AMC

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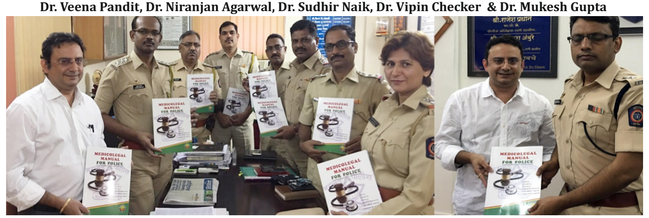
MEDICOLEGAL MANUAL FOR POLICE

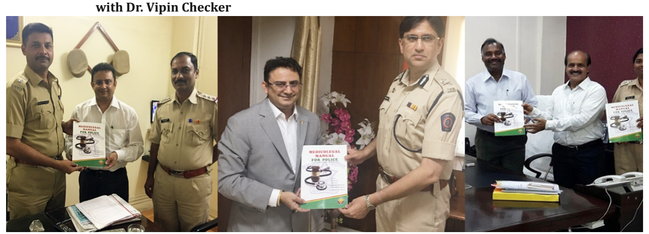
(an Association of Medical Consultants, Mumbai Publication)

Shri Ahmed Javed, IPS, Commissioner of Police, Mumbai Releasing the Book with Dr. Kishore Adyanthaya, Dr. Veena Pandit, Dr. Niranjan Agarwal, Dr. Sudhir Naik, Dr. Vipin Checker & Dr. Mukesh Gupta



DySP Shri Suhas Bawche with Mira Bhayander Sr. P.I. with Dr. Vipin Checker

Superintendent of Police Shri Rajesh Pradhan



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MEDICOLEGAL MANUAL FOR POLICE

MEDICOLEGAL MANUAL FOR POLICE

(an Association of Medical Consultants, Mumbai Publication)

- MTP Act
- PCPNDT Act
- POCSO Act
- Maharashtra Medicare Act
- Jacob Mathew Judgement
- Martin D'Souza Judgement

About the Book

We, doctors, are law abiding citizens. We practice our profession at the pleasure of the public. We wan that our image in the society shall remain as law abiding intellectuals. As our prosperity depends o satisfaction of our patients regarding our services, we always try to keep them happy.

But, despite all due care, some untoward incidents occur. A complaint is filed in the Police Station. Police come for investigations. At that time, the treating doctor is already disturbed because of the untoward event and reaction of the relatives. In this situation, the relatives want that Police should arrest the doctor and doctor wants that Police should control the mob and convince them to adopt legal ways of protest for the grievance caused.

Sometimes, the Police Officer on duty is ignorant about the Acts specifically related to doctors. So, there is chance that under the pressure of the mob and accompanying politicians, they act unilaterally which is injustice on the doctor. Because of such injustice, doctor community is unhappy with the law enforcing authorities.

On the other hand, many a times the doctor is ignorant of the provisions in Law and tries to pressurise the Officer for favourable actions.

The solution to all this chaos is that let the doctor, the investigating Police Officer and the mob know about the Acts specifically applicable to the doctors, so that no injustice is caused to any of the parties.

To achieve this, we have made a humble effort to come out with a book in which Acts specifically applicable to doctors are given. It will help doctors to know the provisions of law applicable to them so that they will act/behave accordingly. It will help the Police Officer to act judiciously and convince the parties accordingly.

We request you to go through the book and spread the contents to your seniors, colleagues and subordinates.

Suggestions, if any, are most welcome. We will include them in our next edition.

Edited & Compiled By

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MEDICOLEGAL MANUAL FOR POLICE

(an Association of Medical Consultants, Mumbai Publication)

Association of Medical Consultants

Dedicated to
Each an every AMC Member
&
Maharashtra Police

2015 - 16

Managing Trustee (AMC)
Dr. Achut Nayak

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Dr. Sudhir Naik

Hon. Secretary (AMC)
Dr. Mukesh Gupta

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Dr. Vipin Checker

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दिनांक :-

प्रति,

प्रिय महोदय,
आम्ही डॉक्टर मंडळी कायद्याचे पालन करणारे लोक आहोत. आमचा व्यवसाय लोककृपेवरच चालतो. 'कायद्याप्रमाणे वागणारी बुद्धिजीवी मंडळी" अशी जनमानसात आणि समाजात आपली ओळख असावी हीच आमची इच्छा आहे. आमचा उत्कर्ष हा आमच्या सेवेबद्दल आमच्या रुग्णांच्या समाधानावरच अवलंबून असल्यामुळे, आंम्ही नेहमीच त्यांना संतुष्ट ठेवण्याचा प्रयत्न करीत असतो

परंतु, सर्व परीने प्रयत्न करून सुद्धा काही अप्रिय घटना घडतात. पोलीस स्टेशनमध्ये तक्रार नोंदविली जाते. तपासासाठी पोलिस येतात. इलाज करणारे डॉक्टर त्या वेळी आधीच त्या अप्रिय घटनेमुळे आणि रोग्याच्या नातेवाईकांच्या प्रतिक्रियेमुळे अस्वस्थ असतात. अशा परिस्थितीत रोग्याच्या नातेवाईकांना पोलिसांकरवी डॉक्टरची अटक हवी असते तर डॉक्टरांना पोलिसांनी जमावाला काबूत ठेऊन त्यांना वैध, कायदेशीर मार्गाचा अवलंब करून त्यांच्या व्यथेला वाचा फोडावी हे पटवून द्यावे असे वाटत असते.

कधी कधी ड्यूटीवरील पोलिस अधिकाऱ्यास डॉक्टर लोकांना खास करुन लागू असणाऱ्या कायद्याचे ज्ञान नसते. त्यामुळे जमावाच्या आणि त्यांच्यासोबतच्या राजकारण्याच्या दबावामुळे त्यांच्याकडून एकतर्फी कारवाई केली जाण्याची शक्यता असते. जी डॉक्टरांवर अन्यायकारक होते. अशा अन्यायामुळे डॉक्टर मंडळी कायदा अधिकारी संबंधित यंत्रनेवर नाखुश आहे.

उलटपक्षी काही वेळेस डॉक्टरांना कायद्याचे ज्ञान नसते आणि त्यामुळे ते पोलिसांवर झुकते माप देण्यासाठी दबाब आणू पाहतात. या सर्व गोंधळावर उत्तम उपाय म्हणजे डॉक्टर, तपास करणारे अधिकारी व जनता यांना डॉक्टरांना लागू असणाऱ्या कायद्यांचे ज्ञान होणे जेणेकरुन कोणत्याही पक्षावर अन्याय होणार नाही.

ह्या उद्दिष्टाच्या सफलतेसाठी एक नम्र प्रयत्न म्हणून आम्ही फक्त डॉक्टरी पेशाला लागू असालेल्या कायद्यांवर एक पुस्तक तयार केलं आहे. त्याचा डॉक्टरांना त्यांना लागू असलेल्या कायद्यांच्या तरतुदींची महिती मिळविण्यास उपयोग होईल व ते त्याप्रमाणे वागतील. ते पोलिस अधिक्ऱ्यांना नि:पक्षपणे तपास करण्यात व इतरांची समजूत घालण्यासदेखिल उपयोगी होईल.

आपण हे पुस्तक वाचावे आणि त्यातील मजकूर आपले वरिष्ठ, समकक्ष व कनिष्ठ अधिकाऱ्यांनाही माहीत करून द्यावा ही नम्र विनंती. या पुस्तकासंदर्भात काही सुचना असतील तर त्यांचे स्वागतच आहे. पुढील आवृत्तीत त्यांचा समावेश करण्यात येईल. या पुस्तकातील माहितीबद्दल काही स्पष्टीकरण हवे असल्यास आमच्याशी अवश्य संपर्क साधावा. आपल्या सहकाराच्या अपेक्षेत, साभार,

डॉ. विपिन चेक्कर
कोषाध्यक्ष (ऐमसी)
९१९८-२०-०१२४१०

डॉ. सुधीर नाईक
अध्यक्ष (ऐमसी)
९१ ९८-२०-१४९३६८

डॉ. मुकेश गुप्ता
सचिव (ऐमसी)
९१ ९८-२१-३४०१४१

Date:-

To,

_____

_____

Dear Sir,

We, doctors, are law abiding citizens. We practice our profession at the pleasure of the public. We want that our image in the society shall remain as law abiding intellectuals. As our prosperity depends on satisfaction of our patients regarding our services, we always try to keep them happy.

But, despite all due care, some untoward incidents occur. A complaint is filed in the Police Station. Police come for investigations. At that time, the treating doctor is already disturbed because of the untoward event and reaction of the relatives. In this situation, the relatives want that Police should arrest the doctor and doctor wants that Police should control the mob and convince them to adopt legal ways of protest for the grievance caused.

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We request you to go through the book and spread the contents to your seniors, colleagues and subordinates.

Suggestions, if any, are most welcome. We will include them in our next edition.

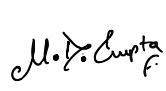
Please feel free to call back for clarification on any of the topics.

Thanking you in anticipation expecting your kind co-operation.

Regards,

Dr. Vipin Checker
Treasurer (AMC)
9820012410

Dr. Sudhir Naik
President (AMC)
9029349368



Dr. Mukesh Gupta
Hon. Secretary (AMC)
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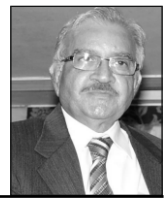

PREAMBLE

Dr. Lalit Kapoor
Director - AMC India Project

The Police Forces are essentially law-enforcing agencies with a crucial role in upholding the Rule of Law in our Society.

Mumbai Police are a particularly disciplined Force. At one time they were even known as the Scotland Yard of India!

We at the Association of Medical Consultants , Mumbai (with a membership of over 8000 Specialist doctors as its members) do acknowledge the hard work being put in by Mumbai Police in difficult conditions and appreciate their contribution in maintaining law and order.

