

(2023) 06 BOM CK 0058

Bombay High Court (Aurangabad Bench)

Case No: Criminal Writ Petition No.851, 546 Of 2021, Criminal Application No.1371 Of 2023

Ranjana Pagar-Gawande And
Others

APPELLANT

Vs

Neena Paresh Shah And Others

RESPONDENT

Date of Decision: June 16, 2023

Acts Referred:

- Pre-Conception And Pre-Natal Diagnostic Techniques Act, 1994 - Section 2(O), 3, 6, 6(2), 6(c), 22, 22(1), 22(2), 22(3), 23(1), 28, 28(1), 28(a)

Hon'ble Judges: Kishore C. Sant, J

Bench: Single Bench

Advocate: Jitendra V. Patil, Neha Kamble, Rajendra Deshmukh, R. S. Navandar, P. B. Pawar, Sanket A. Jadhav, Sanket A. Jadhav

Final Decision: Dismissed/Allowed

Judgement

Kishore C. Sant, J

1. Heard both the petitions.

2. Rule was granted on 25-10-2021 in writ petition No. 851/2021 and matter was directed to be placed for final hearing on 22-11-2021. However, same could not be taken and was adjourned from time to time. So far as writ petition No. 546/2021 is concerned, same was not admitted. Since common order is challenged in both the petitions, the petitions are taken up together for final disposal by consent of the parties.

3. Writ petition No. 546 is filed by the private person claiming to be social activist in Andhashraddha Nirmoolan Samiti [ANIS i.e. Superstition Eradication Committee]. Both have challenged the common order passed by the learned Additional Sessions Judge, Sangamner in Criminal Revision No.16/2022 dated 30-03-2021 filed by respondent Nivrutti Deshmukh (Indorikar). Criminal Revision came to be allowed by

quashing and setting aside the order issuing process dated 03-07-2020 by the learned JMFC, Sangamner bearing RCC No. 207/2020. It is further prayed to restore the complaint RCC No. 207/2020.

4. At the outset learned Senior Advocate raised the objection so far as the maintainability of the criminal writ petition No. 546/2021 on the ground of locus standi to the petitioner. The petition, is therefore, heard on the point of maintainability as petitioner is not the competent authority under the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (Hereinafter referred to as 'the PCPNDT Act')

5. Ms. Neha Kamble, learned advocate h/f Mr. Jitendra V. Patil, learned Advocate submits that complaint though was lodged by the competent authority, however, it was at the instance of this present petitioner. It is this petitioner who had brought the act of respondent to the notice of competent authority and therefore she has locus standi. In the revision application before the learned Sessions Judge and her intervention application was allowed as she was heard by the revisional court and therefore she has locus standi.

6. As against that the learned senior counsel for the respondent submits that in view of section 28 of the PCPNDT Act cognizance of the offence can be taken only on the complaint of the appropriate authority concerned or any officer authorized in this behalf by the Central or State Government. For ready reference section 28 of the PCPNDT Act is reproduced:-

Section 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 authorized in this behalf of 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 make a complaint to the court.

(2) No court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(3) Where a complaint has been made under clause (b) of sub-section (1) the court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person.

7. Thus, the complaint can be filed by an appropriate authority or any officer in this behalf by the government or the appropriate authority as per clause-B. As per clause-B any other person can file complaint by giving notice of not less than 15 days in any manner prescribed to the appropriate authority showing his intention to make a complaint. Thus in this case this petitioner has not filed a complaint though

she claims herself to be from a social organization. However, looking to the wording it is clear that this petition does not fall under clause-A and B of section 28(a). Though the petitioner tried to show that it is the petitioner who had given notice to the competent authority dated 01-01-2020. Looking to the nature of the said notice it is seen that she has only requested the appropriate authority i.e. Civil Surgeon to take action against the respondent therein. There is nothing to indicate that she sought permission to file a complaint. Second notice dated 27-02-2020 also shows that it is stated that if competent authority failed to lodge the complaint. She thereafter had stated that if no complaint is filed and if no action is taken then she would be constrained to file the complaint. However, in both cases it is not that she was granted a permission or she had sought permission. It also does not appear that she expressed any intention to make a complaint in the court. The intention is qualified as to if authorities fail to file the complaint then she would file a complaint. However, competent authority has not granted permission and it itself filed a complaint on 20-06-2020 in the court of learned JMFC, Sangamner. Since the petitioner was not a complainant this court finds that the petitioner in this case does not have locus standi to file the petition.

8. Since the applicant-intervenor was permitted to assist the learned Public Prosecutor before the revisional court and since the complaint is lodged at her instance this court finds the application for intervention needs to be allowed partly allowing her to assist the learned APP.

