

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

CRIMINAL WRIT PETITION NO. 250 OF 2015

Dr. Paayal W/o Shreekant Chobe
Age : 39 Years, Occu : Gynaecologist,
R/o Shree Hospital, Gauravi Centre
for Laparoscopy, U-12, Manik Arcade,
Chetna Nagar, Aurangabad.

... PETITIONER

VERSUS

- 1] The State of Maharashtra,
Through its Secretary
Public Health and Family
Welfare Department,
Mantralaya, Mumbai.
- 2] Aurangabad Municipal
Corporation, Aurangabad,
Through its Commissioner.
- 3] Dr. Jayshree Kulkarni,
Medical Officer Health,
Municipal Corporation,
Aurangabad and
Alleged appropriate authority

... RESPONDENTS

.....
Mr. V. D. Salunke, Advocate for Petitioner.
Mr. K. S. Patil, A.P.P. for Respondent No.1.
Mr. A. M. Karad, Advocate for Respondent Nos.2 & 3.
.....

**CORAM : S.S. SHINDE &
A.M. BADAR, JJ.**

**Date of reserving the
Judgment : 21st August, 2015**

**Date of pronouncing the
Judgment : 16th October, 2015.**

JUDGMENT (Per A.M. Badar, J.) :

1] Rule. Rule made returnable forthwith. Heard finally with consent of the parties.

2] By this petition under Articles 226 and 227 of the Constitution of India, read with Section 482 of the Code of Criminal Procedure, 1973, petitioner - Dr. Payal Choube - a Gynecologist, holding qualifications as M.B.B.S. and M.D. (Gynecology) is praying for quashing and setting aside Regular Criminal Case No. 541/2013, pending on the file of learned Chief Judicial Magistrate, Aurangabad.

3] Shri Salunke, the learned Counsel appearing for the petitioner, in order to apprise us about facts of the case, submitted that the petitioner is a qualified Gynecologist having her clinic and hospital named as 'Shree Hospital & Gauravi Centre for Leproscopy'. According to the learned Counsel for the petitioner, for having ready medical assistance in medical

investigation of her patients, the petitioner applied for registration of ultra sound sonography as per the provisions of the Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 [hereinafter referred to as "PCPNDT Act" for the sake of brevity] and received the certificate of registration in March 2012. Thereafter, the petitioner purchased a sonography machine and started the procedure of ultra sound sonography from 10th March 2012.

4] Shri Salunke, the learned Counsel for the petitioner, further submitted that on 16-6-2012, Dr. Dimpal Pardeshi and Dr. Ujjawala Bhamre, Medical Officers working with respondent no.2 - Municipal Corporation visited the hospital of the petitioner and hurriedly directed the petitioner to show the record. After inspecting the record, both these officers went back. Shri Salunke, the learned Counsel for the petitioner, further submitted that on 16-6-2012 itself, in the evening hours, again both these Medical Officers with Dr. Manisha Bondwe came to the Hospital and Sonography Centre of the petitioner and handed over a show cause notice to her containing the averments that Column Nos. 10 and 11 of Form F are not filled in; in Column No.14, result of the sonography is not mentioned; there are no signatures of the Sonologist on three affidavits;

there is no mention of medical termination of pregnancy in Column Nos.18 and 19 of some forms and medical termination of pregnancy register is not in prescribed form. The petitioner was again asked to show the records of her Sonography Centre and those officials immediately took away the same, including all Form F and documents regarding medical termination of pregnancy. According to Shri Salunke, the learned Counsel for the petitioner, on 18-6-2012, the petitioner tendered her explanation *inter alia* explaining that result of the sonography is attached to the Form F by separate sheets; signature on three affidavits is not clearly visible due to use of overused carbon paper, all cases of medical termination of pregnancy are already informed in monthly report and the medical termination of pregnancy register is in prescribed format. According to the learned Counsel for the petitioner, thereafter the petitioner received notice of appearance before the Advisory Committee on 4-7-2012 and accordingly she appeared. She was asked to submit an explanation on bond paper of Rs. 100/- in the form of an affidavit. Accordingly, she tendered her explanation.

5] Shri Salunke, the learned Counsel for the petitioner, further contended that on 5-7-2012, squad comprising Dr. Archana Rane, Dr.

Amarjyoti Shinde, along with 5 - 6 staff members of respondent no.2 Municipal Corporation and Police personnel came to her Sonography Centre and showed an order for sealing purportedly issued by the appropriate authority under the PCPNDT Act. Accordingly, the Sonography machine came to be sealed. According to the learned Counsel for the petitioner, action of sealing of the sonography machine, seizure of record and suspension of registration certificate of Sonography Centre came to be challenged by the petitioner by filing a Writ Petition bearing No. 7090/2012 and this Court by an order dated 18-9-2012 was pleased to allow that petition by holding that there is no notification appointing the Medical Officer as Appropriate Authority under the PCPNDT Act. Accordingly, impugned orders of suspension of registration and sealing of sonography machine of the petitioner came to be quashed by this Court.

6] The learned Counsel appearing for the petitioner further submitted that subsequently respondent nos.2 and 3 de-sealed the sonography machine and returned the record. Thereafter according to the learned Counsel for the petitioner, on 20-3-2012 a private criminal complaint bearing Regular Criminal Case No. 541/2013 came to be filed against the petitioner by respondent no.3 - Dr. Jayshree Kulkarni alleging

herself to be an Appropriate Authority. Shri Salunke, the learned Counsel for the petitioner further submitted that on 28-3-2013, without application of mind, the learned Chief Judicial Magistrate, Aurangabad, has been pleased to issue process against the petitioner for the offences punishable under Sections 23 and 25 of the PCPNDT Act and Rule 9 of the Rules framed thereunder.

7] After narration of these facts, in submission of the learned Counsel for the petitioner, act of entertaining the criminal complaint at the behest of respondent no.3 - Dr. Jayshree Kulkarni, who is not at all an Appropriate Authority under the PCPNDT Act; by the learned Chief Judicial Magistrate, Aurangabad is totally illegal and the said Court ought not to have mechanically taken cognizance of the said complaint because it was not filed by the authority or a person who is notified as an Appropriate Authority under the PCPNDT Act.

8] According to Shri Salunke, the learned Counsel for the petitioner under Section 17(2) of the PCPNDT Act the State Government has power to authorize an officer as an Appropriate Authority by notification in the Official Gazette. According to the learned Counsel for

the petitioner, the petitioner applied to the State taking recourse to the provisions of Right to Information Act for supplying information in order to ascertain as to who is an Appropriate Authority under the PCPNDT Act for Aurangabad. In reply the State Government with the covering letter dated 30-9-2014, supplied a copy of notification dated 16-10-2007, informing that all Additional Collectors in Districts, Sub-Divisional Officers, Tahsildars, Naib-Tahsildars as well as Municipal Commissioner, Deputy Municipal Commissioner, Ward Officers of the Municipal Corporation as well as Chief Officer of the Municipal Councils are appointed as an Appropriate Authority for the area under their jurisdiction. In submission of Shri Salunke, the learned Counsel for the petitioner, the post of Medical Officer, Health with respondent no.2 - Municipal Corporation, Aurangabad, has not been notified as an Appropriate Authority under Section 17(2) of the PCPNDT Act, 2003 for city of Aurangabad and therefore, the learned Chief Judicial Magistrate, Aurangabad, ought not to have taken cognizance of the alleged offences by ordering issuance of process for the offences under Sections 23 and 25 of the PCPNDT Act as well as for alleged contravention of Rule 9 of the Rules framed thereunder.