This handbook highlights the salient features of some of the more important legislations pertaining to the medical profession and ones which come into play in the interface between the Police , Doctors and the Public.

We trust this publication will prove to be a valuable reference source to the personnel of the Mumbai Police Force.

We wish to present this Volume as our humble tribute to the tireless round-the-clock activity of the Mumbai Police to ensure our safety.

एमटीपी कायदा

Dr. Hitesh Bhatt
MBBS, MD, PGDLMS

एमटीपी कायदा

डॉक्टरच्या विरुद्ध कारवाई करण्यापूर्वी पोलिसांनी खालील गोष्टी तपासल्या पाहीजेत:

- एमटीपी कायद्याचे कलम ३ येणेप्रमाणे आहे:

कलम ३ : पंजीकृत डॉक्टर गर्भपात केव्हा करू शकतो.

"जर एखाद्या पंजीकृत डॉक्टरने प्रस्तुत कायद्याच्या तरतुदींच्या कक्षेत रहून गर्भपात केला तर तो भारतीय दंड संहितेतील (Indian Penal Code) (१८६० च ४५ वा कायदा) अथवा त्या वेळी अमलात असलेल्या अन्य कोणत्याही कायद्याच्या तरतुदींखाली कोणत्याही गुन्ह्यासाठी दोषी मानला जाणार नाही."

- जर स्थळ पंजीकृत असेल आणि डॉक्टर एमटीपी करण्याकरिता क्वालिफ़ाईड असेल, म्हणजेच जर तो एमडी वा डीजीओ (in obst आणि स्त्रीरोग), किंवा एमबीबीएस असून त्याने एमटीपी करण्याचे प्रशिक्षण घेतले असेल आणि सी फॉर्ममध्ये सहमती घेतलेली असेल तर त्याला दोषांविरुद्ध कलम ३चे संरक्षण मिळते.
- पंजीकरणाच्या सर्टिफिकेटमध्ये परवानगी दिलेल्या आठवड्यांपर्यंत डॉक्टर एमटीपी करू शकतो.
- कायदेशीर अधिकार प्राप्त नसलेली कॉणीही व्यक्ति एमटीपी करण्यासंबंधीची कागदपत्रे तपासू शकत नाही कारण ती गुप्त स्वरूपाची कागदपत्रे असतात.

एमटीपी कायद्याखाली शिक्षेच्या तरतुदी

कृती	दंडनीय व्यक्ति	दंड
पंजीकृत डॉक्टर नसलेल्या व्यक्तीने गर्भपात करणे	एमटीपी करणारी व्यक्ति	२ ते ७ वर्षपर्यंत सश्रम कारावास
पंजीकृत नसलेल्या स्थळी गर्भपात करणे	एमटीपी करणारी व्यक्ति (आरपीएम / नॉन आरपीएम) आणि जागेचे मालक	२ ते ७ वर्षपर्यंत सश्रम कारावास
नोंदी करण्यात अथवा कागदपत्रे सुरक्षित ठेवण्यात त्रुटी अथवा कायद्याच्या कलम ७(१) प्रमाणे मध्यवर्ती सरकारने जारी केलेल्या कोणत्याही नियमांचे पालन न करणे.	असे करण्यास असमर्थ ठरलेली व्यक्ति	रु. १,000/- पर्यंत दंड

- सर्व सरकारी इस्पितळे एमटीपी कायद्याखाली आपोआप पंजिकृत आहेत.
- एमटीपी कायद्यामध्ये गुन्ह्याचा स्वत:हून दखल घेण्याचा उल्लेख नाही.
- जर डॉक्टरला एमटीपी कायद्याखाली संरक्षण प्राप्त नसेल तर त्याच्यावर / तिच्यावर भा.द.सं. च्या ३१२-३१८ कलमांखाली गुन्हा नोंदविला जाऊ शकतो.
- काही शल्यक्रिया, जसे अपूर्ण गर्भपात, गर्भपात न करणे, निष्फळ बिजाणू एमटीपी सदरात मोडत नाहीत; त्यामुळे त्यावर इलाज करण्याकरिता जागेच्या पंजीकरणाची आवश्यकता नाही.

MEDICAL TERMINATION OF PREGNANCY ACT, 1971

Dr. Hitesh Bhatt
MBBS, MD, PGDLMS

MTP Act

Police has to check following before taking action against a doctor

- Section 3 of MTP act mentions

Section 3 (1) When pregnancies may be terminated by registered medical practitioners

"Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act."

- So if Place is registered and doctor is qualified to do MTP that means if doctor is MD, or DGO in obstetrics and gynecology, or an MBBS with training for MTP and consent in form C is signed, then he can do MTP and he gets protection under section 3 from criminal charges.
- Doctor can perform MTP up to the weeks for which the permission is granted on certificate of registration.
- No one without authority of law can check MTP recorded because these are secret documents.

Provision of penalty under MTP act

ACTION	PERSON PUNISHED	PUNISHMENT
Termination of pregnancy by a person who is not a registered medical practitioner	The person doing MTP	Rigorous imprisonment for 2 to 7 yrs
Termination of pregnancy at non registered place	The person doing MTP (RPM/Non RMP) and Owner of the place	Rigorous imprisonment for 2 to 7 yrs
Deficiency in record keeping or failure to comply with the requirements of any regulation made under section 7 (1) by the central Govt	Person who fails to do so	Fine up to 1000/- rupees

- All Govt. hospitals are automatically registered under MTP act
- There is no mention about cognizance of an offense in MTP act.
- If doctor does not have protection under MTP act then a case can be filed against him/her under IPC section 312 -318.
- Some procedures like incomplete abortion, missed abortion, blighted ovum do not fall under MTP category and doctors do not need registration of the place to treat the same.

MEDICAL TERMINATION OF PREGNANCY ACT, 1971

[Act, No. 34 of 1971]

PREAMBLE

An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:-

Section 1 - Short title, extent and commencement

(1) This Act may be called the Medical Termination of Pregnancy Act, 1971.
(2) It extends to the whole of India except the State of Jammu and Kashmir.
(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

1. Enforcement date of the Act in the State of Sikkim as per Notification No. SO997(E) is 19.06.2007

Section 2 - Definitions

In this Act, unless the context otherwise requires,-

(a) "Guardian" means a person having the care of the person of a minor or a [mentally ill person].

(b) "Mentally ill person" means a person who is in need of treatment by reason of any mental disorder other than mental retardation.

(c) "Minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority.

(d) "registered medical practitioner" means a medical practitioner who possesses any recognised medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956), whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics as may be prescribed by rules made under this Act.

(1) Words "lunatic"" Substituted by The Medical Termination Of Pregnancy (Amendment) Act, 2002 (64 Of 2002) w.e.f. 18.06.2003.

(2) Clause "b" Substituted by The Medical Termination Of Pregnancy (Amendment) Act, 2002 (64 Of 2002) w.e.f. 18.06.2003. Prior to substitution it read as under:

(b) "lunatic" has the meaning assigned to it in section 3 of the Indian Lunacy Act, 1912 (4 of 1912).

Section 3 - When pregnancies may be terminated by registered medical practitioners

(1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub- section (4), a pregnancy may be terminated by a registered medical practitioner,-

(a) Where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(b) Where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion formed in good faith, that-

(I) The continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) There is a substantial risk that if the child were born, it would be suffer form such physical or mental abnormalities as to be seriously handicapped.

Explanation 1- Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2 - Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub- section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a [mentaly ill person], shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

1. Words "lunatic"" Substituted by The Medical Termination Of Pregnancy (Amendment) Act, 2002 (64 Of 2002) w.e.f. 18.06.2003

Section 4 - Place where pregnancy may be terminated

4. Place where pregnancy may be terminated

No termination of pregnancy shall be made in accordance with this Act at any place other than

(a) A hospital established or maintained by Government, or

(b) A place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee:

Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to time.

1. Substituted by The Medical Termination Of Pregnancy (Amendment) Act, 2002 (64 Of 2002) w.e.f 18.06.2003. Prior to substitution it read as under:

4. Place where pregnancy may be terminated.

No termination of pregnancy shall be made in accordance with this Act at any place other than-

(a) A hospital established or maintained by Government , or

(b) A place for the time being approved for the purpose of this Act by Government**.** "

Section 5 - Sections 3 and 4 when not to apply

(1) The provisions of section 4, and so much of the provisions of sub **-** section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy boy a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman**.**

(2) Notwithstanding anything contained in the Indian Penal Code, the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

(3) Whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

(4) Any person being owner of a place which is not approved under clause (6) of section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

Explanation 1- For the purposes of this section, the expression "owner" in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act.

Explanation 2 - For the purposes of this section, so much of the provisions of clause (d) of section 2 as relate to the possession, by registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply.

(1) Substituted by The Medical Termination of Pregnancy (Amendment) Act, 2002 (64 Of 2002) w.e.f 18.06.2003. Prior to substitution it read as under:

(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of a pregnancy by a person who is not a registered medical practitioner shall be an offence punishable under that Code, and that Code shall, to this extent, stand modified**.**

Explanation - For the purposes of this section, so much of the provisions of clause (d) of section 2 as relate to the possession, by a registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply."

Section 6 - Power to make rules

(1) The central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act**.**

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters namely-

(a) The experience or training, or both, which a registered medical practitioner shall have if he intends to terminate any pregnancy under this Act; and

(b) Such other matters as are required to be or may be, provided by rules made under this Act**.**

(3) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two

successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Section 7 - Power to make regulations

(1) The State Government may, by regulations,-

(a) require any such opinion as is referred to in sub-section (2) of section 3 to be certified by a registered medical practitioner or practitioners concerned, in such form and at such time as may be specified in such regulations, and the preservation or disposal of such certificates;

(b) require any registered medical practitioner, who terminates a pregnancy, to give intimation of such termination and such other information relating to the termination as may be specified in such regulations;

(c) prohibit the disclosure, except to such persons and for such purposes as may be specified in such regulations, of intimations given or information furnished in pursuance of such regulations.

