of the General Hospital, Gurgaon. It was contended by the defendants that the Sterilisation operation performed upon Smt. Santra on 4.2.1988 was done carefully and successfully and there was no negligence on the part of the Doctor who performed that operation. It was further pleaded that Smt. Santra had herself put her thumb impression on a paper containing a recital that in case the operation was not successful, she would not claim any damages. It was pleaded that she was estopped from raising the plea of negligence or from claiming damages for an unsuccessful Sterilisation operation from the State which, it was further pleaded, was not liable even vicariously for any lapse on the part of the Doctor who performed that operation.

6. The trial court as also the lower appellate court both recorded concurrent findings of fact that the Sterilisation operation performed upon Smt. Santra was not 'complete' as in that operation only the right Fallopian Tube was operated upon while the left Tube was left untouched. The courts were of the opinion that this exhibited negligence on the part of the Medical Officer who performed the operation. Smt. Santra, in spite of the unsuccessful operation, was informed that Sterilisation operation was successful and that she would not conceive any child in future. The plea of estoppel raised by the defendants was also rejected. The trial court has recorded the following findings on the question of negligence:

The birth of the female child by plaintiff Smt. Santra after operation for sterilization is not disputed and the case of the delfts is that there was no negligence and carelessness on the part of the deflt, but on going through the documents placed on the file as well as testimony of PWs that the medical officer who conducted the operation has

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threw the care and caution to the winds and focussed attention to perform as many as operations as possible to build record and earn publicity. It is in such settling that a poor lady obsessed to plan his family, was negligently operated upon and treated and left in the lurch to suffer agony and burden which he was made to believe was avoidable. Therefore, the act of the DW 2 Dr. Sushil Kumar shows that he did not perform his duty to the best of his ability and with due care and caution and due to the above said act, the plaintiff has to suffer mental pain and agony and burden of financial liability.

7. The findings of the lower Appellate Court on this question are as under:

In the instant case, admittedly, plaintiff Santra was operated for right tube and not for left tube. Dr. Sushil Kumar Goel while appearing as DW 2 has categorically stated so. He has specifically stated that Santra, plaintiff was not traceable. I am of the considered opinion that if Santra plaintiff was not operated for left side in that event the doctor should not have issued certificate of sterilization to her. The doctors who operated plaintiff Santra should have advised her to come for second time for her operation of left side. The plaintiff has placed family sterilization case card Ex. P2 on the file. The defendant State has admitted in its written statement that she was successfully operated on 4.2.88 in General Hospital, Gurgaon. When admittedly Santra, plaintiff was not operated, as discussed above, for her left tube in that event issuance of certificate to her of her sterilization amounts gross negligence.

8. The High Court, as pointed out above, summarily dismissed the second appeal.

9. Learned Counsel appearing on behalf of the State of Haryana has contended that the negligence of the Medical Officer in performing the unsuccessful Sterilisation operation upon Smt. Santra would not bind the State Govt. and the State Govt. would not be liable vicariously for any damages to Smt. Santra. It was also claimed that the expenses awarded for rearing up the child and for her maintenance could not have been legally decreed as there was no element of "tort" involved in it nor had Smt. Santra suffered any loss which could be compensated in terms of money.

10. Negligence is a 'tort'. Every Doctor who enters into the medical profession has a duty to act with a reasonable degree of care and skill. This is what is known as 'implied undertaking' by a member of the medical profession that he would use a fair, reasonable and competent degree of skill. In *Bolam v. Friern Hospital Management Committee* (1957) 2 All ER 118, Monair, J. summed up the law as under:

The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular Article. In the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent med-

ical men at the time. There may be one or more perfectly proper standards, and if he conforms with one of these proper standards, then he is not negligent.

11. This decision has since been approved by the House of Lords in *Whitehouse v. Jordan* (1981) 1 All ER 267 (HL); *Maynard v. West Midlands Regional Health Authority* (1985) 1 All ER 635 (HL); and *Sidway v. Bathlem Royal Hospital* (1986) 1 All ER 643 (HL).