9] Shri Salunke, the learned Counsel for the petitioner invited our attention to the affidavit in reply filed on behalf of respondent nos.2 and 3 (Record page 121) and submitted that reliance on the notification dated 9th December 1997 by respondents in order to demonstrate that respondent no.3 - Dr. Jayshree Kulkarni being holder of post of Medical Officer, Health with Municipal Corporation, Aurangabad, is an Appropriate Authority under Section 17(2) of the PCPNDT Act; is totally misplaced. In his submission, bare perusal of this notification dated 9th December 1997 goes to show that Medical Officer, Health of Aurangabad Municipal Corporation is not an officer notified as an Appropriate Authority under the PCPNDT Act for the area of Aurangabad Municipal Corporation by respondent no.1 - State of Maharashtra. In his submission, the said notification is applicable to those districts where there is no post of District Civil Surgeon at district level. He contended that the post of District Civil Surgeon as well as the post of Dean of the Medical College is available at Aurangabad. Therefore in submission of the learned Counsel for the petitioner, Medical Officer, Health of the Municipal Corporation of Aurangabad cannot usurp the powers of an Appropriate Authority under the PCPNDT Act. Shri Salunke, the learned Counsel for the petitioner drew our attention to this notification dated 6th December

1997 placed on record by respondent no.3 with her affidavit in reply (Record page 132) as well as to the notification dated 11-9-1997 placed on record along with her affidavit by the petitioner (Record page 139). Shri Salunke, the learned Counsel for the petitioner drew our attention to the affidavit dated 20-8-2015 of the petitioner as well as to the chart annexed to it downloaded from the website of the State and contended that there is post of Medical Superintendent in the Medical College, Aurangabad, so also, there is post of the District Civil Surgeon at Aurangabad, which is held by one Dr. Gaikwad. He submitted that the chart annexed to the affidavit shows that names of the district Appropriate Authority cum District Civil Surgeon are notified for various districts of the State on the website of the State Government and so far Aurangabad is concerned, name of Dr. G.M. Gaikwad is shown as the District Civil Surgeon cum Appropriate Authority for the city of Aurangabad. Hence, according to Shri Salunke, the learned Counsel for the petitioner in view of availability of the post of District Civil Surgeon as well as those of the Dean and Medical Superintendent of the Medical College at Aurangabad, respondent no.3 - Dr. Jayshree Kulkarni who is allegedly working on the post of Medical officer, Health with the Municipal Corporation cannot be an Appropriate Authority under the PCPNDT Act. Therefore, according to

the learned Counsel for the petitioner, private criminal complaint bearing Regular Criminal Case No. 541/2013 filed by respondent no.3 by alleging herself to be an Appropriate Authority needs to be quashed and set aside.

10] Shri Salunke, learned counsel for the petitioner vehemently argued that only additional charge of the post of Medical Officer, Health, Aurangabad Municipal Corporation was entrusted to respondent No.3 Dr. Jayshree Kulkarni. According to him, respondent No.3 Dr. Jayshree Kulkarni had preferred Writ Petition bearing no. 2454 of 2013 with a prayer to issue order of promotion on the post of Medical Officer, Health, because of her selection by the Departmental Promotion Committee and resolution of the general body of the Municipal Corporation. According to him, being holder of the additional charge of that post, respondent No.3 is not an Appropriate Authority under the PCPNDT Act.

11] According to Shri Salunke, learned counsel for the petitioner, in earlier W.P. No. 7090 of 2012 filed by the present petitioner, prayer was made that the action of sealing Sonography machine and record, as well as suspending registration be declared as arbitrary, unjust and violative of Article 14 of the Constitution of India and same be quashed and set aside.

As that prayer clause (B) was granted by this Court while allowing the said writ petition as per judgment dated 18-9-2012, the action of respondent No.3 in initiating criminal prosecution is absolutely illegal. He also placed reliance on judgment of this Court in **Dr. Mrs. Sukhada Dilip Mule Vs. state of Maharashtra and others** reported in **2013(2) Bom.C.R. 316**, as well as unreported judgment of the Honourable Apex Court in petitions for Special Leave to Appeal (Civil) No. 18033/2013, **Assistant Commissioner, Nanded Waghala city Vs. Kalpana and others** with SLP (Civil) No. 18035/2013 and SLP (Civil) No. 18124/2013 decided on 9-12-2013, to submit that criminal complaint filed by the person other than notified Appropriate Authority is not maintainable. Shri Salunke, learned counsel for the petitioner further relied upon judgment of the Honourable Supreme Court in **A.K. Roy and others Vs. State Punjab and others reported in AIR 1986 SC 2160** and contended that when the statute prescribes the manner in which something is to be done, then, the thing must be done in that manner alone.

12] Lastly, Shri Salunke, learned counsel for the petitioner contended that case in hand is a fit case to exercise inherent power of this Court to quash R.C.C. No. 541 of 2013 filed by respondent No.3 purporting

to be an Appropriate Authority as there is express legal bar under Section 28 of the PCPNDT Act prohibiting the court from taking cognizance of an offence under the said Act, except on complaint made by an Appropriate Authority. To buttress this contention, he relied upon judgment of the Honourable Supreme Court in ***State of Haryana Vs. Chi. Bhajanlal and others reported in AIR 1992 SC 604*** and unreported judgment of the Honourable Supreme Court in ***Anjanikumar Vs. State of Bihar, in Appeal (Criminal) No.413 of 2000, decided on 24-4-2008***, in which criminal proceedings were quashed relying on the judgment in the matter of Chi. Bhajanlal (supra). Reliance is also placed on the judgment of the Honourable Apex Court in the matter of ***R.P. Kapur Vs. State of Punjab***, reported in ***AIR 1960 SC 862 and State of Karnataka Vs. Munniswami and others reported in AIR 1977 SC 1489***, wherein, it is held that inherent jurisdiction of the Court should be exercised to quash the proceedings where there is a legal bar against the institution or continuance of the proceedings.

13] Appearing for respondent Nos. 2 and 3, Shri Karad, learned counsel submitted that the petitioner herself has accepted the fact that respondent No.3 Dr. Jayshree Kulkarni is an Appropriate Authority. He contended that certificate of registration of the Genetic Clinic/Ultrasound

clinic/Imaging Center of the petitioner annexed to the petition was issued by respondent No.3 Dr. Jayshree Kulkarni. He further submitted that respondent No.3 Dr. Jayshree Kulkarni is holding an additional charge of the post of Medical Officer, Health, with respondent No.2 Municipal Corporation because of promotion of Dr. S.G. Degaonkar, w.e.f. 23-9-2011 and, therefore, respondent No.3 is an Appropriate Authority under the PCPNDT Act by virtue of notification dated 9.12.1997 issued by respondent No.1 State of Maharashtra. He placed reliance on the Division Bench judgment of this Court in **Dr. Sujit G. Dange Vs. State of Maharashtra** reported in **2013(2) Bom.C.R. 351**, wherein, after considering the provisions of Section 4,5,6 and 20 of the PCPNDT Act, it is held that if there is deficiency or inaccuracy in maintaining the record, it amounts to contravention of Section 5 and 6 of the said Act. Shri Karad, learned counsel for the Respondent Nos. 2 and 3, placed reliance on the judgment of this Court rendered at Aurangabad in Criminal Application No. 5232 of 2012 **Dr. Aparna Mutthe vs. Appropriate Authority** decided on 15th December, 2014 with connected matters, so also, judgment in Criminal Application No. 520 of 2015 **Dr. Mandipsingh Karansingh Rajput vs. Municipal Corporation and others**, with Application No. 1045 of 2015, decided by this Court at Aurangabad Bench on 2-7-2015 and contended that

holder of additional charge of the post notified as Appropriate Authority can exercise powers and take actions which are required to be taken by the Appropriate Authority under the PCPNDT Act. Therefore, in submission of Shri Karad, after transfer of Shri Devgaonkar, respondent No.3 who is holding the additional charge of the post of Medical Officer, Health, is competent to lodge complaint against the petitioner for violation of the provisions of the PCPNDT Act and the Rules framed thereunder. According to Shri Karad, learned counsel for respondent Nos.2 and 3, Section 29 of the said Act provides for preservation of record, chart, form, report, consent letter and other documents required to be maintained under the Act for the period of 2 years and Rule 9 of the Rules framed under the said Act prescribes the manner in which the record is required to be maintained. In his submission, the petitioner failed to maintain record of her Genetic Clinic as per the provisions of Rule 9 and this failure on the part of the petitioner amounts to contravention of the provisions of the PCPNDT Act as well as the Rules framed thereunder. According to Shri Karad, learned counsel for respondent nos.2 and 3, perusal of record of criminal complaint filed by respondent No.3 Dr. Jayshree Kulkarni would reveal that there is enough evidence showing failure on the part of the petitioner to maintain record of her Genetic Clinic and as such, the same cannot be quashed on technical

grounds.

