



## Villainy of Female Foeticide: Role of Judiciary in Implementation of PCPNDT Act in India

Falak Naaz

PhD Research Scholar, Central University of Kashmir, Jammu and Kashmir, India

### Abstract

Gender inequalities have persisted in India since centuries. Women and girls continue to be discriminated against at every stage of their life cycle. This manifests itself in the form of neglect, lack of access to education, health care, nutrition, early marriages, repeated and frequent pregnancies at a very young age, violence, infanticide and foeticide including sex selection i.e. pre-birth elimination of female foetuses, which has led to declining sex –ratio, the consequences of which are serious, all pervading and far reaching. This a matter of grave concern and needs to be addressed using a multi-pronged approach involving different sections of the society. Like other sections of the society the Judiciary also plays an important role in impacting the issue of sex-selection. The Indian judiciary has from time to time come up with ingenious ways to provide protection to the fairer sex and this essentially includes the group of unborn girls too. Since 2001, the judiciary has been closely monitoring the implementation of its various orders passed regarding the ban on the use of ultrasound scanners for conducting such tests.

**Keywords:** foeticide, violence, pre- natal, pre-conception, determination.

### Introduction

Millions of women throughout the world live in conditions of abject deprivation of, and attacks against their fundamental human rights for no other reason than that they are women. Social institutions such as marriage, which is associated with the system of dowry payment, serve to perpetuate abuses against women particularly amongst poor and low caste women.<sup>[1]</sup> Gender inequalities have persisted in India since centuries. This manifests itself in the form of infanticide and foeticide. Son preference and discrimination against the girl child is almost common amongst all the sections of the Indian society and manifests itself in many ways, including sex selection i.e. pre-birth elimination of female foetuses. This practice has led to decline in the Child Sex Ratio in most parts of India. The Child Sex Ratio, which is the number of girls per 1000 boys in the 0-6 year's age group, has declined from 976 in 1961 to 914 in 2011.

Taking cognizance of declining sex ratio the Government of India has put in place a law - The Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act<sup>2</sup>, that prohibits the use of pre-conception and prenatal diagnostic techniques to determine the sex of the unborn child. It also imposes a fine and imprisonment on doctors indulging in this practice. It has, however, been difficult to implement the Act because sex selection happens within the confines of the doctor-client relationship. The Act regulates the use of technology but the mindset of the people who adopt and practice this cannot be addressed by Law. Girl Child still remains unwanted in several households. In view of the laxity in implementing the provisions of 'The Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act<sup>2</sup>', and the continuing sex-selection and

discriminatory practices against female child, the Indian judiciary in common and the higher judiciary in particular has rendered some important judgments relating to excesses and violence against women and has also laid down certain important guidelines with regard to proper and effective implementation of the law governing sex selection. It is in this backdrop that the present paper is devoted to analyse and evaluate the role that the judiciary has played in making the law more effective.

### Directions for Effective Implementation of the Law

The primary credit for implementation of the Pre Natal Diagnostic Techniques (Prevention of Misuse) Act goes to the judiciary. Supreme Court has been exerting and infact has compelled State Government to initiate action against diagnostic centers encouraging female foeticide prohibited under PNDT Act, 1994<sup>[2]</sup>.

### Centre for Enquiry into Health and Allied Themes

(CEHAT) v. *Union of India*<sup>[3]</sup> was a Public Interest Litigation, filed under Article 32 of the Constitution of India, by Centre for Enquiry into Health and Allied Themes (CEHAT), a research organisation; Mahila Sarvangin Utkarsh Mandal (MASUM), a Non-Governmental organization and Dr. Sabu M. George, a civil society member. Shah J. delivering the judgment said,

It is an admitted fact that in Indian 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

<sup>1</sup> K. Vijay Lakshmi, "Women's Rights are Human Rights" 22 AIRJ (2009).

<sup>2</sup> Ms. Gulafroz Jan, "Female Foeticide- A Socio-Legal Analysis WSR to J&K State" 11 KULR 207 (2007).

<sup>3</sup> (2003) 8 SCC 398.

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 eliminating 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 foetus (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.”