12. In two decisions rendered by this Court, namely, *Dr. Laxman Balakrishna Joshi v. Dr. Trimbak Bahu Godbole and Anr.* AIR 1969 SC 128 and *A.S. Mittal v. State of U.P.*, it was laid down that when a Doctor is consulted by a patient, the former, namely, the Doctor owes to his patient certain duties which are (a) a duty of care in deciding whether to undertake the case; (b) a duty of care in deciding what treatment to give; and (c) a duty of care in the administration of that treatment. A breach of any of the above duties may give a cause of action for negligence and the patient may on that basis recover damages from his Doctor. In a recent decision in *Poonam Verma v. Ashwin Patel and Ors.* where the question of medical negligence was considered in the context of treatment of a patient, it was observed as under:

40. Negligence has many manifestations - it may be active negligence, collateral negligence, comparative negligence, concurrent negligence, continued negligence, criminal negligence, gross negligence, hazardous negligence, active and passive negligence, wilful or reckless negligence or Negligence per se, which is defined in Black's Law Dictionary as under:

Negligence per se: Conduct, whether of action or omission, which may be declared and treated as negligence without any argument or proof as to the particular surrounding circumstances, either because it is in violation of a statute or valid municipal ordinance, or because it is so palpably opposed to the dictates of common prudence that it can be said without hesitation or doubt that no careful person would have been guilty of it. As a general rule, the violation of a public duty, enjoined by law for the protection of person or property, so constitutes.

13. It was also observed that where a person is guilty of Negligence per se. no further proof is needed.

14. In *Spring Meadows Hospital and Anr. v. Harjol Ahluwalia through K.S. Ahluwalia and Anr.*, it was observed as under:

In the case in hand we are dealing with a problem which centers round the medical ethics and as such it may be appropriate to notice the broad responsibilities of such organisations who in the garb of doing service to the humanity have continued commercial activities and have been mercilessly extracting money from helpless patients and their family members and yet do not provide the necessary services. The influ-

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ence exerted by a doctor is unique. The relationship between the doctor and the patient is not always equally balanced. The attitude of a patient is poised between trust in the learning of another and the general distress of one who is in a state of uncertainty and such ambivalence naturally leads to a sense of inferiority and it is, therefore, the function of medical ethics to ensure that the superiority of the doctor is not abused in any manner. It is a great mistake to think that doctors and hospitals are easy targets for the dissatisfied patient. It is indeed very difficult to raise an action of negligence. Not only there are practical difficulties in linking the injury sustained with the medical treatment but also it is still more difficult to establish the standard of care in medical negligence of which a complaint can be made. All these factors together with the sheer expense of bringing a legal action and the denial of legal aid to all but the poorest operate to limit medical litigation in this country.

It was further observed as under:

In recent days there has been increasing pressure on hospital facilities, falling standard of professional competence and in addition to all, the ever increasing complexity of therapeutic and diagnostic methods and all this together are responsible for the medical negligence. That apart there has been a growing awareness in the public mind to bring the negligence of such professional doctors to light. Very often in a claim for compensation arising out of medical negligence a plea is taken that it is a case of bona fide mistake which under certain circumstances may be excusable, but a mistake which would tantamount to negligence cannot be pardoned. In the former case a court can accept that ordinary human fallibility precludes the liability while in the latter the conduct of the defendant is considered to have gone beyond the bounds of what is expected of the reasonable skill of a competent doctor.

15. In this judgment, reliance was placed on the decision of the House of Lords in *Whitehouse v. Jordan and Anr.* (1981) 1 ALL ER 267. Lord Fraser, while reversing the judgment of Lord Denning (sitting in the Court of Appeal), observed as under:

The true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant holds himself out as having, and acting with ordinary care, then it is negligence. If, on the other hand, it is an error that such a man, acting with ordinary care, might have made, then it is not negligence.

16. The principles stated above have to be kept in view while deciding the issues involved in the present case.

17. The facts which are not disputed are that Smt. Santra, respondent, had undergone a Sterilisation Operation at the General Hospital, Gurgaon, as she already had

seven children and wanted to take advantage of the scheme of Sterilisation launched by the State Govt. of Haryana. She underwent the Sterilisation Operation and she was issued a certificate that her operation was successful. She was assured that she would not conceive a child in future. But, as the luck would have it, she conceived and ultimately gave birth to a female child. The explanation offered by the officers of the appellant-State who were defendants in the suit, was that at the time of Sterilisation Operation, only the right Fallopian Tube was operated upon and the left Fallopian Tube was left untouched. This explanation was rejected by the courts below and they were of the opinion, and rightly so, that Smt. Santra had gone to the Hospital for complete and total Sterilisation and not for partial operation. The certificate issued to her, admittedly, was also in respect of total sterilisation Operation.