9. Facts giving rise to the petitions in short are that respondent No.1 happens to be a public speaker (Kirtankar). Kirtankar is person who normally gives speeches in lucid manner before the gathering and people at large assembled for discourse. Kirtankars have influence over people in rural and semi-urban areas. Respondent as per the allegations in his Kirtans had addressed gathering about so called techniques as to how to conceive a male child by giving certain extracts from the religious and also from some books on Ayurveda. Said speech was given on 04-01-2020 and on the same day it was also uploaded on the 'youtube' channel. It is stated in the said speech that if husband and wife come in contact on the even-dates then wife conceives a male child if it is on the odd dates then it would be a female child. If the contact takes place at inauspicious time then child born spoils the name of family. He also further stated that even after six months if a fetus in womb takes a round on right side it turns to be a male child and takes round of left side then it turns to be a female child by giving some examples.

10. On receiving representation from intervenor the complainant issued a show cause notice on 11-02-2020. Notice was replied by respondent stating that he could not get as to which video footage is exactly objectionable. Thereafter social workers i.e. intervenor advocate Pagare who is the Secretary of ANIS working against superstition, addiction, alcoholism and Woman's right and working in the field of gender equality and for effective implementation of PCPNDT Act in the State of Maharashtra made a representation to the competent authority. Thereafter, the

complainant also received explanation given by the accused and after finding that offence is made out to file a complaint as stated.

11. Complaint came to be filed under Section 28(1). It is alleged that respondent has propagated technique of having a male child and therefore he is guilty of the offences punishable under Section 22(1)(2)(3) & 23(1) of the PCPNDT Act. The learned Magistrate on going through the complaint and considering the propagatory nature of the lectures found that act of the complainant falls under definition given in Section 2(O) i.e. sex selection. Section 22 i.e. prohibition of advertisement relating to pre-conception and pre-natal determination of sex and issued process by order dated 03-07-12020. The respondent filed criminal revision No. 16/2020. In the said revision the petitioner in writ petition No. 546 i.e. Ranjana was allowed to intervene and was permitted to participate in the proceeding by making it clear that APP shall be assisted by the intervenor by filing notes of argument.

12. Learned Sessions Judge recorded that the respondent has not made any advertisement about facilities of pre-natal determination of sex or sex selection before conception available at such centre, laboratory & clinic. It is held that the respondent has simply made a statement that sexual contact on particular days result into conceiving of male child and this cannot be said to be propagating sex selection. The court also further observed that no controversial statement was made during religious discourse. Considering that PCPNDT is concerning about ban to use of diagnostic techniques to determine sex selection. Alleged religious discourse would not amount to violation of law and speeches would not be an advertisement and allowed the revision by quashing the order of issuance of process.

13. Question before this court is thus whether act of the respondent can be said to amount to an offence under PCPNDT Act and whether speeches amount to propagation of sex selection or advertisement of any diagnostic technique. In this case admittedly there is no propagation of any modern day & established technique.

14. Learned APP submits that the act of the respondent falls into definition falling under the Act. The learned trial court had rightly issued the process under Section 22(1)&(2). From reading of the complaint it is clearly seen that the accused had stated that if there is a physical contact on odd dates then girl child is born. He submits that this clearly amounts to making an advertisement of sex selection. Speeches are made before huge mob having influence of this Kirtankar. The speech is even uploaded on the youtube channel & this fact is not denied. The learned Sessions Judge has not considered the basic object of the provisions of the PCPNDT Act.

15. Considering the order of the learned Magistrate it is clear that the learned Magistrate has considered the material before it. It is only upon preliminary consideration as to whether to issue process or not. In this case certainly there is material to show prima facie case against the accused. Findings recorded by the

learned Sessions Judge in its order are totally perverse. Considering the object of the act if the finding recorded that there is no advertisement itself is totally against the material on record. As a matter of fact he has propagated the selection of sex. By reading definition of section 2(O) i.e. '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;. Considering definition it is seen that it attracts section 6(C). Further it is submitted that there is clear contravention of section 22 and specifically contravention of section 2 attracting the provision of section-3. He submits that in explanation it is clearly stated that for the purpose of this section, 'advertisement' includes any notice, circular, label, wrapper or other document including advertisement through internet or any other media in electronic or print form and also includes any visible representation made by means of any hoarding, wall painting, signal light, sound, smoke or gas. It is further stated that it covered technique before or after conception. In this case it is clearly an act of sex selection before conception is attracted. The respondent has clearly accepted his speech and whatever he has stated in the said speech. He has not only accepted that he gives such speeches, he has even justified the said stating that his statements are supported by the religious texts and also by some books. He has also accepted that he is having influence over persons. The communication in the discourse would be an advertisement. The accused knows that people comes to listen his religious discourse and therefore it is the case whether trial is required. At this stage only prima facie material is to be seen etc and prays to allow the petition by setting aside the impugned order.