(2) The intimation given and the information furnished in pursuance of regulations made by virtue of clause (b) of sub-section **(1)** Shall be given or furnished, as the case may be, to the Chief Medical Officer of the State.

(3) Any person who wilfully contravenes or wilfully fails to comply with the requirements of any regulation made under sub-section (1) shall be liable to be punished with fine which may extend to one thousand rupees.

Section 8 - Protection of action taken in good faith

No suit or other legal proceedings shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act.

Amending Act 1 - MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2002

THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) ACT, 2002

[Act, No. 64 of 2002]

PREAMBLE

An Act to amend the Medical Termination of Pregnancy Act, 1971.
BE it enacted by Parliament in the Fifty-third Year of the Republic of India as follows:–

1. Short title and Commencement

(1) This Act may be called the Medical Termination of Pregnancy (Amendment) Act, 2002.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

1. Date appointed is 18.06.2003 vide Notification No. SO 704(E) Dated 18.06.2003

2. Amendment of section 2

In section 2 of the Medical Termination of Pregnancy Act, 1971 (34 of 1971) (hereinafter referred to as the principal Act),-

(i) in clause (a), for the word "lunatic", the words "mentally ill person" shall be substituted;

(ii) for clause (b), the following clause shall be substituted, namely:-

(b) "mentally ill person" means a person who is in need of treatment by reason of any mental disorder other than mental retardation;'.

3. Amendment of section 3

In section 3 of the principal Act, in sub-section (4), in clause (a), for the word "lunatic", the words "mentally ill person" shall be substituted.

4. Substitution of new section for section 4

For section 4 of the principal Act, the following section shall be substituted, namely: -

4. Place where pregnancy may be terminated

No termination of pregnancy shall be made in accordance with this Act at any place other than

(a) A hospital established or maintained by Government, or

(b) A place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee:

Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to time".

5. Amendment of section 5

In section 5 of the principal Act, for sub-section (2) and the Explanation thereto, the following shall be substituted, namely:-

(2) Notwithstanding anything contained in the Indian Penal Code, the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

(3) Whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

(4) Any person being owner of a place which is not approved under clause (6) of section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

Explanation1 - For the purposes of this section, the expression "owner" in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act.

Explanation2 - For the purposes of this section, so much of the provisions of clause (d) of section 2 as relate to the possession, by registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply.

पॉक्सो कायदा

Dr. Ashok Shukla
MBBS, DNB, FCPS, DGO, DFP, LLB

हा कायदा संपूर्ण भारतामध्ये लागू असून तो १८ वर्षाखालील बालकांना लैंगिक गुन्ह्यांपासून संरक्षण देतो.

घटनांची तक्रार नोंदणी, बयाण नोंदणी, वैद्यकीय तपासणी ई. बाबत.

पॉक्सो कायद्यातील व्यवस्था :

पॉक्सो कायदा (लैंगिक गुन्ह्यापासून मुलांचे संरक्षण कायदा २०१२) बालकांविरुद्ध होणाऱ्या पाच लैंगिक गुन्ह्यांचे वर्णन करीतो. ते म्हणजे - penetrative sexual assault (लैंगिक शिरकावी हल्ला), aggravated penetrative sexual assault (अधिक दु:सह लैंगिक शिरकावी हल्ला), sexual assault (लैंगिक हल्ला), aggravated sexual assault (अधिक दु:सह लैंगिक हल्ला), sexual harassment (लैंगिक छळ), आणि using a child for pornographic purposes (बालकांचा पोर्नोग्रफीसाठी वापर). वरील गुन्हे करण्यासोबतच वरील गुन्हे करण्याचा प्रयत्न करणे व वरील गुन्हे करण्यास मदत करणे वा प्रोत्साहन देणेदेखील या कायद्यांतर्गत दंडनीय आहे. हा कायदा गुन्हेगार (शिरकाव करणारा) व गुन्ह्याचा बळी यांमध्ये लिंगभेद करीत नाही.so punishable under the Act.These offences are genderneutral vis-à-vis the perpetrator as well as the victim.

गुन्ह्यांची तक्रार करणे :

गुन्ह्यांची तक्रार कोण करु शकतो ?

ज्या कोणा व्यक्तीला (यात बालकदेखिल सामील आहे) या कायद्यांतर्गत गुन्हा घडण्याची शक्यता असल्याचे कळते अथवा या कायद्यांतर्गत गुन्हा घडला असल्याचे कळते, त्याच्यावर अश्या गुन्ह्याची तक्रार करण्याची अनिवार्य जबाबदारी आहे. अशीच तक्रार करण्याची स्पष्ट जबाबदारी प्रसारमाध्यमे, हॉटेल, लॉज, इस्पितळे, क्लब, स्टुडिओ, छायाचित्रणाची सोय असलेली स्थळे, ई. ठिकाणी काम करणारे कर्मचारी, यांच्यावर, जर त्यांना बालकांचे लैंगिक शोषण करण्याजोग्या वस्तु अथवा साहित्य आढळून आले तर, ठेवण्यात आली आहे.

तक्रार न करणे हे सहा महिन्यांपर्यंतचा कारावास अथवा दंड किंवा दोन्हीही प्रकारे दंडनीय आहे. ही तरतूद बालकांना लागू नाही.

तक्रार कोणाकडे करावयाची ?

या कायद्यांतर्गत तक्रार ही विशेष अल्पवयीन पोलीस युनिट (एसजेपीयू) अथवा स्थानिक पोलिसांकडे करावयाची आहे. पोलिस वा एसजेपीयू यांनी तक्रार लेखी नोंदवून घेऊन, त्याला एन्ट्री क्रमांक देऊन बातमी देणाऱ्यास त्याच्या सत्यतेसाठी वाचून दाखविण्याची आहे आणि त्यानंतर त्याची रजिस्टरमध्ये नोंद करावयाची आहे. प्रथम माहिती अहवाल (एफआयआर) नोंदविणे अनिवार्य असून त्याची एक प्रत माहिती देणाऱ्यास / तक्रार करणाऱ्यास विनामूल्य द्यावयाची आहे.

तक्रारीची भाषा :

जर प्रकरणाची माहिती बालक स्वत: देत असेल तर ती शब्दश: व सोप्या भाषेत नोंदली जावी जेणेकरुन काय लिहिले / नोंदले जात आहे हे त्या बलकाला कळू शकेल. जर ते त्या मुलाला न कळणाऱ्या भाषेत नोंदले जात असेल तर त्या बालकाला एक पात्रता प्राप्त दुभाषी अथवा अनुवादक सहाय्यक म्हणून दिला गेला पाहिजे.

"मार्गदर्शन आणि प्रोटोकॉल, लैंगिक हिंसेपासून वाचलेले / बळी यांच्यासाठी वैद्यकीय कायदेशीर काळजी, आरोग्य आणि कुटुंब कल्याण मंत्रालय, भारत सरकार, २०१४"
या मार्गदर्शक पुस्तिकेद्वारे भारत सरकारच्या आरोग्य आणि कुटुंब कल्याण मंत्रालयाने या बाबतीत आरोग्य व्यवस्था आणि पोलिस यांच्या दरम्यान समन्वयासाठी खालील सूचना केल्या आहेत:

- स्वास्थ्य व्यवस्था आणि पोलिस यांच्यातील समन्वयासाठी एक प्रमाणीत कार्यपध्दती, निश्चित व्यवहार व्यवस्था, असणे अत्यंत महत्वाचे आहे. जेव्हा कोणी अश्या प्रकारच्या गुन्ह्यांचा पीडित पोलिसांकडे तक्रार करतो तेव्हा पोलिसांने त्याला / तिला वैद्यकीय तपासणीसाठी, आणि आवश्यक त्या उपचारांसाठी जवळच्या जवळ आरोग्य केंद्रात नेणे आवश्यक आहे. वैद्यकीय तपासणी आणि उपचार यात झालेला विलंब त्याच्या आरोग्याला अतिशय हानीकारक होऊ शकतो.
- वैद्यकीय व्यावसाईकांनी अशा व्यक्तीस त्याची त्या केंद्रावर येण्याआधी इतर कोठे वैद्यकीय तपासणी झाली आहे का याची चौकशी करावी व जर अशी तपासणी झाली असेल तर त्याचे रिपोर्ट सोबत आणले आहेत का ते विचारावे. जर अशी तपासणी झाली असेल आणि त्याची कागदपत्रे उपलब्ध असतील तर त्यांची केवळ पोलीसांनी तशी विनंती केली याच एक कारणासाठी पुन्हा तपासणी करु नये व पुन्हा तपासणी का करीत नाही याचे कारण त्यांना समजाऊन सांगावे.
- आरोग्य विभागाला या प्रकारामध्ये उपचार करण्याची भूमिका आहे आणि त्यांनी महितीची गोपनीयता आणि संपूर्ण तपासणी आणि उपचारादरम्यान संपूर्ण एकांत उपल्ब्ध करून देणे महत्वाचे आहे.
- त्याच्या / तिच्याकडून लैंगिक गुन्ह्याची माहीती मिळवतांना, वैद्यकीय परिक्षण करीत असतांना, पुरावे गोळा करीत असतांना आणि उपचारांसंबधी महिती विचारत असतांना पोलिस त्या स्थळी उपस्थित असू नये.
- पोलीस वैद्यकीय व्यावसाईकांच्या कर्तव्यात ढवळाढवळ करू शकत नाहीत. पुरावे गोळा केल्याबरोबर ताबडतोब ते (पोलिस) पिडीताला घेऊन जाऊ शकत नाहीत. त्यांनी उपचार आणि त्याची / तिची पुरेशी काळजी घेतली जाईपर्यंत वाट पहावी.
- पोलिसांनी आणलेला/ली पीडित/ता जर एकटा/टी असेल तर त्याच्या / तिच्या मेडिको - लीगल फ़ॉर्मवर साक्षीदार म्हणून पोलिसांच्या स्वाक्षऱ्या मागू नयेत. ही व्यवस्था

त्या पीडीताच्या भल्यासाठी आहे. पोलीसांच्या 'बलात्कार झाला आहे का?", 'पीडीत व्यक्ति समागम / संभोगास सक्षम आहे का?", किंवा 'ही व्यक्ति समागम / संभोग करण्यास सक्षम आहे का?" अशा प्रश्नांना उत्तरे देऊ नयेत. त्यांनी मेडीको-लीगल पुराव्याचे स्वरूप, त्याच्या मर्यादा आणि तपासणी करणाऱ्या डॉक्टरची तज्ञ साक्षीदार म्हणून भूमिका त्यांना समजाऊन सांगावी.