14] Learned APP appearing for the State submitted that clarifying the notification dated 9-12-1997, a subsequent notification dated 3-2-2006 is issued wherein, it is notified that for every municipal area, Medical Officer, Health is an Appropriate Authority and the latest notification issued on 15-5-2015 further clarifies that aspect.

15] We have carefully perused the record and proceedings of the RCC No. 541 of 2013, between the parties pending on the file of learned CJM, Aurangabad, apart from memo of petition, documents annexed thereto, as well as additional affidavits and the documents filed by the petitioner. We have also carefully gone through the reply affidavits filed by Dr. Sau Amarjyoti, Medical Officer on behalf of respondent Nos. 2 and 3, reply affidavit filed by respondent no.3 Dr. Jayshree Kulkarni (page 121), additional affidavit by respondent no.3 Dr. Jayshree Kulkarni (page 156) and reply filed by respondent No.1 State (page 177) alongwith the documents relied by them. We have also gone through the notification dated 9.12.1997 issued by the Public Health Department, Mantralaya, under the signature of Ranjana Sinha, which is annexed to the criminal complaint filed by respondent No.3 Dr. Jayshree Kulkarni in the capacity of the

Medical Officer, Health which is registered as RCC No. 541 of 2013, relying which she is claiming to be an Appropriate Authority. Apart from this notification, we have also perused notification dated 11.9.1997, which is referred in the said notification dated 9.12.1997, apart from all other notifications placed on record by the parties including those dated 9.5.2007, 16.10.2007, 2.4.2009 and 15.5.2015.

16] At the outset, we may note that the short controversy involved in the instant case is, whether respondent No.3 Dr. Jayshree Kulkarni who was holding additional charge of the post of Medical Officer, Health, with respondent No.2 Municipal Corporation, can be termed as an Appropriate Authority notified under Section 17(2) of the PCPNDT Act and whether private criminal complaint lodged by her in the capacity of holder of the post of Medical Officer, Health, albeit, in additional charge entitles her to lodge a complaint for contravention of the provisions of PCPNDT Act and Rules framed thereunder. In other words this Court will have to examine whether the Medical Officer, Health of Aurangabad Municipal Corporation is notified by the State Government under Section 17(2) of the PCPNDT Act as an Appropriate Authority for the area under the jurisdiction of that Corporation. It is not the case of respondents that respondent No.3 Dr.

Jayshree Kulkarni, Medical Officer, Health, Aurangabad Municipal Corporation has been authorized by the State Government or by the Appropriate Authority to lodge Criminal Complaint bearing RCC No. 541 of 2013, against the petitioner. On the contrary, averments in that private Criminal Complaint are to the effect that the Medical Officer, Health with the Aurangabad Municipal Corporation is an Appropriate Authority notified under Section 17 (2) of the PCPNDT Act by the State Government and the complaint is filed by complainant Dr. Jayshree Kulkarni, Medical Officer, Health acting as an Appropriate Authority under the PCPNDT Act.

17] For deciding whether, respondent No.3 Dr. Jayshree Kulkarni, Medical Officer, Health, of the Aurangabad Municipal Corporation is an Appropriate Authority or not, one will have to take a brief resume of the relevant provisions of the PCPNDT Act as well as the rules framed thereunder. Section 17(2) and (3) of the PCPNDT Act, confers power on the State Government to appoint Appropriate Authorities and the relevant portion of this Section reads thus :-

“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.

(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 Prohibition 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.”

18] Perusal of these provisions makes it clear that the State level Appropriate Authority is required to be multi-member Authority but if an Appropriate Authority is appointment for any part of the State, then, it can comprise of officer of such rank, as the State or Central Government as the case may be, deem fit. Thus, any officer can be appointed by the State as an Appropriate Authority for any part of the State by notification in the Official Gazette.

19] At this juncture, it is apposite to note that as per the provisions of Section 17(4) of the PCPNDT Act, the Appropriate Authority is required to discharge several functions and one amongst them is to investigate complaint for breach of the provisions of the PCPNDT Act as well as the Rules framed thereunder and to take immediate action. Section 19 provides for issuance of certificate of Registration by the Appropriate Authority, after holding necessary enquiry and after giving due regard to the advice of the Advisory Committee. Section 20 makes a provision for cancellation or suspension of the Certificate of Registration by the Appropriate Authority after following due process as prescribed therein. Section 17-A of the PCPNDT Act, confers power of summoning any person in possession of any information relating to violation of the provisions of the Act and the Rules, apart from direction for production of

documents or material object and issuance of Search Warrant. Section 30 empowers the Appropriate Authority for Search and Seizure of record etc., including any material object, if it has reason to believe, that the same may furnish evidence of the commission of an offence punishable under the said Act and the Rules. Suffice it to put on record that the Appropriate Authority appointed by the State is a Kingpin to carry out several duties and functions under the PCPNDT Act and is mainly responsible for the implementation of the provisions of the said Act.

20] In order to examine whether there is an express legal bar under the PCPNDT Act for entertaining Criminal Complaint instituted against the petitioner vide Regular Criminal Case No. 541/2013 one will have to consider the provisions of Sections 27 and 28 from Chapter VII of the said Act which deals with the offences and penalties. For the sake of convenience it is necessary to re-produce the provisions of Sections 27 and 28 of the PCPNDT Act which reads thus :-

"27. Offence to be cognizable, non-bailable and non-compoundable. — Every offence under this Act shall be cognizable, non-bailable and non-compoundable.

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 make a complaint to the Court.

Explanation. — For the purpose of this clause, "person" includes a social organisation.

(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. "

Perusal of provisions of Section 28 shows that the Court is debarred from taking cognizance of an offence under the PCPNDT Act except on the complaint made by the concerned Appropriate Authority or by an officer authorized for making complaint by the Central or the State Government, as the case may be. Even any officer authorized by the Appropriate Authority for instituting the criminal proceedings can also lodge the complaint. In the case in hand, as stated in foregoing para, it is not the case of prosecution that the private complaint bearing Regular

Criminal Case No. 541/2013 is instituted by an officer under the authorization of the concerned Appropriate Authority. Similarly it is not the case of respondents that the said complaint is instituted by the complainant authorized in that behalf by the State Government. It is specific case of the prosecution as seen from the perusal of record of R.C.C. No. 541/2013 that respondent no.3 - Dr. Jayshree Kulkarni has lodged the said criminal proceedings as a holder of the post of Medical Officer, Health and as per version of the prosecution, the post of Medical Officer, Health with Municipal Corporation Aurangabad is notified by the State Government in the Official Gazette as an Appropriate Authority in view of the notification dated 9-12-1997 issued by the Public Health Department of the State of Maharashtra.