The Court issued a series of directions to the Centre and the State Governments to rigorously implement the law and crack down on diagnostic centres determining sex of a foetus. The directions are as follows:

**(i) Directions to the Central Government**

1. The Central Government was directed to create public awareness against the practice of pre-natal sex determination and female foeticide through appropriate releases/programmes in the electronic media.
2. The Central Government was directed to implement with all vigour and zeal the PNDT Act and the Rules framed in 1996.

**(ii) Directions to the Central Supervisory Board (CSB)**

1. The CSB was directed to review and monitor the implementation of the Act.
2. The CSB was directed to issue directions to all State/UT and the Appropriate Authorities to furnish quarterly returns to the CSB giving a report on the implementation and working of the Act.
3. The CSB was directed to 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.
4. The CSB was directed to 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.
5. The CSB was directed to 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 Governments/UT Administrations**

1. All State Governments/UT Administrations were 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.
2. All State Governments/UT Administrations were 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 were 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 were 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.

**(iv) Directions to Appropriate Authorities**

1. Appropriate Authorities were directed to take prompt action against any person or body that issued or caused to be issued any advertisement in violation of section 22 of the Act.
2. Appropriate Authorities were directed to take prompt action against all bodies specified in section 3 of the Act as also against persons who were operating without a valid certificate of registration under the Act.
3. All State/UT Appropriate Authorities were directed to furnish quarterly returns to the CSB giving a report on the implementation and working of the Act.

An analysis of these directions reveals that Diagnostic centres were required to paste notices outside their doors declaring that they do not determine sex of foetus. The governments took that as a solemn pledge and slunk into its usual slumber<sup>[4]</sup>.

The Supreme Court issued further directions for taking appropriate action against the Medical Officers and the Clinics violating the provisions of the Act.

On 07.11.2001, on the suggestion of Central Government, Supreme Court ordered setting up of National Inspection and Monitoring Committee for the implementation of the Act. In the year 2003 in conformity with the several directions issued by the Supreme Court, the Act was amended to bring within its purview the misuse of pre-conception and pre-natal diagnostic techniques and was titled as the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act. On 31.03.2003 and 10.09.2003 after giving some further directions, for creating public awareness and for effective implementation of the amended Act, the Supreme Court finally disposed of the Petition on 10.09.2003.

The perusal of these directions reflects that the Supreme Court had to literally legislate on how the Act should be implemented. This decision hence constitutes a land mark in its impact. The Supreme Court was equally concerned with the indifference on the part of Government in implementation of the law which aims at preventing such a social evil. As per Supreme Court:

“it was unfortunate that for implementation of the law, which was the urgent need of the hour, NGOs had to approach the Court for the implementation of the Act which is the normal

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<sup>4</sup> Abortion: Are we more humane than Irish law? *available at* [http://articles.timesofindia.indiatimes.com/2012-11-19/india/35204278\\_1\\_female-infanticide-irish-envoy-female-foeticide](http://articles.timesofindia.indiatimes.com/2012-11-19/india/35204278_1_female-infanticide-irish-envoy-female-foeticide)(Visited on 31 May 2013 at 02:05 pm.)

function of the Executive”.

The Supreme Court before disposing off the writ petition held that it would be open to the parties to approach the Court in case of any difficulty in implementing the aforesaid directions. As the Judgments and Orders of Supreme Court are binding on all in view of Article 141 of the Constitution of India and as the non-obedience and non-compliance with the directions issued by the Supreme Court amounts to contempt of court, it appears that only with a view to avoid facing the action of contempt of the Supreme Court, the Government and Authorities have at least made some efforts towards implementation of this Act. This decision is in that respect epoch making. This petition puts the issue of sex selection and sex selective abortion on the national agenda and as a consequence there have been heightened activities on this issue by government and non-governmental agencies alike <sup>[5]</sup>.

However despite detailed directions issued by the Supreme Court since 2001 in the landmark decision of CEHAT v. Union of India, several States did not take any step for effective implementation of the Act. Hence, PILs were filed in the respective High Courts of various States to that effect.