18. Family Planning is a National Programme. It is being implemented through the agency of various Govt. Hospitals and Health centers and at some places through the agency of Red Cross. In order that the National Programme may be successfully completed and the purpose sought may bear fruit, every body involved in the implementation of the Programme has to perform his duty in ail earnestness and dedication. The Govt. at the center as also at the State level is aware that India is the second most-populous country in the world and in order that it enters into an era of prosperity, progress and complete self-dependence, it is necessary that the growth of the population is arrested. It is with this end in view that family planning programme has been launched by the Government which has not only endeavoured to bring about an awakening about the utility of family planning among the masses but has also attempted to motivate people to take recourse to family planning through any of the known devices or Sterilisation operation. The Programme is being implemented through its own agency by adopting various measures, including the popularisation of contraceptives and operation for sterilising the male or female. The implementation of the Programme is thus directly in the hands of the Govt. officers, including Medical Officers involved in the family planning programmes. The Medical Officers entrusted with the implementation of the Family Planning Programme cannot, by their negligent acts in not performing the complete Sterilisation operation, sabotage the scheme of national importance. The people of the country who cooperate by offering themselves voluntarily for Sterilisation reasonably expect that after undergoing the operation they would be able to avoid further pregnancy and consequent birth of additional child.

19. If Smt. Santra, in these circumstances, had offered herself for complete Sterilisation, both the Fallopian Tubules should have been operated upon. The Doctor who performed the operation acted in a most negligent manner as the possibility of conception by Smt, Santra was not completely ruled out as her left Fallopian Tube was not touched. Smt. Santra did conceive and gave birth to an unwanted child.

20. Who has to bear the expenses in bringing up the “unwanted child”, is the question which is to be decided by us in this case.

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21. The amount of Rs. 54,000/- which has been decreed by the courts below represents the amount of expenses which Smt. Santra would have to incur at the rate of Rs. 2,000/- per annum in bringing up the child upto the age of puberty.

22. The domestic legal scenario on this question appears to be silent, except one or two stray decisions of the High Courts, to which a reference shall be made presently. Before coming to those cases, let us have a look around the Globe,

23. In Halsbury's Laws of England, Fourth Edition (Re-issue) Vol. 12(1), while considering the question of "failed Sterilisation", it is stated in para 896 as under:

Failed Sterilisation. Where the defendant's negligent performance of a Sterilisation operation results in the birth of a healthy child public policy does not prevent the parents from recovering damages for the unwanted birth, even though the child may in fact be wanted by the time of its birth. Damages are recoverable for personal injuries during the period leading up to the delivery of the child, and for the economic loss involved in the expense of losing paid occupation and the obligation of having to pay for the upkeep) and care of an unwanted child. Damages may include loss of earnings for the mother, maintaining the child (taking into account child benefit), and pain and suffering to the mother.

24. In *Udale v. Bloomshury Area Health Authority* [1983] 2 All ER 522, a woman who had approached Hospital Authorities for Sterilisation was awarded damages not only for pain and suffering on account of pregnancy which she developed as a result of failed Sterilisation, but also damages for the disturbance of the family finances, including the cost of layette and increased accommodation for the family. The Court, however, did not allow damages for future cost of the child's upbringing upto the age of 16 years, on a consideration of public policy. The Court held that the public policy required that the child should not learn that the Court had declared its life to be a mistake. The Court further held that the joy of having a child and the pleasure derived in rearing up that child have to be set off against the cost in upbringing the child.

25. The doctrine of public policy, however, was not followed in *Emeh v. Kensington and Chelsea and Westminster Area Health Authority* and it was held that there was no rule of public policy which precluded recovery of damages for pain and suffering for maintaining the child. So also, in *Thake v. Maurice*, in which a vasectomy was performed on the husband who was also told, subsequent to the operation, that contraceptive precautions were not necessary, Still, a child was born to him and damages for the child's upkeep upto the seventeenth birthday were awarded, though for an agreed sum. The Court of Appeal in its judgment since reported in , held that the joy of having a child could be set off against the trouble and care in the upbringing of the child, but not against prenatal pain and distress, for which damages had to be awarded.

26. In *Benarr v. Kettering Health Authority* (1988) 138 NLJ 179, which related to a negligently performed vasectomy operation, damages were awarded for the future private education of the child. In *Allen v. Bloomsbury Health Authority* [1993] 1 All ER 651, damages were awarded in the case of negligence in the termination of the pregnancy and it was held that these damages will include general damages for pain and discomfort associated with the pregnancy and birth as also damages for economic loss being the financial expenses for the unwanted child in order to feed, clothe and care for and possibility to educate the child till he becomes an adult. On these considerations, a general and special damages including the cost of maintaining the child until the age of 18 were allowed. The judgment was followed in two other cases, namely, *Crouchman v. Burke* (1997) 40 BMLR 163 and *Robinson v. Salford Health Authority* [1992] 3 Med LR 270.