या कायद्यात समाविष्ट असलेले लैंगिक अपराध आणि त्यांच्यासाठीच्या शिक्षा

अनु.	अपराध आणि त्याचे वर्णन	शिक्षा
१.	**कलम ३:** **शिरकावी लैंगिक हल्ला** शरीराचा भाग अथवा वस्तु बालकाच्या शरीरात घुसविणे, अथवा एका बालकाला दुसऱ्या बालकाच्या शरीरात घुसविण्यास भाग पाडणे.	**कलम ४** किमान सात वर्षे कारावास, जो आजन्म कारावासापर्यंतही वाढवला जाऊ शकतो, आणि दंड.
२.	**कलम ५:** **दुस्सह शिरकावी लैंगिक हल्ला** पोलिस अधिकारी, सेनेतील कर्मचारी, पब्लिक सर्व्हंट, सुधारगृह, तुरुंग, इस्पितळे, अथवा शाळा यांचे कर्मचारी यांनी केलेला शिरकावी लैंगिक हल्ला. यात अन्य कोणाही व्यक्तीने घातक शस्त्रे, अग्नी, तापविलेल्या वस्तु, नष्ट करणाऱ्या रासायनिक वस्तु, ज्यामुळे बालकाला शारीरिक नुकसान होते अथवा तो मानसिक रोगाने ग्रस्त होऊ शकतो असा शिरकावी लैंगिक हल्ला करणे, गंभीर दुखापत, शारीरिक ईजा, जननेन्द्रियांना दुखापत, बालिकेला गर्भवती करणे, बालकाला HIV अथवा अन्य कोणत्याही जीवनास घातक अश्या रोगाची लागण करणे, १२ वर्षाखालील बालकावर नातेवाईकाने, त्या बालकास सेवा पुरविणाऱ्या संस्थेच्या मालकाने / मॅनेजरने किंवा कर्मचारी यांनी, बालकाच्या विश्वासातील अथवा त्याच्यावर हुकुमत गाजवू शकेल अश्या व्यक्तिने शिरकावी लैंगिक हल्ला करणे, ती बलिका गर्भवती आहे हे माहीत असुनही तिच्यावर शिरकावी लैंगिक हल्ला करणे, पूर्वी लैंगिक गुन्ह्यासाठी शिक्षा झालेल्य व्यक्तिने बालकाच्या हत्येचा प्रयत्न करणे, सांप्रदायीक अथवा पंथिक दंग्यादरम्यान शिरकावी लैंगिक हल्ला करणे, बालकास नागवे करणे अथवा त्या/तीची नागवी धींड काढणे या कृत्यांचाही समावेश होतो.	**३. कलम ६** किमान १० वर्षे कारावास जो आजन्म कारावासापर्यंतही वाढवला जाऊ शकतो, आणि दंड
३.	**कलम ७:** **लैंगिक हल्ला** लैंगिक हेतूने बालकाच्या गुप्तांगांना स्पर्श करणे.	**कलम ८** किमान ३ वर्षे कारावास जो ५ वर्षांपर्यंत वाढवला जाऊ शकतो, आणि दंड
४.	**कलम ९:** **दुस्सह लैंगिक हल्ला** पोलिस अधिकारी, सैनिक दलातील कर्मचारी, पब्लिक सर्व्हंट, सुधारगृह, तुरुंग, इस्पितळे, अथवा शाळा यांचे कर्मचारी यांनी केलेला लैंगिक हल्ला आणि कलम ५ च्या दुसऱ्या भागामध्ये नमूद केलेलया व्यक्तीने केलेल्या लैंगिक हल्ल्याची इतर कृत्ये (बलिकेस गर्भवती करणे वगळून)	**कलम १०** किमान ५ वर्षे कारावास जो ७ वर्षांपर्यंत वाढवला जाऊ शकतो, आणि दंड.
५.	**कलम ११:** लैंगिक उद्देशाने बालकाचे लैंगिक छळ • एखादी वस्तु अथवा शरीराचा भाग दाखवणे, किंवा • बालकाला उद्देशून इशारा करणे • बालिकेला तिचे शरीर दाखविण्यास भाग पाडणे पॉर्नोग्राफीसाठी वापर करण्यासाठी बालकाला अमिष दाखवणे अथवा धाकदपटशा	**कलम १२** तीन वर्षांपर्यंत कारावास आणि दंड

६.	**कलम १३:** पॉर्नोग्राफीसाठी बालकांचा वापर	**कलम १४(१)** पाच वर्षांपर्यंत कारावास आणि दंड; पुन्हा तोच गुन्हा केल्यास सात वर्षांपर्यंत कारावास आणि दंड
७.	**कलम १४(२):** पॉर्नोग्राफिक कृत्यात प्रत्यक्ष भाग घेऊन शिरकावी लैंगिक हल्ला	**कलम १४(२)** किमान १० वर्षे कारावास जो आजन्म कारावासापर्यंत वाढवला जाऊ शकतो, आणि दंड.
८.	**कलम १४(३):** पॉर्नोग्राफिक कृत्यात प्रत्यक्ष भाग घेऊन दुस्सह शिरकावी लैंगिक हल्ला	**कलम १४(३)** आजन्म सश्रम कारावास आणि दंड.
९.	**कलम १४(४):** पॉर्नोग्राफिक कृत्यात प्रत्यक्ष भाग घेत असतांना लैंगिक हल्ला	**कलम १४(४)** किमान सहा वर्षे कारावास जो ८ वर्षांपर्यंत वाढवला जाऊ शकतो, आणि दंड
१०.	**कलम १४(५):** पॉर्नोग्राफिक कृत्यात प्रत्यक्ष भाग घेत असतांना दुस्सह लैंगिक हल्ला	**कलम १४(५)** किमान आठ वर्षे कारावास जो १० वर्षांपर्यंत वाढवला जाऊ शकतो आणि दंड.
११.	**कलम १५:** व्यावसाईक उपयोगासाठी बालकांचा वापर असलेले पॉर्नोग्राफिक साहित्याचा साठा करणे	**कलम १५** तीन वर्ष कारावास आणि / किंवा दंड
१२.	**कलम २१:** गुन्ह्याची खबर न देणे (रिपोर्ट न करणे) अथवा केस रेकॉर्ड न करणे (१) कोणत्याही व्यक्तिने; (२) एखाद्या कंपनी अथवा संस्थेच्या प्रमुख (इन चार्ज) असलेल्या कोणत्याही व्यक्तीने (हा गुन्हा बालकाला लागू नाही)	**कलम २१** (१) कमाल ६ महिनेपर्यंत साधा अथवा सश्रम कारावास अथवा दंड अथवा दोन्हीही. (२) कोणीही व्यक्ति, जी एखाद्या कंपनी किंवा संस्थेची इन चार्ज आहे (पदनाम कोणतेही असले तरी), जर त्याच्या हाताखालील व्यक्तीच्या बबतीत कलम १९(१) मध्ये वर्णन केलेल्या प्रकारचा गुन्हा घडला असल्याची तक्रार करण्यात चुकेल तर त्याला एक वर्षापर्यंत कारावास आणि दंड अशी शिक्षा होईल.
१३.	**कलम २२:** खोटी तक्रार / महिती (१) कलम ३, ५, ७ आणि ९ खाली घडलेल्या गुन्ह्यांबद्दल निव्वळ अपमानित करण्यासाठी, पैसे उकळण्यासाठी, धमकवण्यासाठी किंवा बदनामी करण्यासाठी खोटी तक्रार करणे / महिती देणे (२) एखाद्या बालकाविरुद्ध प्रस्तुत कायद्यातील कोणत्याही गुन्ह्याबाबत खोटी तक्रार / महिती, ती तक्रार वा महिती खोटी आहे हे माहीत असूनसुद्धा, देऊन त्यास फसविणे (ही तरतूद बालकांना लागू नाही)	**कलम २२** १. कमाल सहा महिन्यांपर्यंत कारावास अथवा दंड अथवा दोन्ही. २. कमाल एक वर्ष पर्यंत कारावास अथवा दंड अथवा दोन्ही.

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

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This act is applicable to the whole of India and provides protection to children under the age of 18 years against sexual offences.

Procedure for reporting of cases, recording of statement of child, medical examination, etc

Procedures under POCSO Act
The Protection of Children from Sexual Offences Act, 2012 (POCSO Act) prescribes
five sexual offences against children - penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, aggravated sexual assault, sexual harassment, and using a child for pornographic purposes. Abetment of or an attempt to commit these offences is also punishable under the Act. These offences are gender neutral vis-à-vis the perpetrator as well as the victim.