In the State of Orissa, for example, hundreds of skeletons, skulls and body parts of infants were recovered, which shocked the common man. As these were found in an area close to various Nursing Homes and Clinics, there was strong allegation that the practice of sex selection and pre-natal sex determination was still rampant. After coming across a series of news items in the print and electronic media to this effect, one Mr. Hemanta Rath, a social activist filed a Public Interest Litigation in Hemanta Rath v. Union of India (UOI) And Ors <sup>[6]</sup> under Article 226 of the Constitution of India in the High Court of Orissa seeking directions for effective implementation of the PNDT Act in the State. The contention raised in the petition was that there was total inaction both on part of the Central and State Government in implementing the provisions of the Act. The appointment of Appropriate Authorities as contemplated under Section 17 (1) of the Act had not been made and the State Advisory Committee as per Section 17 (5) of the Act had not been constituted and without constitution of such Appropriate Authority and Advisory Committee, provisions of Section 28 became nugatory as under Section 28, a court can take cognizance of the offence only on a complaint made by the Appropriate Authority.

After referring to the Object of the Act and Constitutional principles, the High Court stressed, on both the statutory and Constitutional obligation of the State, to implement the provisions of the Act. The High Court also took note of the delayed response of the State for formation of the State Advisory Committee which was constituted only in 2007. This also was not in accordance with the provisions of the Act. The High Court gave explicit directions to the State Government to appoint Appropriate Authority and Advisory Committee within 6 weeks and further directed the Committee to take strict measures to implement the provisions of the Act.

In this case the Court held that once it is determined that the

foetus is a female foetus; there is a tendency of terminating such pregnancy. Normally such medical technology has been developed in order to guard against the genetic and other disorders of the child in the mother's womb and for detecting diseases, such as HIV and VD. But such techniques are misused by medical practitioners as a device for determination of the sex of the foetus and if it is a female one, the same is aborted to prevent the birth of a female child. The court observed that, in order to prevent such malpractices, the said Act was enacted and under Section 7 of the said Act, the Central Government has to constitute a Board to be known as The Central Supervisory Board.

The State Government has also the statutory obligation to constitute such a Board under Section 16A of the said Act. Section 17 of the said Act casts an obligation both on the Central Government and the State Government to appoint one or more Appropriate Authorities for the whole or part of the State for the purposes of implementation of the said Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide. Under Section 17(5) of the said Act, the Central Government or the State Government shall constitute an Advisory Committee for each Appropriate Authority for advising the Appropriate Authority in the discharge of its functions and shall appoint one of the members of the Advisory Committee to be its Chairman. Under Section 28 of the said Act, a Court can take cognizance of the offence under the said Act only on a complaint made by the Appropriate Authority.

### The Court observed

It has been complained in the petition that without constitution of Appropriate Authority, the provisions of Section 28 become nugatory. Therefore, the complaint in the petition is that there is total inaction both on the part of State Government and the Central Government in the matter of implementing the provisions of the said Act which was enacted for preventing infanticide and foeticide. The said Act has come into existence in order to protect the appropriate male and female ratio in the society so that there will be no social imbalance. Apart from that this Court feels that the said Act has a broader human right perspective inasmuch as it has been enacted to prevent the killing of a foetus on a gender bias. This is against the essence of our Constitutional principles.

This judgment is very positive in nature, giving impetus to strict implementation of the provisions of the Act and compelling the State to comply with its duty/obligation of implementing the Act, which was not properly implemented even after 13 years from enactment of the legislation.

### In *Voluntary Health Ass. of Punjab v. Union of India & Ors.*

<sup>[7]</sup> the Court held, “This Court, as early as, in 2001 in *Centre for Enquiry into Health and Allied Themes v. Union of India* <sup>[8]</sup> had noticed the misuse of the Act and gave various

<sup>5</sup> Available at <http://www.legalservicesindia.com/forum/topic50-cehat-and-ors-vs-union-of-india-female-foeticide.html> (Visited on 31 May 2013 at 6:52 pm).

<sup>6</sup> AIR 2008 Ori 71.