21] Careful perusal of the provisions of Section 28 of the PCPNDT Act which deals with cognizance of offences under the said Act reveals that it prohibits initiation of prosecution for any offence under the said Act except on a complaint made by the Appropriate Authority concerned, or any officer authorized for the said purpose by the Central or State Government as the case may be or by any officer authorized for this purpose by the Appropriate Authority. No doubt apart from these persons, a private person

can also institute prosecution under this Act after fulfilling the conditions prescribed by Section 28 of the said Act. Thus provision contained in Section 28(1) of the PCPNDT Act does not contemplate the lodging of a private criminal complaint for the offences under the said Act by any person other than the person empowered in the said Section. The bar for institution of prosecution is at the threshold itself and the Court taking cognizance of an offence punishable under the PCPNDT Act is duty bound to satisfy itself that the complaint is lodged by any of the Officer/person authorized to do so as per the provision of Section 28 of the PCPNDT Act. Provision of Section 28 of the PCPNDT Act mandates that the complaint for the offence punishable under the said Act can only be made by the Officers/persons authorized under the said Section. In absence of such duly filed Criminal Complaint, the Court is not empowered to take cognizance of the alleged offences. So far as the instant case is concerned, respondent no.3 - Dr. Jayshree Kulkarni has lodged the private criminal complaint bearing R.C.C. No. 541/2013 purportedly acting as an Appropriate Authority being in-charge of the post of Medical Officer, Health with respondent no.2 - Aurangabad Municipal Corporation. At this juncture, it is apposite to quote relevant observation of the Hon'ble Apex Court in the case of **A.K. Roy & another (supra)**. While considering the provision of Section 20(1) of the

Prevention of Food Adulteration Act 1954 dealing with cognizance and trial of offences under the said Act, it is held thus by the Hon'ble Apex Court :-

“ A careful analysis of the language of S.20(1) of the Act clearly shows that it inhibits institution of prosecutions for an offence under the Act except on fulfillment of one or the other or the two conditions. Either the prosecutions must be instituted by the Central Government or the State Government or a person authorised in that behalf by the Central Government or the State Government, or the prosecutions should be instituted with the written consent of any of the four specified categories of authorities or persons. If either of these two conditions is satisfied, there would be sufficient authority for the institution of such a prosecution for an offence under the Act. The provision contained in S.20(1) of the Act does not contemplate the institution of a prosecution by any person other than those designated. The terms of S. 20(1) do not envisage further delegation of powers by the person authorised, except that such prosecution may be instituted with the written consent of the Central Government or the State Government or the person authorised. The use of the negative words in S.20(1) "No prosecution for an offence under this Act .. shall be instituted except by or with the written consent of" plainly make the requirements of the section imperative. That conclusion of ours must necessarily follow from the well known rule of construction of inference to be drawn from the negative language used in a statute stated by Craies on Statute Law, 6th edn., p. 263 in his own terse language :

"If the requirements of a statute which prescribe the manner in which something is to be done are expressed in negative language, that is to say, if the statute enacts that it shall be done in such a manner and in no other manner, it has been laid down that those requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceeding."

Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other modes of performance are necessarily forbidden. The intention of the Legislature in enacting S.20(1) was to confer a power on the authorities specified therein which power had to be exercised in the manner provided and not otherwise.”

Keeping in mind this exposition of the Hon'ble Apex Court, it becomes clear that as Section 28 of the PCPNDT Act in terms provides for the category of persons who are empowered to institute the prosecution for the offences under the said Act, no person other than the one falling in the category of persons mentioned in Section 28 of the PCPNDT Act is empowered to institute the prosecution. The complaint for the offences under the PCPNDT Act as such can be filed only by the Appropriate Authority concerned or by any officer authorized for this purpose by the Central or the State Government as the case may be, or by the Appropriate Authority apart from a private person on giving notice of not less than 15 days in the prescribed manner to the Appropriate Authority. Unless and until the complaint for the offence punishable under the PCPNDT Act is instituted by any of these Officers/persons, the Court is not empowered to take cognizance of the offence alleged in the said complaint. Any other officer howsoever high ranking he may be in the hierarchy cannot institute the prosecution for the offence punishable under the PCPNDT Act and

complaint if any made by such unauthorised complainant cannot be validly entertained.

22] Now let us examine whether the Medical Officer, Health of the Municipal Corporation is notified as an Appropriate Authority and whether respondent no.3 - Dr. Jayshree Kulkarni who is holding additional charge of this post in Aurangabad Municipal Corporation can lodge the complaint in respect of the offence punishable under the PCPNDT Act so as to enable the Court to validly take cognizance of the offences alleged therein. The Notification dated 9th December 1997 issued by the Public Health Department of the State Government annexed with R.C.C. No. 541/2013 by respondent no.3 for demonstrating that the complainant therein is an Appropriate Authority for area under the jurisdiction of Municipal Corporation Aurangabad which is in Marathi reads thus : -

अधिसूचना

सार्वजनिक आरोग्य विभाग,
मंजालय, मंबई - ४०००३२
दिनांक ९ डिसेंबर, १९९७

क्रमांक प्रचिनि, १०९७/६३०/सीआर-कु.क.३ शासनाच्या समकमांकाच्या दिनांक ११.९.९७ च्या अधिसूचने अन्वये जिल्हा पातळीवर जिल्हा शल्य चिकित्सकांचे पद नसलेल्या ठिकाणी महाविद्यालयाशी संलग्न असलेल्या अधिष्ठातास समुचित प्राधिकरण म्हणून नियुक्त करण्यात आले आहे. तथापि या अधिसूचने अन्वये त्यामध्ये खालीलप्रमाणे बदल करण्यात येत आहे.

जिल्हा शल्य चिकित्सक हे पद नसलेल्या ठिकाणी जिल्हयातील वैद्यकीय

(27)

Cri. W.P. No. 250 of 2015

महाविद्यालयाशी संलग्न असलेल्या वैद्यकीय अधिकाऱ्यांना पुणे महानगरपालिका क्षेत्रात वैद्यकीय अधिकाऱ्यां बी.जे. मेडिकल कॉलेज, वैद्यकीय महाविद्यालय, पुणे व इतर महानगरपालिका क्षेत्रात महानगरपालिकेतील आरोग्य अधिकाऱ्यांना समुचित /प्राधिकरण म्हणून घोषित करण्यात येत आहे.

स्वाक्षरी
(रंजना सिन्हा)
आयुक्त व प्रदसिध्द सचिव (कु.क.)

When freely translated in English, this Government Notification dated 9th December 1997 reads thus :-

NOTIFICATION

Public Health Department,
Mantralaya, Mumbai - 400 032
Date : 9th December 1997.

No. Pra.Chi.Ni. - 1097/630/CR-140/Ku.Ka.3 Vide notification of the Government of the even number dated 11-9-1997, at the District Level where post of District Civil Surgeon is not available at that place Dean affiliated to the Medical College has been appointed as Appropriate Authority. However, by this notification following change has been made in that notification :-

At place where there is no post of District Civil Surgeon, Medical Superintendent affiliated to the Medical College; for Pune Municipal Corporation area Medical Superintendent of B.J. Medical College, Medical College Pune and for other Municipal Corporation area, Health Officers in the Municipal Corporations are declared as Appropriate Authorities.

By the order and in the name of the Governor of Maharashtra

(Sd/-)
(Ranjana Sinha)
Commissioner & Ex-Officio
Secretary (Family Planning).

23] As this Notification dated 9-12-1997 issued by the State refers to the earlier Notification dated 11-9-1997 it is profitable to re-produce the said Notification dated 11-9-1997 issued by the Public Health Department, Mantralaya, Mumbai, which is at record page 139. It reads thus :-

PUBLIC HEALTH DEPARTMENT

Mantralaya, Mumbai 400 032, dated the 11th September 1997

NOTIFICATION

PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) ACT, 1994.

No. PRACHINI. 1097/630/CR-140/FW-III - in exercise of the powers conferred by sub-section (2) read with sub-section (3) of Section 17 of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (57 of 1994) and of all other powers enabling it in that behalf, the Government of Maharashtra hereby appoints the Civil Surgeons or Dean of Medical College (where Civil Surgeons are not available) at every district level as the Appropriate Authority for the purpose of this Act.