Reporting of Cases
Who can report?
Any person (including the child) who has an apprehension that an offence under the POCSO Act is likely to be committed or has knowledge that an offence has been committed has a mandatory obligation to report the matter. An express obligation has also been vested upon media personnel, staffs of hotels, lodges, hospitals, clubs, studios or photographic facilities, to report a case if they come across materials or objects that are sexually exploitative of children.

Failure to report is punishable with imprisonment of up to six months or fine or both.
This penalty is, however, not applicable to a child.

Whom should the case be reported do?
A case must be reported to the Special Juvenile Police Unit (SJPU) or the local police. The police or the SJPU must then record the report in writing, ascribe an entry number, read the report over to the informant for verification, and enter it in a book. A FIR must be registered and its copy must be handed to the informant free of charge.

Language of the report
If a case is reported by a child, it must be recorded verbatim and in simple language so that the child understands what is being recorded. If it is being recorded in a language that the child does not understand, a qualified translator or interpreter must be provided to the child.

- As per the document "Guidelines & Protocol, Medical-legal Care for Survivors/Victims of Sexual Violence", Ministry of Health & Family Welfare, Government of India, 2014, the following guidelines have been suggested in order to forge an interface of health system with police:

- A standard operating procedure outlining the interface between the police and health systems is critical. Whenever a survivor reports to the police, the police must take her/ him to the nearest health facility for medical examination, treatment and care. Delays related to the medical examination and treatment can jeopardize the health of the survivor.

- Health professionals should also ask survivors whether they were examined elsewhere before reaching the current health set up and if survivors are carrying documentation of the same. If this is the case, health professionals must refrain from carrying out an examination just because the police have brought a requisition and also explain the same to them.

- The health sector has a therapeutic role and confidentiality of information and privacy in the entire course of examination and treatment must be ensured. The police should not be present while details of the incident of sexual violence, examination, evidence collection and treatment are being sought from the survivor.

- The police cannot interface with the duties of a health professional. They cannot take away the survivor immediately after evidence collection but must wait until treatment and care is provided.

- In the case of unaccompanied survivors brought by the police for sexual violence examination, police should not be asked to sign as witness in the medico legal form. In such situations, a senior medical officer or any health professional should sign as witness in the best interest of the survivor.

- Health professionals must not entertain questions from the police such as "whether rape occurred", "whether survivor is capable of sexual intercourse" "whether the person is capable of having sexual intercourse". They should explain the nature of medico legal evidence, its limitations as well as the role of examining doctors as expert witnesses.

Types of sexual offences covered under the Act and punishments there of *List of sexual offences under the Act and the punishment for the offences:*

Sr. No.	Offence and Description	Punishment
1	**Section 3** **Penetrative Sexual Assault** Inserting body part or object in a child, or making a child do this with another.	**Section 4** Not less than seven years of imprisonment which may extend to imprisonment for life, and fine
2	**Section 5** **Aggravated Penetrative Sexual Assault** Penetrative sexual assault by a police officer, member of armed forces, public servant, staff of remand home, jail, hospital or school. It includes penetrative sexual assault committed by any other person through gang penetrative assault, penetrative sexual assault using deadly weapons, fire, heated substance or corrosive substance, penetrative sexual assault which physically incapacitates the child or causes child to become mentally ill, causing grievous hurt or bodily harm and injury to the sexual organs of the child, making girl child pregnant, inflicting child with HIV or any other life threatening disease, penetrative sexual assault more than once, penetrative sexual assault on a child younger than 12 years, by a relative, owner / manager or staff of any institution providing services to the child, by a person in a position of trust or authority over the child, committing penetrative sexual assault knowing the child is pregnant, attempts to murder the child, by a person previously convicted for a sexual offence, penetrative sexual assault in the course of communal or sectarian violence, penetrative sexual assault and making the child strip or parade naked in public.	**Section 6** Not less than ten years of imprisonment which may extend to imprisonment for life, and fine
3	**Section 7** **Sexual Assault** With sexual intent touching the private parts of a child	**Section 8** Not less than three years of imprisonment which may extend to five years, and fine
4	**Section 9** **Aggravated Sexual Assault** Sexual assault by a police officer, member of armed forces, public servant, staff of remand home/ jail/ hospital/ school, etc, and other acts of sexual assault by any person as mentioned in the second part of section 5, except making a girl child pregnant.	**Section 10** Not less than five years of imprisonment which may extend to seven years, and fine (Section 10)

5	**Section 11** Sexual Harassment of the Child With sexual intent: • showing any object/ body part, or • making any gesture aimed at a child • making a child exhibit her body • enticing or threatening to use a child for pornography	**Section 12** Up to three years of imprisonment and fine
6	**Section 13** Use of Child for Pornographic Purposes	**Section 14 (1)** Imprisonment up to five years and fine and in the event of subsequent conviction, up to seven years and fine
7	**Section 14 (2)** Penetrative sexual assault by directly participating in pornographic acts	**Section 14 (2)** Not less than ten years of imprisonment, which may extend to imprisonment for life and fine
8	**Section 14 (3)** Aggravated penetrative sexual assault by directly participating in pornographic acts	**Section 14 (3)** Rigorous imprisonment for life and fine
9	**Section 14 (4)** Sexual assault by directly participating in pornographic acts	**Section 14 (4)** Not less than six years of imprisonment which may extend to eight years and fine
10	**Section 14 (5)** Aggravated sexual assault by directly participating in pornographic acts	**Section 14 (5)** Not less than eight years of imprisonment which may extend to ten years and fine
11	**Section 15** Storage of pornographic material involving a child for commercial purposes	**Section 15** Three years of imprisonment and /or fine
12	**Section 21** Punishment for failure to report or record a case by (i) Any person; (ii) Any person, being in charge of any company or an Institution. (This offence does not apply to a child)	**Section 21** (i) Imprisonment of either description which may extend to six months or with fine or with both (ii) Any person, being in charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub section (1) of section 19 in respect of a subordinate under his control shall be punished with imprisonment for a term which may extend to one year and with fine.
13	**Section 22** (1) Punishment for false complaint or false information in respect of an offence committed under sections 3, 5, 7 and section 9 solely with the intention to humiliate, extort or threaten or defame him. (2) False complaint or providing false information against a child knowing it to be false, thereby victimising such child in any of the offences under this Act. (This offence does not apply to a child)	**Section 22** (1) Imprisonment for a term which may extend to six months or with fine or with both. (3) Imprisonment which may extend to one year or with fine or with both.

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

Preamble - THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

[Act No. 32 of 2012]

PREAMBLE

An Act to protect children from offences of sexual assault, sexual harassment and pornography and provide for establishment of Special Courts for trial of such offences and for matters connected therewith or incidental thereto.

Whereas clause (3) of article 15 of the Constitution, inter alia, empowers the State to make special provisions for children;

And whereas, the Government of India has acceded on the 11th December, 1992 to the Convention on the Rights of the Child, adopted by the General Assembly of the United Nations, which has prescribed a set of standards to be followed by all State parties in securing the best interests of the child;

And whereas it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child;

And whereas it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child;

And whereas the State parties to the Convention on the Rights of the Child are required to undertake alt appropriate national, bilateral and multilateral measures to prevent-
(a) the inducement or coercion of a child to engage in any unlawful sexual activity;
(b) the exploitative use of children in prostitution or other unlawful sexual practices;
(c) the exploitative use of children in pornographic performances and materials;

And whereas sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed.

Be it enacted by Parliament in the Sixty-third Year of the Republic of India as follows:-

Section 1 - Short title, extent and commencement

(1) This Act may be called the Protection of Children from Sexual Offences Act, 2012.
(2) It extends to the whole of India, except the State of Jammu and Kashmir.
(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Section 2 - Definitions

(1) In this Act, unless the context otherwise requires, -

(a) "aggravated penetrative sexual assault" has the same meaning as assigned to it in section 5;

(b) "aggravated sexual assault" has the same meaning as assigned to it in section 9;

(c) "armed forces or security forces" means armed forces of the Union or security forces or police forces, as specified in the Schedule;

(d) "child" means any person below the age of eighteen years;

(e) "domestic relationship" shall have the same meaning as assigned to it in clause

(f) of section 2 of the Protection of Women from Domestic Violence Act, 2005 (43 of 2005);

(f) "penetrative sexual assault" has the same meaning as assigned to it in section 3;

(g) "prescribed" means prescribed by rules made under this Act;

(h) "religious institution" shall have the same meaning as assigned to it in the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988);

(i) "sexual assault" has the same meaning as assigned to it in section 7;

(j) "sexual harassment" has the same meaning as assigned to it in section 11;

(k) "shared household" means a household where the person charged with the offence lives or has lived at any time in a domestic relationship with the child;

(l) "Special Court" means a court designated as such under section 28;

(m) "Special Public Prosecutor" means a Public Prosecutor appointed under section 32.

Section 3 - Penetrative sexual assault

A person is said to commit "penetrative sexual assault" if-
(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mourn to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person

Section 4 - Punishment for penetrative sexual assault

Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

Section 5 - Aggravated penetrative sexual assault

(a) Whoever, being a police officer, commits penetrative sexual assault on a child-
(i) within the limits of the police station or premises at which he is appointed; or
(ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or
(iii) in the course of his duties or otherwise; or
(iv) where he is known as, or identified as, a police officer; or

(b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child-
(i) within the limits of the area to which the person is deployed; or
(ii) in any areas under the command of the forces or armed forces; or
(iii) in the course of his duties or otherwise; or
(iv) where the said person is known or identified as a member of the security or armed forces; or

(c) whoever being a public servant commits penetrative sexual assault on a child; or

(d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or

(e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or

(g) whoever commits gang penetrative sexual assault on a child.