16. Learned senior counsel Mr. Deshmukh for respondent argued in response to the petition. He submits that in fact whatever the books on 'Ayurveda' respondent has stated is well supported by religious texts such as 'Gurucharitra', 'Ashtang Hridayam', 'Dharmasindhu', 'Santanyog'. He has given books' list of all those texts books. He submits that when this material is already available to all the persons, speaking about the same in public discourse cannot be said to be illegal or amounting to an offence. His submission is whatever is already there in the books is only conveyed to people. He submits that such acts cannot be said to be an advertisement and supports the judgment.

17. Learned advocate mainly relied upon the judgment in the case of Balaji Tambe delivered by this court in Cr. W. P. No. 784/2016. That was a case wherein a book was written by the petitioner therein. In the book there were references to old texts about methods of pre-natal sex determination or selection utilized in Ayurveda. The text therein was a part of syllabus. Writing a book for study for academic purpose cannot be equated with the acts alleged in this case. Preserving & imparting knowledge is always to be done in particular manner to the persons interested to gain the knowledge. There is no case of respondent that he was giving lecture to students of medicine. He was giving public speech in the form of Kirtan. Thus the

judgment in the case of Balaji Tambe is not applicable. Though other judgments are relied upon by the respondent this court finds that those are not material for the present case.

18. Having considered the submission this court has mainly considered as to whether material taken as it is amounts to an offence under Section 22(1) and (2). Sections 6 & 22(1) read as under:-

Section 6: Determination of sex prohibited :- on and from the commencement of this Act;

(a)....

(b)....

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

Section 22: Prohibition of advertisement relating to pre-conception and pre-natal determination of sex and punishment for contravention:

(1) No person, organization, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic including clinic, laboratory or Centre having ultrasound machine or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus or sex selection shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement, in any form, including internet, regarding facilities or pre-natal determination of sex or sex selection before conception available at such centre, laboratory, clinic or at any other place.

19. Definition of sex selection needs to be considered as given in Section 2(O) of the PCPNDT Act which is reproduced as under:-

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.

20. This definition clearly speaks as to what amounts to sex selection. Considering definition under Section 2(O) we need to consider whether section 6(c) is attracted prima-facie. Section 6(c) clearly speaks that such propagation whether before or after conception. In this case if the words are taken as it is certainly may appear to be advertisement or propagating technique of sex selection. The words advertisement propagation are used in wide sence and needs to be taken in their wide meaning. It cannot be restricted only to the extent of diagnostic centre, clinic but anything that propagates or tries to impose upon the message that by use of certain techniques sex of foetus can be selected. Learned Sessions Court further erred in that there has to be clinic diagnostic centre or modern technique of which advertisement is made. In this case the respondent has not only advertised but has

claimed the information about the techniques to be correct and having scientific base. He also supports that such texts has religious sanctity which make it more serious looking to the people before whom speeches are made.

21. By reading all the above sections and definitions this court finds that this is a case which necessarily requires a trial whether giving such speeches spreading such influence which respondent believe to be true amounting to an advertisement and propagation are necessarily questions which will have to be gone into by conducting a trial. The learned trial court had rightly considered the complaint and the material before him and has come to a right conclusion. The Sessions Court however, has practically appreciated all the material like evidence after trial and has come to a conclusion and delivered the judgment.

22. This court avoids to make more comments at this stage to avoid prejudice to any of the parties.

23. This court appreciate the efforts taken by the learned advocate Ms. Neha Kamble for the intervenor.

24. Hence, the following order.

ORDER

a] Writ Petition No. 546/2021 stands dismissed for want of locus standi.

b] Writ petition No. 851/2021 is allowed. Rule is made absolute in terms of prayer clause 'C'.

c] Application No.1371/2023 stands allowed.

d] Order dated 03-07-2020 passed below Exh.1 in Criminal case bearing RCC No. 207/2020 passed by learned JMFC, Sangamner, stands restored.

e] Trial court shall proceed with the trial without being influenced by observations made by this court or by the Sessions Court while deciding the revision.

[KISHORE C. SANT, J.]

1. At this stage, learned advocate for the respondent in writ petition No.851/2021 prays for stay to the effect, operation and implementation of this order.

2. Learned advocate for the petitioner opposed the prayer.

3. However, considering request of the respondent the effect of this order is stayed for a period of four weeks from today.