By order and in the name of the Governor of Maharashtra,

T.F. Thekkekara
Commissioner & Ex-Officio Secretary (FW)
Government of Maharashtra.

24] Conjoint reading of the notifications dated 11-9-1997 and 9-12-1997 issued by the Public Health Department of the State of Maharashtra notifying the Appropriate Authorities under Section 17(2) of

the PCPNDT Act settles the controversy involved in the instant petition. By notification dated 11-9-1997, the Government of Maharashtra had notified the Civil Surgeon of the concerned District as an Appropriate Authority for that district. It is seen that the State Government has kept in mind the fact that in some of the districts in the State, Civil Surgeons were not available. To cover up that contingency, this notification dated 9-12-1997 further notifies that in the districts where Civil Surgeons are not available, Deans of the Medical Colleges shall be the Appropriate Authorities for those districts under Section 17 (2) of the PCPNDT Act.

25] By subsequent notification dated 9-12-1997, the State of Maharashtra has made some changes in the earlier notification dated 11-9-1997 and declared some more Officers as Appropriate Authorities under PCPNDT Act to cover up the contingency of non-availability of the post of the District Civil Surgeon in some of the Districts of the State. It appears that, keeping in mind the huge academic and administrative work which the Dean of the Medical College is required to perform, the State Government in its wisdom has chosen to notify some more officers as Appropriate Authority in the eventuality of non-availability of the post of the District Civil Surgeon in a particular district. Needless to mention here

that, the duties and functions of the Appropriate Authority under the PCPNDT Act are also vast and requiring constant action as well as vigil over the large area under its control. Earlier by virtue of the Notification dated 11-9-1997, in the event of non-availability of Civil Surgeon of the District, the Dean of the Medical College was required to act as an Appropriate Authority for that district. As such, it is seen that for effective implementation of the PCPNDT Act, the State Government vide Notification dated 9-12-1997 has notified several other Officers in the district where no post of the District Civil Surgeon is available to perform functions and duties of the Appropriate Authority. Careful perusal of this State Government notification dated 9-12-1997 makes it crystal clear that only in the eventuality of non-availability of the post of the District Civil Surgeon, the following Officers can act as an Appropriate Authority for the area under their jurisdiction :-

- a) Medical Superintendent affiliated to the Medical College in district.
- b) For the area under jurisdiction of Pune Municipal Corporation, Medical Superintendent of the B. J. Medical College, Pune and
- c) For other Municipal Corporation area, Health Officers in those Municipal Corporations.

The Government Notification dated 9-12-1997 thus notifies the above mentioned Officers in clause (a) to (c) to act Appropriate Authorities for the district only if there is no post of the District Civil Surgeon available in that district. It is only in the event of non availability of the post of the District Civil Surgeon in the district, rest of the Officers notified in that notification dated 9-12-1997 can act as an Appropriate Authority for such district. Careful perusal of the said notification dated 9-12-1997 does not allow us to hold that the District Civil Surgeon in the district and the other officers notified in the said notification can simultaneously act as an Appropriate Authority in the same district. In the eventuality of availability of the post of the District Civil Surgeon in the particular district, the other Officers mentioned in the notification dated 9-12-1997 shall not have power to act as Appropriate Authority under the PCPNDT Act for that district. In such contingency, the District Civil Surgeon shall be the Appropriate Authority for that district to the exclusion of all other Officers notified by the said notification dated 9-12-1997. The Government Notification dated 9-12-1997 relied by respondents and particularly respondents No.2 and 3 for instituting the Regular Criminal Case No.541/2013 against the petitioner by alleging that the Medical officer, Health of the Aurangabad Municipal

Corporation is an Appropriate Authority for the city of Aurangabad is not susceptible for any other interpretation than the one in which we have interpreted the same. Language of this notification is very clear and unambiguous. Careful scrutiny of the said Government Notification dated 9-12-1997 makes it clear that there is no scope to hold that the Officers mentioned therein can act as an Appropriate Authority in addition to the Civil Surgeon in the district. Other Officers notified by the said notification dated 9-12-1997 will get powers to act as Appropriate Authority only and only where there is no post of District Civil Surgeon in the said district.

26] At this juncture, we feel it necessary to refer to other notifications appointing Appropriate Authorities under Section 17(2) of the PCPNDT Act issued by the State Government, as those will throw light on the fact that Medical Officer, Health of Municipal Corporation Aurangabad was never appointed by the State Government as an Appropriate Authority under the PCPNDT Act. This aspect is clear from the fact that Officers other than the Medical Officer, Health working with the Municipal Corporations at several places, including that at Aurangabad came to be notified under Section 17(2) of the PCPNDT Act as Appropriate Authorities, vide notification dated 16-10-2007 issued by the Public Health Department

of the State Government. This notification is placed on record at page 64 of the petition and reads thus :-

अधिसूचना

सार्वजनिक आरोग्य विभाग,
मंजालय, मंबई - ४०००३२
दिनांक १६/१०/२००७

गर्भधारणापूर्व व क.प्रचिनी-२००७/५२५/प.क.१३३(भाग-३)/कु.क.२-गर्भधारणापूर्व व
प्रसवपूर्व निदान प्रसवपूर्व निदान तंत्र (विनियमन आणि दुरुपयोग प्रतिबंध) अधिनियम,
तंत्र (विनियमन १९९४ (१९९४ चा ५७) या अधिनियमाच्या कलम १७ च्या पोट कलम
आणि दुरुपयोग (२) द्वारे प्रदान करण्यात आलेल्या अधिकारांचा आणि त्याबाबतीत
प्रतिबंध) सहाय्यभूत करणाऱ्या सर्व अधिकारांचा वापर करून या कायद्याच्या
अधिनियम, प्रयोजनार्थ महाराष्ट्र शासन याद्वारे सर्व जिल्हयातील अतिरिक्त
१९९४ जिल्हाधिकारी, उप विभागीय अधिकारी, तहसिलदार, नायब तहसिलदार
तसेच आयुक्त महानगरपालिका, उपायुक्त महानगरपालिका, प्रभाग
अधिकारी महानगरपालिका तसेच मुख्य अधिकारी नगरपालिका, यांना
त्यांच्या अधिपत्याखाली असलेल्या क्षेत्राकरीता "समुचित प्राधिकारी"
म्हणून नियुक्ती करित आहे.

महाराष्ट्राचे राज्यपाल यांच्या आदेशानुसार व नावाने.

स्वाक्षरी / -
(शोमीता बिश्वास)
महाराष्ट्र शासनाच्या सह सचिव

Freely translated in English, this notification reads thus :-

NOTIFICATION

Public Health Department
Mantralaa, Mumbai - 400 032.
Date : 16-10-2007

**THE PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC
TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) ACT,
1994.**

No.PNTR, 2007 (525/C.No.133/Part III)/ No.2 – In exercise of the powers conferred under Sub Section (2) of Section 17 of the Pre-Conception and Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, (Act No. 57 of 1994) and all other powers ancillary to the said powers, the government of Maharashtra is hereby appointing the Additional Collectors, Sub Divisional Officers, Tahsildar, Naib Tahsildar also the Municipal Commissioner, Deputy Commissioner of Municipal Corporation, Ward Officers of Municipal Corporation and similarly the Chief Officer of Municipal Councils for the area under their command as “Appropriate Authority”.

By the Order and in the name of the Governor of Maharashtra.