<sup>7</sup> Available at <http://www.legalservicesindia.com/forum/topic50-cehat-and-ors-vs-union-of-india-female-foeticide.html> (Visited on 31 May 2013 at 6:52 pm).

<sup>8</sup> (2001) 5 SCC 577.

directions for its proper implementation. Non-compliance of various directions was noticed by this Court again in *Centre for Enquiry into Health and Allied Themes v. Union of India*<sup>9</sup> and this Court gave various other directions.”

Having noticed that those directions as well as the provisions of the Act were not being properly implemented by the various States and Union Territories, the Court passed an order on 8.1.2013 directing personal appearance of the Health Secretaries of the States of Punjab, Haryana, NCT Delhi, Rajasthan, Uttar Pradesh, Bihar and Maharashtra, to examine what steps they have taken for the proper and effective implementation of the provisions of the Act as well as the various directions issued by the Court.

The Court further observed that even though the Union of India has constituted the Central Supervisory Board and most of the States and Union Territories have constituted State Supervisory Boards, Appropriate Authorities, Advisory Committees etc. under the Act, but their functioning are far from satisfactory and as such the Court observed,

We have gone through the chart as well as the data made available by various States, which depicts a sorry and an alarming state of affairs. Lack of proper supervision and effective implementation of the Act by various States, are clearly demonstrated by the details made available to this Court. However, State of Maharashtra has comparatively a better track record.

Seldom, the ultrasound machines used for such sex determination in violation of the provisions of the Act are seized and, even if seized, they are being released to the violators of the law only to repeat the crime. Many of the ultra-sonography clinics seldom maintain any record as per rules and, in respect of the pregnant women, no records are kept for their treatment and the provisions of the Act and the Rules are being violated with impunity. The Court said,

The Central Government vide GSR 80(E) dated 7.2.2002 issued a notification amending the Act and regulating usage of mobile machines capable of detecting the sex of the foetus, including portable ultrasonic machines, except in cases to provide birth services to patients when used within its registered premises as part of the Mobile Medical Unit offering a bouquet or other medical and health services. The Central Government also vide GSR 418(E) dated 4.6.2012 has notified an amendment by inserting a new Rule 3.3(3) with an object to regulate illegal registrations of medical practitioners in genetic clinics, and also amended Rule 5(1) by increasing the application fee for registration of every genetic clinic, genetic counselling centre, genetic laboratory, ultrasound clinic or imaging centre and amended Rule 13 by providing that an advance notice by any centre for intimation of every change in place, intimation of employees and address. Many of the clinics are totally unaware of those amendments and are carrying on the same practises.

In order to deal with such circumstances, the following directions are given:

1. The Central Supervisory Board and the State and Union

Territories Supervisory Boards, constituted under Sections 7 and 16A of PCPNDT Act, would meet at least once in six months, so as to supervise and oversee how effective is the implementation of the PCPNDT Act.

2. The State Advisory Committees and District Advisory Committees should gather information relating to the breach of the provisions of the PCPNDT Act and the Rules and take steps to seize records, seal machines and institute legal proceedings, if they notice violation of the provisions of the PCPNDT Act.
3. The Committees mentioned above were required to report the details of the charges framed and the conviction of the persons who have committed the offence, to the State Medical Councils for proper action, including suspension of the registration of the unit and cancellation of licence to practice.
4. The authorities were required to ensure that all Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics, Infertility Clinics, Scan Centres etc. using pre-conception and pre-natal diagnostic techniques and procedures maintain all records and all forms, required to be maintained under the Act and the Rules and the duplicate copies of the same be sent to the concerned District Authorities, in accordance with Rule 9(8) of the Rules.
5. States and District Advisory Boards were required to ensure that all manufacturers and sellers of ultra-sonography machines do not sell any machine to any unregistered centre, as provided under Rule 3-A and disclose, on a quarterly basis, to the concerned State/Union Territory and Central Government, a list of persons to whom the machines have been sold, in accordance with Rule 3-A(2) of the Act.
6. A direction to all Genetic Counselling Centres, Genetic Laboratories, Clinics etc. to maintain forms A, E, H and other Statutory forms provided under the Rules and if these forms are not properly maintained, appropriate action should be taken by the authorities concerned.
7. Steps to be taken by the State Government and the authorities under the Act for mapping of all registered and unregistered ultra-sonography clinics, in three months time.
8. Steps to be taken by the State Governments and the Union Territories to educate the people of the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the State and District levels.
9. Special Cell be constituted by the State Governments and the Union Territories to monitor the progress of various cases pending in the Courts under the Act and take steps for their early disposal.
10. The authorities concerned were required to take steps to seize the machines which have been used illegally and contrary to the provisions of the Act and the Rules there under and the seized machines can also be confiscated under the provisions of the Code of Criminal Procedure and be sold, in accordance with law.
11. The various Courts of the country were directed to take steps to dispose of all pending cases under the Act, within a period of six months. Communicate this order to