Explanation - When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j) whoever commits penetrative sexual assault on a child, which—
(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (b) of section 2 of the Mental Health Act, 1987(14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or
(ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;
(iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or

(k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or

(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or

(m) whoever commits penetrative sexual assault on a child below twelve years; or

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or

(o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or

(p) whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or

(q) whoever commits penetrative sexual assault on a child knowing the child is pregnant; or

(r) whoever commits penetrative sexual assault on a child and attempts to murder the child; or

(s) whoever commits penetrative sexual assault on a child in the course of communal or sectarian violence; or

(t) whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or

(u) whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.

Section 6 - Punishment for aggravated penetrative sexual assault

Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

Section 7 - Sexual assault

Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

Section 8 - Punishment for sexual assault

Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

Section 9 - Aggravated sexual assault

(a) Whoever, being a police officer, commits sexual assault on a child
(i) within the limits of the police station or premises where he is appointed; or
(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or
(iii) in the course of his duties or otherwise; or
(iv) where he is known as, or identified as a police officer; or

(b) whoever, being a member of the armed forces or security forces, commits sexual assault on a child-
(i) within the limits of the area to which the person is deployed; or
(ii) in any areas under the command of the security or armed forces; or
(iii) in the course of his duties or otherwise; or
(iv) where he is known or identified as a member of the security or armed forces; or

(c) whoever being a public servant commits sexual assault on a child; or

(d) whoever being on the management or on the staff of a jail, or remand home or protection home or observation home, or other place of custody or care and protection established by or under any law for the time being in force commits sexual assault on a child being inmate of such jail or remand home or protection home or observation home or other place of custody or care and protection; or

(e) whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of an educational institution or religious institution, commits sexual assault on a child in that institution; or

(g) whoever commits gang sexual assault on a child.

Explanation - when a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(i) whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j) whoever commits sexual assault on a child, which-
(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987(14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or
(ii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or

(k) whoever, taking advantage of a child's mental or physical disability, commits sexual assault on the child; or

(l) whoever commits sexual assault on the child more than once or repeatedly; or

(m) whoever commits sexual assault on a child below twelve years; or

(n) whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child; or

(o) whoever, being in the ownership or management or staff, of any institution providing services to the child, commits sexual assault on the child in such institution; or

(p) whoever, being in a position of trust or authority of a child, commits sexual assault on the child in an institution or home of the child or anywhere else; or

(q) whoever commits sexual assault on a child knowing the child is pregnant; or

(r) whoever commits sexual assault on a child and attempts to murder the child; or

(s) whoever commits sexual assault on a child in the course of communal or sectarian violance; or

(t) whoever commits sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or

(u) whoever commits sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated sexual assault.

Section 10 - Punishment for aggravated sexual assault

Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

Section 11 - Sexual harassment

A person is said to commit sexual harassment upon a child when such person with sexual intent,

(i) utters any word or makes any sound, or makes any gesture or exhibits any object or part of body with the intention that such word or sound shall be heard, or such gesture or object or part of body shall be seen by the child; or

(ii) makes a child exhibit his body or any part of his body so as it is seen by such person or any other person; or

(iii) shows any object to a child in any form or media for pornographic purposes; or

(iv) repeatedly or constantly follows or watches or contacts a child either directly or through electronic, digital or any other

means; or

(v) threatens to use, in any form of media, a real or fabricated depiction through electronic, film or digital or any other mode, of any part of the body of the child or the involvement of the child in a sexual act; or

(vi) entices a child for pornographic purposes or gives gratification therefor. Explanation,--Any question which involves "sexual intent" shall be a question of fact.

Section 12 - Punishment for sexual harassment

Whoever, commits sexual harassment upon a child shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

Section 13 - Use of child for pornographic purposes

Whoever, uses a child in any form of media (including programme or advertisement telecast by television channels or internet or any other electronic form or printed form, whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes-

(a) representation of the sexual organs of a child;
(b) usage of a child engaged in real or simulated sexual acts (with or without penetration);
(c) the indecent or obscene representation of a child,
shall be guilty of the offence of using a child for pornographic purposes.

Explanation - For the purposes of this section, the expression "use a child" shall include involving a child through any medium like print, electronic, computer or any other technology for preparation, production, offering, transmitting, publishing, facilitation and distribution of the pornographic material.

Section 14 - Punishment for using child for pornographic purposes

(1) Whoever, uses a child or children for pornographic purposes shall be punished with imprisonment of either description which may extend to five years and shall also be liable to fine and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also be liable to fine

(2) If the person using the child for pornographic purposes commits an offence referred to in section 3, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(3) If the person using the child for pornographic purposes commits an offence referred to in section 5, by directly participating in pornographic acts, he shall be punished with rigorous imprisonment for life and shall also be liable to fine.

(4) If the person using the child for pornographic purposes commits an offence referred to in section 7, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than six years but which may extend to eight years, and shall also be liable to fine.

(5) If the person using the child for pornographic purposes commits an offence referred to in section 9, by directly participating in pornographic acts, he shall be punished with imprisonment of either description for a term which shall not be less than eight years but which may extend to ten years, and shall also be liable to fine.

Section 15 - Punishment for storage of pornographic material involving child

Any person, who stores, for commercial purposes any pornographic material in any form involving a child shall be punished with imprisonment of either description which may extend to three years or with fine or with both.

Section 16 - Abetment of an offence

A person abets an offence, who-

Firstly - Instigates any person to do that offence; or

Secondly - Engages with one or more other person or persons in any conspiracy for the doing of that offence, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that offence; or

Thirdly - Intentionally aids, by any act or illegal omission, the doing of that offence.

Explanation I - A person who, by wilful misrepresentation, or by wilful concealment of a material fact, which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that offence.

Explanation II - Whoever, either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Explanation III - Whoever employ, harbours, receives or transports a child, by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position, vulnerability or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of any offence under this Act, is said to aid the doing of that act.

Section 17 - Punishment for abetment

Whoever abets any offence under this Act, if the act abetted is committed in consequence of the abetment, shall be punished with punishment provided for that offence.

Explanation - An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy or with the aid, which constitutes the abetment.

Section 18 - Punishment for attempt to commit an offence

Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.

Section 19 - Reporting of offences

(1) Not withstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974), any person (including the child), who has apprehension that in offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,-
(a) the Special Juvenile Police Unit; or
(b) the local police.

(2) Every report given under sub-section (1) shall be-
(a) ascribed an entry number and recorded in writing;
(b) be read over to the informant;
(c) shall be entered in a book to be kept by the Police Unit

(3) Where the report under sub-section (1) is given by a child the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.

(4) In case contents, are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

(5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.

(6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.

(7) N o person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

Section 20 - Obligation of media, studio and photographic facilities to report cases

Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit, or to the local police, as the case may be.

Section 21 - Punishment for failure to report or record a case

(1) Any person, who fails to report the commission of an offence under subsection (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine.

(3) The provisions, of sub-section (7) shall not apply to a child under this Act.

Section 22 - Punishment for false complaint or false information

(1) Any person, who makes false complaint or provides false information against any person, in respect of an offence committed under sections 3, 5, 7 and section 9, solely with the intention to humiliate, extort or threaten or defame him, shall be punished with imprisonment for a term which may extend to six months or with fine or with both.

(2) Where a false complaint has been made or false information has been provided by a child, no punishment shall be imposed on such child.

(3) Whoever, not being a child, makes a false complaint or provides false information against a child, knowing it to be false, thereby victimising such child in any of the offences under this Act, shall be punished with imprisonment which may extend to one year or with fine or with both.

Section 23 - Procedure for media

(1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.

(2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child:

Provided mat for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

(3) The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee.

(4) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both.

Section 24 - Recording of statement of a child

(1) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.

(2) The police officer while recording the statement of the child shall not be in uniform.

(3) The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused.

(4) No child shall be detained in the police station in the night for any reason.

(5) The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child.

Section 25 - Recording of statement of a child by Magistrate

(1) If the statement of the child is being recorded under section 164 of the Code of Criminal Procedure, 1973(2 of 1974) (herein referred to as the Code), the Magistrate recording such statement shall, notwithstanding anything contained therein, record the statement as spoken by the child:

Provided that the provisions contained in the first proviso to sub-section (1) of section 164 of the Code shall, so far it permits the presence of the advocate of the accused shall not apply in this case.

(2) The Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code, upon the final report being filed by the police under section 173 of that Code.

Section 26 - Additional provisions regarding statement to be recorded

(1) The Magistrate or the police officer, as the case may be, shall record the statement as spoken by the child in the presence of the parents of the child or any other person in whom the child has trust or confidence.

(2) Wherever necessary, the Magistrate or the police officer, as the case may be, may take the assistance of a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, while recording the statement of the child.

(3) The Magistrate or the police officer, as the case may be, may, in the case of a child having a mental or physical disability, seek the assistance of a special educator or any person familiar with the manner of communication of the child or an expert in that field, having such qualifications, experience and on payment of such fees as may be prescribed, to record the statement of the child.

(4) Wherever possible, the Magistrate or the police officer, as the case may be, shall ensure that the statement of the child is also recorded by audio-video electronic means.

Section 27 - Medical examination of a child

(1) The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding mat a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973(2 of 1974).

(2) In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.

(3) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.

(4) Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution

Section 28 - Designation of Special Courts

(1) For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act:

Provided that if a Court of Session is notified as a children's court under the Commissions for Protection of Child Rights Act, 2005(4 of 2006) or a Special Court designated for similar purposes under any other law for the time being in force, then, such court shall be deemed to be a Special Court under this section.

(2) While trying an offence under this Act, a Special Court shall also try an offence [other than the offence referred to in sub-section (1)], with which the accused may, under the Code of Criminal Procedure, 1973(2 of 1974), be charged at the same trial.

(3) The Special Court constituted under this Act, notwithstanding anything in the Information Technology Act, 2000(21 of 2000), shall have jurisdiction to try offences under section 67B of that Act in so far as it relates to publication or transmission of sexually explicit material depicting children in any act, or conduct or manner or facilitates abuse of children online.