27. In a case in Scotland, namely, *Allan v. Greater Glasgow Health Board* (1998) 1998 SLT 580, public policy considerations were rejected and cost of rearing the child was also awarded.

28. In three cases in the United States of America, namely, *Szekeres v. Robinson* (1986) 715 P 2d 1076; *Johnson v. University Hospitals of Cleveland* (1989) 540 NE 2d 1370 (Ohio) and *Public Health Trust v. Brown* (1980) 388 So 2d 1084, damages were not allowed for rearing up the child. In the first of these three cases, the Supreme Court of Nevada refused to award damages for the birth of an unwanted child even though the birth was partially attributable to the negligent conduct of the doctor attempting to prevent the child birth. In the second case, it was held that the parents could recover only the damages for the cost of the pregnancy, but not the expense of rearing an unwanted child. The basis of the judgment appears to be the public policy that the birth of a normal, healthy child cannot be treated to be an injury to the parents. In the third case in which the claim was preferred by a woman alleging that the Sterilisation operation performed upon her was negligently done which resulted in pregnancy for a child which she never wanted, the Supreme Court of Florida was of the opinion that it was a matter of universally-shared emotion and sentiment that the tangible but all-important, incalculable but invaluable 'benefits' of parenthood far outweigh any of the mere monetary burdens involved.

29. However, in another case arising in the United States, the Supreme Court of New Mexico in *Lovelace Medical center v. Mendez* (1991) 805 P 2d 603 allowed damages in the form of reasonable expenses to raise the child to majority as it was of the opinion that the prime motivation for Sterilisation was to conserve family resources and since it was a failed Sterilisation case, attributable to the negligent failure of Lovelace Medical center, the petitioner was entitled to damages.

30. In a South African case in *Administrator, Natal v. Edouard* 1990 (3) SA 581, damages were awarded for the cost of maintaining the child in a case where Sterilisation of the wife did not succeed. It was found in that case that the wife had submitted for

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Sterilisation for socio-economic reasons and in that situation the father of the child was held entitled to recover the cost likely to be incurred for maintaining the child.

31. In a Newzealand case in *L v. M* [1979] 2 NZLR 519, the court of appeal refused to allow cost of rearing a child.

32. In a case from Australia, namely, *CES v. Superclinics (Australia) Pty. Ltd.* (1995) 38 NSWLR 47, the expenses involved in rearing the child were not allowed. In this case, a woman who was pregnant, claimed damages for loss of the opportunity to terminate the pregnancy which Doctors had failed to diagnose. The claim was dismissed by the trial judge on the ground that abortion would have been unlawful. Meagher JA discounted the claim altogether on the ground of public policy, but the other Judge, Kirby A-CJ was of the opinion that the woman was entitled to damages both for the pain and suffering which she had to undergo on account of pregnancy as also for the birth and the cost of rearing the child. But he thought that it would be better to offset against the claim of damages, the value of the benefits which would be derived from the birth and rearing of the child. He was of the opinion that the matter of setting off of nett benefits against the nett injury incurred would depend upon the facts of each case. In the result, therefore, he agreed with priestly JA, that the ordinary expenses of rearing the child should be excluded. priestly JA was of the view that,

The point in the present case is that the plaintiff chose to keep her child. The anguish of having to make the choice is part of the damage caused by the negligent breach of duty, but the fact remains, however, compelling the psychological pressure on the plaintiff may have been to keep the child, the opportunity of choice was in my opinion real and the choice made was voluntary It was this choice which was the cause, in my opinion, of the subsequent cost of rearing the child.

33. From the above, it would be seen that the courts in the different countries are not unanimous in allowing the claim for damages for rearing up the unwanted child born out of a failed Sterilisation operation. In some cases, the courts refused to allow this claim on the ground of public policy, while in many other, the claim was offset against the benefits derived from having a child and the pleasure in rearing up that child. In many other cases, if the Sterilisation was undergone on account of social and economic reasons, particularly in a situation where the claimant had already had many children, the court allowed the claim for rearing up the child.

34. In *State of M.P. and Ors. v. Asharam*, 1997 Accident Claim Journal 1224, the High Court allowed the damages on account of medical negligence in the performance of a family planning operation on account of which a daughter was born after fifteen months of the date of operation.