Sd/-
Shomita Biswas,
Joint Secretary to Government

27] From perusal of this notification dated 16.10.2007, it is clear that though Municipal Commissioner, Deputy Municipal Commissioner and

Ward Officers of Municipal Corporations throughout the State are appointed as Appropriate Authorities, the State Government vide this notification has consciously not appointed Medical Officer, Health, working with the Municipal Corporations in the State as Appropriate Authority under the PCPNDT Act. Another notification issued under Section 17(2) of the PCPNDT Act is dated 6th November, 2001 (record page 141) and by that notification, the State Government has been pleased to appoint the Medical Superintendent of Rural Hospital at every Taluka level in the State as Appropriate Authority. Vide notification dated 27-12-2001 (page 142) the State Government had appointed Medical Officer, Health of each Municipal Ward office in the Municipal Corporations of Greater Mumbai, to be the Appropriate Authorities for the for the respective area under his jurisdiction. Respondents could not point out similar notification issued by the State under Section 17(2) of the PCPNDT Act appointing the Medical Officer, Health of the Municipal Corporation, Aurangabad as an Appropriate Authority under the said Act. This necessarily implies that the State has consciously decided not to notify the Medical Officer, Health of the Municipal Corporation, Aurangabad as an Appropriate Authority under the PCPNDT Act. For the sake of convenience, the notification dated 27-12-2001 is reproduced hereunder :-

PUBLIC HEALTH DEPARTMENT
Mantralaya, Mumbai 400 032, dated the 27th December 2001

NOTIFICATION

PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) ACT, 1994.

No. PRACHINI. 2001/1545/CR-349/FW-III - in exercise of the powers conferred by sub-section (2) read with sub-section (3) of Section 17 of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (57 of 1994) and of all other powers enabling it in that behalf, the Government of Maharashtra hereby pleased to, appoint the Medical Officer of Health of each Municipal Ward Office in the Municipal Corporation of Greater Mumbai to be the Appropriate Authority for the respective area under his jurisdiction, for the purpose of the said Act.

By order and in the name of the Governor of Maharashtra,

S. C. MONDKAR,
Under Secretary to Government

28] One more notification under Section 17(2) of the PCPNDT Act needs mention at this juncture. Vide this notification dated 2nd April, 2009 (record Page 148), the State Government had appointed Medical Officer (Health) working with the Municipal Corporations at Bhiwandi-Nijampur (District Thane), Mira-Bhayandar (District Thane), Malegaon (District Nasik), Akola (District Akola), Jalgaon (District Jalgaon), Dhule (District Dhule) and Ahmednagar (District Ahmednagar), as Appropriate Authorities, under Section 17(2) of the PCPNDT Act. This notification reads thus :-

अधिसूचना
सार्वजनिक आरोग्य विभाग
मंत्रालय, मुंबई ४०० ०३२,
दिनांक : २ एप्रिल, २००९

गर्भधारणापूर्व व कमांक प्रचिनि- २००८/९७१/प्र.क.२७३/कु.क.२
प्रसवपूर्व गर्भधारणा व प्रसवपूर्व निदानतंत्र (लिंग निवडीस प्रतिबंध)
निदानतंत्र लिंग अधिनियम, २००३ (२००३ चा १४) या अधिनियमाच्या कलम
निवडीस १७ मधील उपकलम २ व ३ द्वारे तसेच या संबंधी असलेल्या
प्रतिबंध अन्य प्राधिकारांचा वापर करून भिवंडी-निजामपूर जि. ठाणे,
अधिनियम, मिरा-भाईदर (जि.ठाणे), मालेगांव (जि. नाशिक), अकोला (जि.
२००३ (२००३ अकोला), जळगांव (जि. जळगांव), धुळे (जि.धुळे), व अहमदनगर
चा १४) (जि. अहमदनगर) या नवनिर्मित महानगरपालिका क्षेत्रात
महानगरपालिकेतील वैद्यकिय अधिकारी (आरोग्य) यांना महाराष्ट्र
शासन त्यांच्या विभाग क्षेत्रात या अधिनियमाच्या सर्व
कामकाजांसाठी समुचित प्राधिकरण म्हणून नियुक्त करीत आहे.

महाराष्ट्राचे राज्यपाल यांच्या आदेशानुसार व नावाने,

स्वाक्षरी / -
(पा. म. ताकटे)
महाराष्ट्र शासनाचे अप्पर सचिव

When translated freely in English, this notification dated 2nd April,
2009, reads thus :-

NOTIFICATION.**PUBLIC HEALTH DEPARTMENT**

Mantralaya, Mumbai – 400 032.

April 2, 2009

No.PNTR-2008 (971/C.No.273/FW-2

**PRE CONCEPTION AND PRE-NATAL DIAGNOSTIC
TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 2003 (ACT
NO.14 OF 2003)**

In exercise of the powers conferred under Sub Section 2 and 3 of Section 17 of the Pre Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 2003 (Act No.14 of 2003), the Government of Maharashtra is hereby appointing the Medical Officers (Health) of the newly formed Municipal Corporation of Bhiwandi – Nizampur (Thane), Meera – Bhojandar (Dist.Thane), Malegaon (Dist.Nashik), Akola (Dist.Akola), Jalgaon (Dist.Jalgaon), Dhule(Dist.Dhule) and Ahmednagar (Dist. Ahmednagar) as the Appropriate Authority for their respective areas for all the functioning to be made under this Act.

By order and in the name of the governor of Maharashtra.

Sd/-

(P. M. Takte)

Under Secretary to the Government of Maharashtra

29] It is thus clear that, whenever the State Government considered it appropriate, it has categorically notified the post of Medical officer (Health) of the selected Municipal Corporations in the State as Appropriate Authorities under section 17(2) of the PCPNDT Act. However, the Medical Officer, Health of the Aurangabad Municipal Corporation is not so

appointed by issuing necessary notification under Section 17(2) of the PCPNDT Act by the State of Maharashtra. No such notification is brought to our notice by respondents nor during the course of prolonged hearing of this petition. This factual position is also not controverted by the learned counsels appearing for respondents during hearing. Rather, the State Government had decided long back vide Government Notification dated 9th December, 1997, that only in the eventuality of non-availability of the post of the District Civil Surgeon, at Aurangabad, the Medical Superintendent affiliated to the Medical College at Aurangabad shall act as an Appropriate Authority under the PCPNDT Act. By no stretch of imagination, one can, therefore, infer that the Medical Officer, Health of the Municipal Corporation Aurangabad had been appointed as Appropriate Authority under section 17(2) of the PCPNDT Act for the area under the Municipal Corporation, Aurangabad.

30] This crystallized position makes it clear that, if the post of the District Civil Surgeon is available at Aurangabad then neither the Medical Superintendent affiliated to the Medical College at Aurangabad nor the Health Officer of the Aurangabad Municipal Corporation can act as an Appropriate Authority under the PCPNDT Act for Aurangabad. In this view

of the matter it is not necessary for us to examine the merits of submission of Shri Salunke, the learned counsel for the petitioner that being in additional charge of the post of Medical Officer, Health, respondent No.3 Dr. Jayshree Kulkarni cannot be an Appropriate Authority under the PCPNDT Act. Similarly, there is no merit in the contention of the learned counsel for the petitioner that without any powers, on 16-6-2012, Dr. Dimpal Pardesi and Ujjwala Bhamre and on 18-6-2012, they both alongwith Dr. Manisha Bondwe from respondent No.2 Corporation inspected her clinic. It is seen from the order dated 8-6-2012 of the District Collector, Aurangabad that he being an Appropriate Authority had authorized them to inspect various Genetic Clinics and Laboratories at Aurangabad. The notification appointing the Collector as an Appropriate Authority dated 9-5-2007 is at Record page 146. Rule 12 of the Rules framed under the PCPNDT Act empowers the Appropriate Authority to authorize any officer to conduct search and seizure.

31] As per the mandate of Section 28 of the PCPNDT Act cognizance of an offence under that Act can be taken only if the complaint is made by the Officer or the Person authorized therein. It is seen from the provisions of Section 28 of the PCPNDT Act that there is an express bar for

taking judicial notice of an alleged offence if the complaint is not made by the authority/officer or the person provided therein. In absence of complaint by the Appropriate Authority, Officer or person competent to make it, in view of bar provided by Section 28 of the PCPNDT Act, the Magistrate cannot take judicial notice of alleged offence with a view to initiate proceedings in respect of such offence. In other words, no cognizance of offences alleged in such complaint can be taken. Taking cognizance of an offence is in fact the condition precedent to the initiation of proceedings by the Magistrate.