<sup>9</sup> (2003) 8 SCC 398.

the Registrars of various High Courts, who would take appropriate follow up action with due intimation to the concerned Courts.

All the State Governments were directed to file a status report within a period of three months.

### 5.2 Constitutional Validity of the PCPNDT Act

As on today there are two decisions, both of the Bombay High Court, in which Constitutional validity of the Act was challenged but upheld. Both the decisions are landmark in the way they deal with this most sensitive and socially relevant issue. In *Vinod Soni and Anr. v. Union of India (UOI)* <sup>[10]</sup> decided on 13/06/2005 the validity of the PCPNDT Act was challenged on the ground that the provisions of the Act are violative of Article 21 of the Constitution of India. A very interesting argument was advanced in this case by the Petitioner that the right to life guaranteed under Article 21 of the Constitution includes right to personal liberty which in turns includes the liberty of choosing the sex of the offspring and to determine the nature of the family. Therefore, it was contended that the couple is entitled to undertake any such medical procedure which provides for determination or selection of sex.

The High Court, however, exposed the fallacy of this argument by observing that, “right to personal liberty cannot be expanded by any stretch of imagination to liberty to prohibit the coming into existence of a female or male foetus which shall be for the nature to decide.” After making reference to the decisions of the Supreme Court, which explain that Article 21 includes the right to food, clothing, decent environment and even protection of cultural heritage, the High Court held that “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 pre-conception or post-conception.” It was observed by the High Court that “this Act is factually enacted to further the right of the child to full development as given under Article 21. A child conceived is, therefore, entitled under Article 21 to full development, whatever is the sex of that child.” Accordingly High Court dismissed the Petition by holding that it does not even make a prima facie case for violation of Article 21 of the Constitution.

In *Mr. Vijay Sharma and Another v. Union of India* <sup>[11]</sup> a petition was 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 Pre-Conception and Pre-natal 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”). The petitioners were a married couple having two female children and were desirous of expanding their family provided they were 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. The petitioners approached various clinics for treatment for the

selection of the sex of the foetus by prenatal diagnostic techniques. However, all clinics denied treatment to them on the ground that it is prohibited under the said Act. They contended that a married couple, who already had a child belonging to one sex, should be permitted to make use of the pre-natal diagnostic techniques to have a child of the sex which was opposite to the sex of their existing child. According to them, the ideal ratio of females to males could be maintained if the pre-natal diagnostic techniques were allowed to be used.

Rejecting the contention of the petitioners regarding the constitutionality of the said Act, the Court held that “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* <sup>[12]</sup>. It is not open to the petitioners to raise the same challenge again”. Also the court rejecting their submissions as fallacious held that the use of the words “Regulation and Prevention of Misuse” in the Amendment Act, 2002 is indicative of the legislative intent. The Statement of Objects and Reasons of the Amendment Act, 2002 clearly indicated that the legislature was alarmed at the severe imbalance created in the male to female ratio on account of rampant use of the pre-natal 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 categorically stated that there was a need to ban pre-conception sex selective techniques and made it clear that 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 pre-natal diagnostic techniques for sex selective abortions.

The Court held that, Section 2(j) defining pre-natal diagnostic techniques stated that such techniques include *all pre-natal diagnostic procedures and pre-natal diagnostic tests*.