35. No other decision of any High Court has come to our notice where damages were awarded on account of failed Sterilisation operation.

36. Ours is a developing country where majority of the people have below the poverty line. On account of the ever-increasing population, the country is almost at the saturation point so far as its resources are concerned. The principles on the basis of which damages have not been allowed on account of failed Sterilisation operation in other countries either on account of public policy or on account of pleasure in having a child being offset against the claim for damages cannot be strictly applied to the Indian conditions so far as poor families are concerned. The public policy here professed by the Government is to control the population and that is why various programmes have been launched to implement the state-sponsored family planning programmes and policies. Damages for the birth of an unwanted child may not be of any value for those who are already living in affluent conditions but those who live below the poverty line or who belong to the labour class who earn their livelihood on daily basis by taking up the job of an ordinary labour, cannot be denied the claim for damages on account of medical negligence.

37. It is, no doubt, true that the parents are under an obligation to maintain their minor children. This is a moral, apart from a statutory, liability in view of the provisions contained in Section 125 of the CrPC. It is also a statutory liability on account of Section 20 of the Hindu Adoptions and Maintenance Act which provides as under:

20. (1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or "her own earning or property.

Explanation. - In this section "parent" includes a childless step-mother.

38. "Maintenance" would obviously include provision for food, clothing, residence, education of the children and medical attendance or treatment. The obligation to maintain besides being statutory in nature is also personal in the sense that it arises from the very existence of the relationship between parent and the child. The obligation is absolute in terms and does not depend on the means of the father or the mother. Section 22 of the Act sets out the principles for computing the amount of maintenance. Sub-section (2) of Section 23 provides that in determining the amount of maintenance, to be awarded to children, wife or aged or infirm parents, regard shall be had to the position and status of the parties; the reasonable wants of the claimant; if the claimant was living separately, whether the claimant was justified in doing so; the

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value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source and the number of persons entitled to maintenance under the Act. But we are not concerned with these factors in the instant case. A reference to Section 23 of the Hindu Adoptions and Maintenance Act has been made only to indicate that a Hindu father or a Hindu mother is under a statutory obligation to provide maintenance to their children.

39. Similarly, under the Mohammedan Law, a father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. [See: Mulla's Principles of Mohammedan Law (19th Edn.) page 300]. But the statutory liability to maintain the children would not operate as a par in claiming damages on account of tort of medical negligence in not carrying out the Sterilisation operation with due care and responsibility. The two situations are based on two different principles. The statutory as well as personal liability of the parents to maintain their children arises on account of the principles that if a person has begotten a child, he is bound to maintain that child. Claim for damages, on the contrary, is based on the principle that if a person has committed civil wrong, he must pay compensation by way of damages to the person wronged.

40. Under every system of law governing the patriarchal society, father being a natural guardian of the child, is under moral liability to look after and maintain the child till he attains adulthood.

41. Having regard to the above discussion, we are positively of the view that in a country where the population is increasing by the tick of every second on the clock and the Government had taken up the family planning as an important programme for the implementation of which it had created mass awakening for the use of various devices including Sterilisation operation, the doctor as also the State must be held responsible in damages if the Sterilisation operation performed by him is a failure on account of his negligence, which is directly responsible for another birth in the family, creating additional economic burden on the person who had chosen to be operated upon for Sterilisation.

42. The contention as to the vicarious liability of the State for the negligence of its officers in performing the Sterilisation operation cannot be accepted in view of the law settled by this Court in *N. Nagendra Rao & Co. v. State of A.P.*; *Common Cause, A Regd Society v. Union of India* and *Ors.* and *Achutrao Haribhau Khodwa and Ors. v. State of Maharashtra and Ors.* 1996 ACJ 505. The last case, which related to the fall-out of a Sterilisation operation, deals, like the two previous cases, with the question of vicarious liability of the State on account of medical negligence of a doctor in a Govt. hospital. The theory of sovereign immunity was rejected.

43. Smt. Santra, as already stated above, was a poor lady who already had seven children. She was already under considerable monetary burden. The unwanted child (girl)

born to her has created additional burden for her on account of the negligence of the doctor who performed Sterilisation operation upon her and, therefore, she is clearly entitled to claim full damages from the State Govt. to enable her to bring up the child at least till she attains puberty.

44. Having regard to the above facts, we find no merit in this appeal which is dismissed but without any order as to costs.