32] In the light of this position of law, it was incumbent on the part of complainant - Dr. Jayshree Kulkarni, Medical Officer, Health of Aurangabad Municipal Corporation to plead in the private criminal complaint bearing R.C.C. No. 541/2013 that the post of District Civil Surgeon was not available at Aurangabad at the relevant time. It was necessary for the complainant to further plead in the said criminal complaint that the post of Medical Superintendent at Medical College of Aurangabad was also not available at Aurangabad and therefore taking resort to the residuary clause of the notification dated 9th December 1997, Medical Officer, Health of Aurangabad Municipal Corporation is required to act an Appropriate Authority under the PCPNDT Act. Careful scrutiny of R.C.C.

No. 541/2013 filed by respondent no.3 alleging herself to be an Appropriate Authority for Aurangabad does not reveal that there is a statement to the effect that post of District Civil Surgeon is not available and therefore being the Medical Officer, Health of the Municipal Corporation respondent no.3 is an Appropriate Authority under the PCPNDT Act for Aurangabad city. Even the complaint which is registered as R.C.C. No. 541/2013 filed by respondent no.3 does not contain any pleading as to under what Government Notification, the Medical Officer, Health of the Aurangabad Municipal Corporation is notified as an Appropriate Authority under Section 17(2) of the PCPNDT Act. The complainant therein i.e. respondent no.3 has vaguely contended in the complaint that she is an Appropriate Authority and annexed the notification dated 9-12-1997 to that complaint R.C.C. No.541/2013. According to respondent no.3 being the Medical Officer, Health of the Municipal Corporation, she is an Appropriate Authority. This is the only contention of respondent no.3 / complainant in her vague Criminal Complaint which is pending now before the learned Chief Judicial Magistrate, Aurangabad. This assumption on the part of respondent no.3 - In-charge Medical Officer, Health of Municipal Corporation, Aurangabad, is totally unjustifiable in view of the notification issued by the State Government on 9th December 1997 which is relied by respondent no.3/

Complainant. In order to establish that the complainant in R.C.C. No. 541/2013 was an Appropriate Authority at the time of filing of the complaint, it was necessary on her part to plead in that complaint and demonstrate before the learned Chief Judicial Magistrate that there is neither the post of District Civil Surgeon nor that of the Medical Superintendent affiliated to the Medical College at Aurangabad and as such by virtue of residuary clause of the said Notification, dated 9th December, 1997, the Health Officer of the Municipal Corporation is required to act as an Appropriate Authority for Aurangabad. The criminal complaint against the petitioner bearing R.C.C. No. 541/2013 is conspicuously silent on this aspect. As against this, by filing an affidavit dated 20-8-2015, the petitioner has categorically pointed out that there is Medical College and Hospital at Aurangabad situated within the jurisdiction Municipal Corporation, Aurangabad, and the post of Medical Superintendent is affiliated to that college. Apart from that, the petitioner has further stated on affidavit that even the post of District Civil Surgeon is very much available at Aurangabad and particularly within the jurisdiction of the Aurangabad Municipal Corporation. Duly sworn testimony of the petitioner further shows that one Dr. Gaikwad is working as Civil Surgeon at Aurangabad within the jurisdiction of Municipal Corporation, Aurangabad. Contention

of the petitioner that the post of Civil Surgeon is available at Aurangabad is further substantiated by the district-wise list of Appropriate Authorities - cum - District Civil Surgeons for the entire State of Maharashtra annexed to the affidavit dated 20-8-2015 of the petitioner. This district-wise list for the entire State of Maharashtra appears to be downloaded from the Government Website - <https://www.nrhm.mah.gov.in/pcpndt/htm>. Perusal of this district-wise list of Appropriate Authorities for the State shows that for city of Aurangabad, Civil Surgeon Dr. G.M. Gaikwad is an Appropriate Authority under the PCPNDT Act. It is thus established that the post of Civil Surgeon is available at Aurangabad. It is worthwhile to mention here that despite having ample opportunity, neither respondent nos.2 and 3 nor respondent no.1 - State has controverted this factual position regarding availability of the post of District Civil Surgeon as well as that of Medical Superintendent at Aurangabad. Contention of the petitioner in this regard went unchallenged. In pursuance to the provision of notification dated 9th December, 1997 because of availability of the District Civil Surgeon at Aurangabad, he has to act as an Appropriate Authority under the PCPNDT Act to the exclusion of other officers by virtue of the Notification dated 9th December 1997. Consequently, the Medical Officer, Health with the Municipal Corporation, Aurangabad cannot act as an Appropriate Authority

under the PCPNDT Act.

33] In this view of the matter, as the post of District Civil Surgeon is very much available at Aurangabad, we hold that the complainant in R.C.C. No. 541/2013 i.e. Dr. Jayshree Kulkarni, Medical Officer, Health of Municipal Corporation, Aurangabad, cannot be held as an Appropriate Authority under the PCPNDT Act and the Notification dated 9th December 1997 is therefore of no avail to the complainant in this regard. At the cost of repetition, we further add that the said complaint is neither made by the complainant / respondent no.3 herein in the capacity of an Officer authorized in that behalf by the State Government or by the Appropriate Authority. As such the learned Chief Judicial Magistrate had no powers to take cognizance of an offence under the PCPNDT Act alleged against the present petitioner in the said complaint. When the PCPNDT Act and particularly Section 28 thereof does not contemplate institution of the prosecution by any person / Officer other than those designated therein, it needs to be held that complainant Dr. Jayshree Kulkarni, Medical Officer, Health of Aurangabad Municipal Corporation was not at all competent to lodge the complaint against the present petitioner for the offences punishable under the PCPNDT Act and more particularly under Sections 23

and 25 of the said Act read with Rule 9 of the Rules framed thereunder. The use of the negative words in Section 28 to the effect, "*No Court shall take cognizance of an offence under this Act except on the complaint made by*" clearly makes the requirement of this Section imperative and mandatory. Thus when Section 28 of the PCPNDT Act prescribes the manner in which the complaint for the offence under the PCPNDT Act should be made and when such requirement is expressed in negative language then the complaint under the PCPNDT Act can be filed only in the manner as has been laid down in the said Section by the Officer / person mentioned therein. As Section 28 of the PCPNDT Act prescribes that the Court shall not take cognizance of the offences under the said Act except on a complaint made by the Authority or Officer or a person prescribed therein, others cannot lodge the complaint regarding offence under the said Act. Permitting some other person / Officer to institute complaint is necessarily forbidden by Section 28 of the PCPNDT Act. Thus, the power and authority to lodge complaint of the offence punishable under the PCPNDT Act can be exercised only by the Authority, Officer or the person prescribed by the provisions of the Section 28 of the PCPNDT Act. The law laid down by the Hon'ble Apex Court in the matter of A.K. Roy & another (supra) that where a power is given to do a certain thing in a certain way, the thing must

be done in that way or not at all, is applicable with full force to the case in hand and as such we hold that the complaint bearing R.C.C. No.541/2013 is not lodged by an authority competent to lodge the same for alleged commission of offences under the PCPNDT Act by the petitioner. As such, the learned Chief Judicial Magistrate could not have validly taken cognizance of the offence alleged in the said criminal complaint bearing R.C.C. No. 541 of 2013. As we are of the considered view that the complaint bearing R.C.C. No. 541 of 2013 which is now reported to be pending before the learned Chief Judicial Magistrate, Aurangabad is not made by the Authority, Officer, or Person competent to do so as per the mandatory provisions of Section 28 of the PCPNDT Act , we do not wish to burden our judgment by dealing with other contention raised by the parties and particularly that of respondent Nos. 2 and 3 in respect of alleged violation of section 29 of the PCPNDT Act read with Rule 9 of the Rules. As such, it is not necessary to refer to the various judgments cited by the respondents on this aspect of the matter.