Section 29 - Presumption as to certain offences

Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved

Section 30 - Presumption of culpable mental state

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Explanation - In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.

Section 31 - Application of Code of Criminal Procedure, 1973 to proceedings before a Special Court

Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973(2 of 1974) (including the provisions as to bail and bonds) shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Sessions and the person conducting a prosecution before a Special Court, shall be deemed to be a Public Prosecutor

Section 32 - Special Public Prosecutors

(1) The State Government shall, by notification in the Official Gazette, appoint a Special Public Prosecutor for every Special

Court for conducting cases only under the provisions of this Act.

(2) A person shall be eligible to be appointed as a Special Public Prosecutor under sub-section (7) only if he had been in practice for not less than seven years as an advocate.

(3) Every person appointed as a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of clause (a) of section 2 of the Code of Criminal Procedure, 1973(2 of 1974) and provision of that Code shall have effect accordingly.

Section 33 - Procedure and powers of Special Court

(1) A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts.

(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the court.

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial.

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation - For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

(8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.

(9) Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973(2 of 1974) for trial before a Court of Session.

Section 34 - Procedure in case of commission of offence by child and determination of age by Special Court

(1) Where any offence under this Act is committed by a child, such child shall be dealt with under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000(56 of 2000).

(2) If any question arises in any proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination.

(3) No order made by the Special Court shall be deemed to be invalid merely by any subsequent proof that the age of a person as determined by it under sub-section (2) was not the correct age of that person.

Section 35 - Period for recording of evidence of child and disposal of case

(1) The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the

offence and reasons for delay, if any, shall be recorded by the Special Court.

(2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.

Section 36 - Child not to see accused at the time of testifying

(1) The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.

(2) For the purposes of sub-section (1), the Special Court may record the statement of a child through video conferencing or by utilising single visibility mirrors or curtains or any other device.

महाराष्ट्र वैद्यकीय सेवा व्यक्ती आणि वैद्यकीय सेवा संस्था (हिंसा आणि मालमत्ता नुकसान किंवा तोटा प्रतिबंधक) अधिनियम २०१०

Dr. Ashok Shukla
MBBS, DNB, FCPS, DGO, DFP, LLB

पोलिसांनी खालील विशेष बाबींची नोंद घ्यावी.

"वैद्यकीय सेवासंस्था" मध्ये सरकारी व खाजगी इस्पितळे, दवाखाने, रुग्णवाहिका, सुतिकागृहे, सुश्रुषा केन्द्रे, आरोग्य तपासणी केन्द्रे यांचा समावेश होतो.

वैद्यकीय सेवा दाता यामध्ये पंजीकृत वैद्यकीय डॉक्टर, पंजीकृत परिचारिक (का), वैद्यकीय विद्यार्थि, परिचारिका -विद्यार्थि, आणि पॅरामेडिकल कर्मचारी यांचा समावेश होतो.

वैद्यकीय सेवा दात्यांविरुद्ध हिंसक कृत्य करणे किंवा असे हिंसक कृत्य करण्यास इतरांस चिथवणे, किंवा वैद्यकीय सेवा संस्थांच्या मिळकतीस हानी अगर नुकसान करणे किंवा यापैकी कोणतेही कृत्य करण्याचा प्रयत्न करणे हा दखलपात्र आणि अजामीनपात्र गुन्हा असून त्याचा खटला judicial magistrate of the First class यांच्या समोर चालवला जाऊ शकतो. (कलम ५)

गुन्हेगारास तीन वर्षांपर्यंत कारावास आणि रु. ५०,000/- पर्यंत दंड अशी शिक्षा होऊ शकते. (कलम ४)
त्यासोबतच न्यायालयाच्या निर्धारणाप्रमाणे त्या व्यक्तिने त्या मिळकतीस जी हानी अथवा नुकसान केले असेल त्या रकमेच्या दुप्पट रकमेची नुकसान भरपाई देण्यासही जबाबदार राहील.

MAHARASHTRA MEDICARE SERVICE PERSONS AND MEDICARE SERVICE INSTITUTIONS (PREVENTION OF VIOLENCE AND DAMAGE OR LOSS TO PROPERTY) ACT, 2010

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Maharashtra Medicare Service Persons and Medicare Service Institutions (Prevention of Violence & Damage or Loss to Property) Act 2010

The Police should take note of the following salient features
Medicare Service Institutions includes government and private hospitals, clinics, ambulance, maternity and nursing homes as well as health check-up camps.

Medicare Service person includes Registered medical practitioner,Registered nurse, Medical Student, Nursing student and paramedical worker.

Any act ofViolence or attempt or incites any act of violence against a Medicare Service Person or damage or loss of property in a Medicare Service Institution will be cognizable and non bailable offence and triable by the court of judicial magistrate of the First class (Sec5)

The offender shall be punished with imprisonment which may extend to three years and with fine which may extend up to fifty thousand rupees (sec 4)
As well as be liable to pay compensation of twice the amount of damage or loss caused to the property as may be determined by the court.

MAHARASHTRA MEDICARE SERVICE PERSONS AND MEDICARE SERVICE INSTITUTIONS (PREVENTION OF VIOLENCE AND DAMAGE OR LOSS TO PROPERTY) ACT, 2010

Preamble - THE MAHARASHTRA MEDICARE SERVICE PERSONS AND MEDICARE SERVICE INSTITUTIONS (PREVENTION OF VIOLENCE AND DAMAGE OR LOSS TO PROPERTY) ACT, 2010

THE MAHARASHTRA MEDICARE SERVICE PERSONS AND MEDICARE SERVICE INSTITUTIONS (PREVENTION OF VIOLENCE AND DAMAGE OR LOSS TO PROPERTY) ACT, 2010

[Act No. 11 of 2010]

PREAMBLE

An Act to provide for the, prevention of violence against Medicare Service Persons and prevention of damage or loss of property of, Medicare Service Institutions in the State of Maharashtra and for matters connected therewith or incidental' thereto.

WHEREAS acts of violence of causing injury or danger to life of Medicare Service Persons and damage or loss to the property of Medicare Service Institutions were on increase in the State creating unrest in Medicare Service Persons and professionals resulting in total, hindrance of such services in the State;

AND WHEREAS it had become necessary to provide for the prevention of violence against Medicare Service Persons and prevention of damage or loss of property of Medicare Service Institutions from such violent activities;

AND WHEREAS both Houses of the State Legislature were not in session;

AND WHEREAS the Governor of Maharashtra was satisfied that circumstances existed which rendered it necessary for him to take immediate action to make necessary provisions, for the purposes aforesaid; and, therefore, promulgated the Maharashtra Medicare Service Persons and Medicare Service Institution (Prevention of Violence and Damage or Loss to Property) Ordinance, 2010, on the 17th February 2010;

AND WHEREAS it is expedient to replace the said Ordinance by an Act of the State Legislature; it is hereby enacted in the Sixty-first Year of the Republic of India as follows:

Section 1 - Short title, extent and commencement

(1) This Act may be called the Maharashtra Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage or Loss to Property) Act, 2010.

(2) It extends to the whole of the State of Maharashtra.

(3) It shall be deemed to have come into force on the 17th February 2010.

Section 2 - Definitions

In this Act, unless the context otherwise requires,-

(a) "Medicare Service Institution" means an institution, providing Medicare service to people either in Medicare Service Institution or through Mobile Medicare Unit or by arranging medical check up camps, under the control of the State Government or the Central Government, or a local body including any private hospital having facilities. for treatment of the sick and used for their reception or stay in any private maternity home, where women are usually received and accommodated for the purpose of confinement and ante-natal and post-natal care in connection with the child birth or anything connected therewith and any private nursing home used or intended to be used for the reception and accommodation of person suffering from any sickness, injury or infirmity, whether of body or mind, and providing of treatment or nursing or both of them and includes convalescent home;

(b) "Medicare Service Person", in relation to Medicare Service Institution, shall include,-

(i) Registered Medical Practitioner, Practitioner or Registered Practitioner (including a person having provisional registration) working in a Medicare Service Institution other than the public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860).

(ii) Registered Nurse, registered under the Maharashtra Nurses Act, 1966 (Mah. XL of 1966), other than the public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860);

(iii) Medical Student;

(iv) Nursing Student; and (v) Para-Medical Worker and other member staff or worker directly or indirectly employed by a Medicare Service Institution for providing required services other than the public servant within the meaning of section 21 of the Indian Penal Code (45 of 1860).

Explanation - For the purpose of this Act, the expression Registered Medical Practitioner, Practitioner or Registered Practitioner, Nurse, shall have the same meanings, as assigned to them in the Maharashtra Medical Practitioners' Act, 1961 (Mah. XXVIII of 1961), the Maharashtra Medical Council Act, 1965 (Mah.XLVI of 1965), the Bombay Homoeopathic Practitioners' Act, 1959 (Bom.XII of 1960) and the Maharashtra Nurses Act, 1966 (Mah. XL of 1966);

(c) "Medical Student" means a student, who is undergoing training or studies in medical profession;

(d) "Mobile Medical Unit" means an ambulance equipped with medical equipment, used for providing Medicare services;

(e) "Nursing Student" means a student, who is undergoing training or studies in nursing profession;

(f) "Offender" means any person, who either by himself or as a member or leader of a group of persons or organization commits or attempts to commit or abets or incites the commission of violence under this Act;

(g) "Para-Medical Worker" means a person, who assists the Medicare Service Person providing Medicare services;

(h) "Property" means any property, movable or immovable or medical equipment or medical machinery owned by or in possession of, or under the control of any Medicare Service Person or Medicare Service Institution;

(I) "Violence" means an act, which causes or may cause any harm, injury or endangering the life of. or intimidation, obstruction or hindrance to, any Medicare Service Person in discharging his duty in a Medicare Service Institution or causing damage or loss to the property in a Medicare Service Institution.