The Court held that the said act did not violate the equality clause <sup>[13]</sup> of the Constitution and rejected the comparison between the said Act and the Medical Termination of Pregnancy (MTP Act). In the opinion of the Supreme Court, the Acts and the mischief they seek to prevent differed. The MTP Act was an Act to provide for the termination of certain pregnancies by registered medical practitioners and for the matters connected or incidental thereto. Statement of Objects and Reasons of the MTP Act indicated that it concerns itself with the avoidable wastage of the mother’s health, strength and sometimes life. It does not deal with sex selective abortion after conception or sex selection before or after conception.

The Court rejected the submission that by sex selection before conception with the help of the said techniques, sex of the child is determined by using male/ female chromosomes before fertilisation and the fertilised egg is inserted in the womb of the mother, there is, therefore, no foeticide.

### 5.3. Validity of FIR

In *Dr. Varsha Gautam v. State of U.P* <sup>[14]</sup>, a writ petition was filed with a prayer for quashing of the first information report

<sup>10</sup> 2005 Cri. LJ 3408; 2005 (3) MLJ 1131.

<sup>11</sup> AIR 2008 Bom 29

<sup>12</sup> *Supra* Note 10.

<sup>13</sup> Article 14 of the Indian Constitution.

<sup>14</sup> Criminal Misc. Writ Petition No. 5086 of 2006.

dated 11.4.2006 lodged in 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.

The allegations was that a sting operation shown on television revealed that a pregnant woman who wanted to get a female foetus aborted approached the petitioner, who agreed. The petitioner was said to have been 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.

The High Court of Allahabad held 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. The High Court held that the said prohibition did not apply at the stage of investigation and only related to the stage when cognizance was sought to be taken by the concerned court.

Secondly, the High Court rejected the contention that no offence under Section 312 read with Section 511 IPC was made out as mere consent to commit the offence of performing the abortion on the woman was 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, as punishable under the Indian Penal Code.

The High Court held that 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.

Further, the High Court also observed that admittedly, there was no registration of the petitioner's clinic under the Act, which amounted to an offence under Section 3(1) of the Act.

In the concluding paragraphs the High Court had expressed concern with respect to the increased misuse of modern scientific technology leading to decline in sex ratio, spelling out very grave social consequences. The Court has observed that "we are sitting on a virtual time bomb, which can spell social disaster."

Hence the High Court found no ground to quash the FIR or to stay the arrest of the petitioner. The petition was accordingly dismissed.

#### 5.4 Registration and Suspension of Registration

In the Writ Petition *M/s Malpani Infertility Clinic Pvt. Ltd. & Others v. Appropriate Authority, PNDDT Act & Others*<sup>[15]</sup> filed by M/s Malpani Infertility Clinic Pvt. Ltd. in the High Court of Bombay, the order passed by Appropriate Authority suspending the registration of Petitioner's Diagnostic Centre under the PNDDT Act was challenged. Main contention raised was that show cause notice, as contemplated under Section 20 (1), an opportunity of hearing as contemplated under Section 20 (2) and sufficient reasons as required under section 20 (3) of the Act, were not given to Petitioners before taking the action of suspending registration; hence the order was bad as

per law.

However, considering peculiar facts of the case, High Court rejected this contention. It was pointed out that Petitioners had joined as one of the Respondents (Respondent No. 38) in Writ Petition *CEHAT v. Union of India*, filed by CEHAT (Centre for Enquiry into Health and Allied Themes) before Apex Court and had also filed an affidavit therein defending the sex determination tests on the ground of 'family balancing'. Though subsequently the Petitioners had filed another affidavit tendering apology, they knew that they were prosecuted for criminal offence under the provisions of the Act. It was held that, as Appropriate Authority has, after referring to that criminal prosecution issued the order of suspension, there was sufficient notice to Petitioners and there was also sufficient mention of the reasons by the Appropriate Authority in suspension order. As regards the contention that Section 20 (3) provides only for cancellation and not for suspension of the registration, it was pointed out that such power has to be read into the Section, otherwise the provisions of a welfare enactment will be rendered nugatory.