34] We have already concluded that as the criminal complaint made by respondent No.3, Incharge Medical Officer, Health, Aurangabad against the petitioner is not by the Authority, Officer or Person, competent to file

the same as per provisions of Section 17(2) of the PCPNDT Act, there is no propriety in continuing the proceedings arising thereof. Section 4 of the Code of Criminal Procedure, 1973 provides that all offences under any other law shall be tried and otherwise dealt with according to the provisions of the Code of Criminal Procedure, 1973. As the offence alleged against the petitioner is punishable with imprisonment for a term which may extend to 3 years, the Regular Criminal Case bearing No. 541 of 2013, is required to be dealt with according to the procedure prescribed in Chapter XIX of the Code of Criminal Procedure, 1973, as a trial of warrant case. The whole purpose of taking cognizance of an offence as per the provisions of Section 190(1)(a) of the Code of Criminal Procedure, 1973 is to commence proceedings under Chapter XIX of the said Code by issuing process under Section 204 of that Code against the accused. However, in the case in hand, for want of a complaint by the Authority, Officer or Person, competent to lodge the same, as per the provisions of Section 28 of the PCPNDT Act, cognizance of the alleged offence cannot be taken validly and as such, the entire sub-stratum of the prosecution case falls to ground. No process could have been issued validly against the petitioner/accused in RCC No. 541 of 2013 in the complaint made at the instance of respondent No.3, Incharge Medical Officer, Health, of the Municipal Corporation Aurangabad for want

of authority in respondent no.3 to make such complaint as per the mandatory provision of Section 28 of the PCPNDT Act.

35] The learned Chief Judicial Magistrate, ordering issuance of process unfortunately failed to examine this material aspect which goes to the root of the case and ignored the settled position of law that summoning of an accused in a criminal case is a very serious matter as the criminal law cannot be set into motion as a matter of course. It is settled that, the order of concerned Magistrate taking cognizance of the offence and issuing the warrant against the accused must reflect that he has applied mind to the facts of the case and the law applicable thereto. In the instant case, perusal of the order dated 28-3-2013 passed by the learned Chief Judicial Magistrate, Aurangabad in R.C.C. No. 541 of 2013 shows that the learned Chief Judicial Magistrate has without application of mind, mechanically ordered issuance of process against the present petitioner and more particularly, without even ascertaining and examining as to whether that complaint is made by the Authority/Officer/Person competent to make it as per the provisions of Section 28 of the PCPNDT Act. The order issuing process is totally silent on this aspect and it is not reflecting any reasoning or prima facie conclusion of the learned chief Judicial Magistrate to the

effect that the complaint is made by the Appropriate Authority notified under Section 27(2) of the PCPNDT Act. It is seen from the perusal of the order dated 28-3-2013 issuing process that the learned Chief Judicial Magistrate was totally oblivious of the mandatory provision of Section 28 of the PCPNDT Act regarding lodging of the complaint only by the Appropriate Authority or other officer/person specified therein. In the case in hand, because of bar which operates at the threshold itself, we are of the considered view that the prosecution of the petitioner in the criminal complaint, cannot commence as no cognizance of offence alleged against the petitioner can validity be taken by the learned Chief Judicial Magistrate.

36] Petitioner has invoked jurisdiction of this Court under Article 226 and 227 of the Constitution of India, apart from the provisions of Section 482 of the Code of Criminal Procedure, 1973. It cannot be disputed that this Court can exercise its power of judicial review in criminal matters. The powers conferred on this Court under Article 226 and 227 of the Constitution of India as well as under Section 482 of the Code of Criminal Procedure, 1973, undoubtedly have no limits but at the same time, it needs to be kept in mind that such powers are required to be exercised with great care and caution. The inherent powers under Section 482 of the

Code of Criminal Procedure, 1973 can be exercised by this Court either to prevent abuse of the process of any Court or otherwise to secure the ends of justice. The saving of the inherent powers of the High Court is with a purpose to achieve a laudable public purpose that proceedings of the Court ought not to be permitted to degenerate into a weapon of harassment or persecution.

37] The Honourable Supreme Court examined the extraordinary power of this Court under Article 226 of the Constitution of India, so also, inherent powers under Section 482 of the Code of Criminal Procedure, 1973 in the matter of *State of Haryana and others vs. Bhajanlal and others (supra)* and laid down certain guidelines where the Court will exercise jurisdiction under these provisions for quashing the criminal proceedings. It is held therein that the guidelines so given cannot be inflexible or laying down rigid formula to be followed in facts and circumstance of each case.

Guideline No.6 found in Para. 8.1 of the said judgment reads thus :-

“6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and / or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.”

38] It is thus clear that the powers of this Court under Article 226, 227 of the Constitution of India and under Section 482 of the Code of Criminal Procedure, 1973 can be exercised for quashing the criminal proceeding when there is an express legal bar engrafted in the provisions of the concerned Act under which a criminal proceeding is instituted, to the institution and continuance of such proceedings.

39] As discussed in the foregoing paragraphs, in the case in hand, there is express legal bar to entertain the complaint for the offence punishable under the provisions of the PCPNDT Act made by the Authority/Officer/Person other than those authorized under Section 28 thereof. We have already held that the criminal complaint bearing R.C.C. No. 541 of 2013 against the petitioner is not made by the Authority/Officer/person competent to lodge the same. As such, allowing continuation of the said criminal complaint would be abuse of the process of the Court apart from waste of time and public money. We are of the view that there is no possibility of conviction in such criminal complaint which cannot be validly entertained. Continuance of such prosecution would put the accused therein, i.e. present petitioner to great oppression and prejudice. Extreme injury would be caused to the petitioner if the proceedings in such

untenable criminal complaint are not quashed.

40] The matter can be viewed from another angle also. Article 21 of the Constitution of India which is held to be “heart and soul” of the Fundamental Rights, reads thus :-

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

The petitioner herein is required to face prosecution for the serious offence punishable under Section 23 of the PCPNDT Act where the punishment prescribed is for a term which may extend to 3 years and with fine, which may extend to Rs. 10,000/-. By now, it is well settled that free and fair trial is a *sine qua non* of Article 21 of the Constitution of India. If a criminal trial initiated at the instance of the State is not free and fair, the confidence of the public at large in the criminal justice system would be eroded.

Assurance of a free trial is the first imperative of dispensation of justice.

The expression, “procedure established by law” in Article 21 has been judiciously construed as meaning a procedure, which is reasonable, fair and just. Therefore, the criminal trial which may result in depriving a person not only of his personal liberty but also his life and reputation needs to be free, fair, unbiased and without prejudice. Allowing the petitioner in the present

case to face trial of criminal complaint having patent legal infirmity would certainly amount to breach of the provisions of Article 21 of the Constitution of India. Requiring the petitioner to face the trial of the untenable criminal complaint lodged by totally incompetent authority will amount to deprivation of her personal liberty by the procedure which cannot be said to be established by law as required by mandate of Article 21 of the Constitution of India. Such prosecution cannot be held to be by the just, fair and reasonable procedure as envisaged by Article 21 of the Constitution of India. As such, we are of the considered view that the proceedings in Criminal Case bearing R.C.C. No. 541 of 2013, between the parties pending before the learned Chief Judicial Magistrate at Aurangabad, needs to be quashed and set aside, in order to prevent abuse of the process of Court, for securing the ends of justice and as the same are violative of the constitutional guarantee enshrined in Article 21 of the Constitution of India.

41] Criminal Writ petition is, therefore, allowed. Rule made absolute in terms of prayer clause (B). No costs.

(A.M. BADAR)
JUDGE

(S. S. SHINDE)
JUDGE

GRT/