In *Dr. Mrs. Sudha Samir v. State of Haryana and others*<sup>[16]</sup> the order of suspension of registration under the Act was challenged on the ground that, when the show cause notices were issued under Section 20 and the action of suspension had been taken, the Gazette Notification had not been made; therefore the entire action under section 20 of the Act ought to fail. The response of the State to this contention was that the Government had issued an Ordinance to validate certain acts done by Appropriate Authority prior to the Gazette Notification. The said Ordinance was subsequently introduced as a Bill in the State Assembly and was also brought as an enactment subsequently. The High Court therefore observed that when subsequent enactment is not challenged which validates the acts done by the Appropriate Authority prior to the Gazette publication, the Petitioners' challenge to the show cause notices and the suspension orders issued by the Competent Authority can not survive for adjudication.

In *Dr. Devender Bohra v. State of Haryana and other Respondent*<sup>[17]</sup> the order of suspension of registration of a sonography machine installed in the hospital run by the petitioner and sealing of the equipment was challenged. The Appropriate Authority had taken the said action on the ground that as the petitioner was a Medical Practitioner with B.A.M.S. degree, he was not qualified as per Section 2 (g) of the Act to possess the said machine. The contention of the petitioner was that under the Indian Medical Council Act, 1956, he was a Medical Practitioner and hence entitled to the use of an ultra sound machine.

After considering various provisions and the Object of the Act, the High Court rejected the said contention by holding that "a Practitioner under Indian Medicine System may have a requirement of Sonography machine for determination of foetal abnormalities for appropriate treatment, but if he doesn't possess the particular qualification required under the PCPNDDT Act to operate the sonography machine, his

<sup>15</sup> AIR 2005 Bom 26; 2005 (1) Bom CR 595; (2005) 107, Bom LR 737

<sup>16</sup> Civil Writ Petition No. 19740 of 2009, Also see, *Dr. R.D. Negi v. State of Haryana and others, Dr. Mrs. Maninder Ahuja v. State of Haryana and others* Civil Writ petition No. 19794 of 2009

<sup>17</sup> Civil Writ Petition No. 14759 of 2009.

challenge to the suspension order is futile without a challenge to the provisions of the PCPNDT Act or the Rules themselves. In *Qualified Private Medical Practitioners and Hospitals Association v. State of Kerala* <sup>[18]</sup> seven hospitals situated in different parts of Kerala had sought declaration that laboratories and clinics which do not conduct pre-natal diagnostic tests using ultra sonography will not come within the purview of the Act and the Authorities under the Act should not insist for registration of all ultra sound scanning centres irrespective of the fact as to whether they are conducting ultra sonography or not. Considering the Provisions of Section 4 (1) and Section 22 of the Act and keeping in mind the object of the Act to prevent misuse of any pre-natal diagnostic techniques it was held that, authorities will be free to conduct inquiries or inspection at any place where such device is available and to take action under the Act in case any person or institution is indulging in activities contrary to the provisions of the Act, irrespective of the fact that such an institute is registered or not under the Act.

### 5.5 Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics

The Full Bench decision of Gujarat High Court in *Suo Motu v. State of Gujarat* <sup>[19]</sup> is a path breaking decision, wherein the Court has taken a progressive view in tune with the provisions of the Act. In this case the Full-Bench of the Gujarat High Court was deciding the Reference made by single Judge in the case of *Hitesh D. Shaha v. State of Gujarat* <sup>[20]</sup> on several important legal issues namely, whether the provisions of the Proviso to subsection (3) of Section 4 of the Act require that the complaint should contain specific allegation regarding the contravention of the provisions of Section 5 and 6 of the Act; whether the burden lies on the Authorities to prove that there was contravention of the Provisions of Section 5 or 6 of the Act and whether any deficiency or inaccuracy in filing Form - 'F' as required under the statutory provisions is merely a procedural lapse?

In this Reference, while answering these legal issues it was held by the Full Bench that the Rules are made and the Forms are prescribed in aid of implementation of the Act to plug the possible loopholes in strict compliance of the Act and hence they are very important for implementation of the Act and for the prosecution of the offender that any improper maintenance of such record is itself made by the Act equivalent to violation of the Proviso of Section 5 and 6 by virtue of the Proviso to subsection (3) of Section 4 of the Act. It was further held that improper maintenance of records also has consequences other than prosecution for the deemed violation of Section 5 or 6 because Section 20 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 framed there under. It was held that by virtue of the deeming provision of the Proviso to subsection (3) of Section 4, contravention of the provisions of Section 5 or 6 is legally to be presumed. Hence Proviso to sub-section (3) of Section 4 of the Act does not require that the complaint

alleging the 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 Act. It was further held that the burden to prove that there was contravention of these provisions does not lie upon the prosecution. It was accordingly held that, 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, 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.

This judgement of Full Bench is really welcome because of the progressive interpretation given to the provisions of the Act. Otherwise the provisions of Section 4 (3) of the Act would have been illusory or futile.

### 5.6 Sentencing Policy and the Court's Approach

The first case of conviction recorded under the Act in the State of Maharashtra was that of *Mumbai Municipal Corporation (Through Legal Assistant of G/N - Ward) v. Chhaya Rajesh Tated and Anr.* <sup>[21]</sup> The facts of this case are peculiar and they pertain to the publication of an advertisement in the weekly magazine in connection with selection of the sex of foetus. In the weekly magazine, "*The Lokprabha*" dated 19/11/2004 and 03/12/2004 one advertisement was released by accused No. 1. Taking into consideration seriousness of the matter, the Court adopted the procedure laid down for warrant triable cases. Both the accused pleaded not guilty. Prosecution examined 4 witnesses in support of its case; whereas accused No. 1 examined herself in support of her defence that she has actually communicated to issue the advertisement "want a child?" and not "want a son?" However there was miscommunication between her and her witness Sunil Patni. Moreover when she came to know that the advertisement was published in the magazine, she immediately informed the said publisher to issue a corrigendum which was accordingly published in "*Lokprabha*" magazine dated 31/12/2004. The Court considered in detail the entire evidence on record, appreciated it in proper perspective and held that the defence raised by accused No. 1 was clearly an afterthought. Both the accused were therefore held guilty for all the offences alleged against them and convicted and sentenced separately on each count to suffer Rigorous Imprisonment for 3 years and to pay fine of Rs. 10,000/- each in default for further 3 months.

### 5.7 Conclusion

Sex selection is a reflection of the low status of women in society and a patriarchal mindset steeped in son preference. In order to do away with the menace, the Government of India responded to the imperative need of the hour by passing Prenatal Diagnostic Techniques Act, 1994. There was total inaction on the part of the Government in implementing the provisions of the Act. Only after several directions were issued by the Supreme Court and the various High Courts, that Government took upon itself the task of creating general awareness, sensitization and also prosecuting doctors and clinics which were found violating the provisions of the Act.

<sup>18</sup> O.P. No. 39084 of 2001 and connected cases

<sup>19</sup> Cri. Reference Nos. 4 and 3 of 2008.

<sup>20</sup> Criminal Misc. Application No. 4406 of 2008

<sup>21</sup> 2011(4)Mh.LJ 21.

Even then, the Act is not being implemented with the zeal and vigour which was expected in implementation of this important piece of social welfare legislation. Very few provisions of the Act have come for judicial interpretation as the unfolding of the Act is yet to take place in the manner it was expected.

However, recently the trial courts have come up with some decisions after full-fledged hearing of the case, which indicates a promising trend. Magistrates have played a key role in the interpretation of the provisions of the Act as the Act vests jurisdiction in the Courts of Judicial Magistrate to punish those found guilty of an offence under the provisions of the PNDT Act.

The task of the legal community including the bench and the bar in such situation becomes heavy and troublesome. The mindset of the people at large needs to be changed. If it is not changed and it lags behind the legislation, it has to be the job of judiciary to fill this gap by adopting a practical and insightful approach for proper implementation of the legislation. The need of the hour is to shape and develop the law so as to meet its object by effective implementation.

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