Section 3 - Prohibition of violence

Any act of violence against a Medicare Service Person or damage or loss to the property in a Medicare Service Institution, shall be prohibited

Section 4 - Penalty

Any offender, who commits or attempts to commit or abets or incites the commission of any act of violence in contravention of the provisions of section 3, shall be punished with imprisonment which may extend to three years and with fine, which may extend to fifty thousand rupees.

Section 5 - Cognizance of offence

Any offence committed under this Act, shall be cognizable and non-bailable and triable by the Court of Judicial Magistrate of the First Class.

Section 6 - Liability to pay compensation for loss or damage caused to property

(1) In addition to the punishment specified in section 4, the offender shall be liable to pay compensation of twice the amount

of damage or loss caused to the property, as may be determined by the Court referred to in section 5.

(2) If the offender has not paid the compensation imposed under sub-section (1), the same sum shall be recovered as if it were an arrear of land revenue.

Section 7 - Authority to aid and advise victims of medical negligence

(1) The State Government shall, by notification in the Official Gazette, establish the Authority for the area as may be specified in such notification, to hear grievances of victims of medical negligence or mismanagement and to aid and advise such victims for taking recourse to an appropriate forum for suitable relief.

(2) The Authority shall consist of experts one each from the field of medical, law, consumer movement and health management.

(3) The conditions of service of the experts mentioned in sub-section (2), and the procedure to be followed by the Authority shall be such as may be specified by the State Government by an order in this behalf.

Section 8 - Act not in derogation of any other law

The provisions of this Act shall be in: addition to and not in derogation of, the provisions of any other law for the time being in force.

Section 9 - Repeal of Mah.Ord. I of 2010 and saving

(1) The Maharashtra Medicare Service Persons and Medicare Service Institutions (Prevention of Violence and Damage or Loss to Property) Ordinance, 2010 (Mah. Ord.I of 2010), is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken (including any notification or order issued) under the said Ordinance, shall be deemed to have been done, taken or issued, as the case may be, under the corresponding provisions of this Act.

पीएनडीटी कायदा

Dr. Hitesh Bhatt
MBBS, MD, PGDMLS

- **पीएनडीटी कायद्याच्या अंमलबजावणीत पोलिसांचा काहीही सहभाग नाही.**
- **पीएनडीटी कायद्याखालील गुन्हा हा दखलपात्र व अजामीनपात्र असून असंयुक्त असतो.**

कलम २८ -- गुन्ह्याची दखल

(१) खाली दर्शवलेल्यांपकी कोणी तक्रार केल्याखेरीज कोणतेही न्यायालय या कायद्याअंतर्गत गुन्ह्याची दखल घेणार नाही-

(अ) कोणी योग्य अधिकारी अथवा मध्यवर्ती अथवा राज्य सरकारने या कामाकरिता नियुक्त केलेला कोणी अधिकारी अथवा योग्य अधिकारी,

(ब) ज्याने योग्य अधिकाऱ्याला विहित पद्धतीप्रमाणे कथित गुन्ह्याची आणि त्यासंबंधात न्यायलयात तक्रार करण्याच्या उद्देशाची किमान १५ दिवसांची नोटिस दिली आहे.

(२) महन्गर दंडाधिकारी आणि जेएमएफसी (Judicial Magistrate of the First Class) याखेरीज अन्य कोणतेही न्यायालय प्रस्तुत कायद्याखाली खटला चालवणार नाही.

(३) उपकलम (१) (ब) अंतर्गत तक्रार केलेली असल्यास, आणि तक्रारकर्त्याने तशी विनंती केल्यास न्यायालय योग्य अधिकाऱ्यास अशा व्यक्तिस त्या अधिकाऱ्याजवळ उपलब्ध असलेल्या कागदपत्रांच्या प्रती देण्याचे निर्देश देऊ शकते.

योग्य अधिकाऱ्यांना सुचना केली जाते की शक्यतोवर पीएनडीटी च्या बाबींमध्ये (केसेसमध्ये) पोलिसांना सामील करु नये. पीएनडीटी नियम कलम १८ अ (३) iv पहा.

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

Dr. Hitesh Bhatt
MBBS, MD, PGDMLS

PNDT Act:

- **There is no role of police in implementation of PNDT Act**
- **The offense under PNDT is cognizable and non bailable, non compoundable**

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 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 l[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.

Appropriate authorities are instructed not to involve police in PNDT cases as far as possible as per PNDT Rules section 18A (3) iv.

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

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

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

[Act No. 57 of 1994]

PREAMBLE

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

BE it enacted by Parliament in the Forty-fifth Year of the Republic of India as follows:-

Section 1 - Short title, extent and commencement

(1) This Act may be called the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.

(2) It shall extend to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Section 2 - Definitions

In this Act, unless the context otherwise requires.-

(a) "Appropriate Authority" means the Appropriate Authority appointed under section 17;

(b) "Board" means the Central Supervisory Board constituted under section 7;

(c) "Genetic Counseling Centre" means an institute, hospital, nursing home or any place, by whatever name called, which provides for genetic counselling to patients;

(d) "Genetic Clinic" means a clinic, institute, hospital, nursing home or any place, by whatever name called, which is used for conducting pre-natal diagnostic procedures;

(e) "Genetic Laboratory" means a laboratory and includes a place where facilities are provided for conducting analysis or tests of samples received from Genetic Clinic for pre-natal diagnostic test;

(f) "Gynaecologist" means a person who possesses a post-graduate qualification in gynecology and obstetrics;

(g) "Medical geneticist" means a person who possesses a degree or diploma or certificate in medical genetics in the field of pre-natal diagnostic techniques or has experience of not less than two years in such field after obtaining--

(i) any one of the medical qualifications recognised under the Indian Medical Council Act, 1956 (102 of 1956); or

(ii) a post-graduate degree in biological sciences;

(h) "Pediatrician" means a person who possesses a post-graduate qualification in paediatrics;

(i) "pre-natal diagnostic procedures" means all gynaecological or obstetrical or medical procedures such as ultrasonography foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, blood or any tissue of a pregnant woman for being sent

to a Genetic Laboratory or Genetic Clinic for conducting pre-natal diagnostic test;

(j) "pre-natal diagnostic techniques" includes all pre-natal diagnostic procedures and pre-natal diagnostic tests;

(k) "pre-natal diagnostic test" means ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue of a pregnant woman conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex-linked diseases;

(l) "prescribed" means prescribed by rules made under this Act;

(m) "registered medical practitioner" means a medical practitioner who possesses any recognised medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956, (102 of 1956.) and whose name has been entered in a State Medical Register;

(n) "regulations" means regulations framed by the Board under this Act.

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

(1) no Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic unless registered under this Act, shall conduct or associate with, or help in, conducting activities relating to pre-natal diagnostic techniques;

(2) no Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall employ or cause to be employed any person who does not possess the prescribed qualifications;

(3) no medical geneticist, gynaecologist, paediatrician, registered medical practitioner or any other person shall conduct or cause to be conducted or aid in conducting by himself or through any other person, any pre-natal diagnostic techniques at a place other than a place registered under this Act.

Section 4 - Regulation of pre-natal diagnostic techniques

On and from the commencement of this Act,-

(1) no place including a registered Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall be used or caused to be used by any person for conducting pre-natal diagnostic techniques except for the purposes specified in clause (2) and after satisfying any of the conditions specified in clause (3);

(2) no pre-natal diagnostic techniques shall be conducted except for the purposes of detection of any of the following abnormalities, namely:-
(i) chromosomal abnormalities;
(ii) genetic metabolic diseases;
(iii) haemoglobinopathies;
(iv) sex-linked genetic diseases;
(v) congenital anomalies;
(vi) any other abnormalities or diseases as may be specified by the Central Supervisory Board;

(3) no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied that any of the following conditions are fulfilled, namely:--
(i) age of the pregnant woman is above thirty-five years;
(ii) the pregnant woman has undergone of two or more spontaneous abortions or foetal loss;
(iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;
(iv) the pregnant woman has a family history of mental retardation or physical deformities such as spasticity or any other genetic disease;
(v) any other condition as may be specified by the Central Supervisory Board;

(4) no person, being a relative or the husband of the pregnant woman shall seek or encourage the conduct of any pre-natal diagnostic techniques on her except for the purpose specified in clause (2).

Section 5 - Written consent of pregnant woman and prohibition of communicating the sex of foetus

(1) No person referred to in clause (2) of section 3 shall conduct the pre-natal diagnostic procedures unless--
(a) he has explained all known side and after effects of such procedures to the pregnant woman concerned;
(b) he has obtained in the prescribed form her written consent to undergo such procedures in the language which she understands; and
(c) a copy of her written consent obtained under clause (b) is given to the pregnant woman.

(2) No person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives the sex of the foetus by words, signs or in any other manner.

Section 6 - Determination of sex prohibited

On and from the commencement of this Act,-

(a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus;

(b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultrasonography for the purpose of determining the sex of a foetus.

Section 7 - Constitution of Central Supervisory Board

(1) The Central Government shall constitute a Board to be known as the Central Supervisory Board to exercise the powers and perform the functions conferred on the Board under this Act.

(2) The Board shall consist of--
(a) the Minister in charge of the Ministry or Department of Family Welfare, who shall be the Chairman, ex officio;

(b) the Secretary to the Government of India in charge of the Department of Family Welfare, who shall be the Vice-Chairman, ex-officio;

(c) two members to be appointed by the Central Government to represent the Ministries of Central Government in charge of Woman and Child Development and of Law and Justice, ex-officio;

(d) the Director General of Health Services of the Central Government, ex officio;

(e) ten members to be appointed by the Central Government, two each from amongst-
(i) eminent medical geneticists;
(ii) eminent gynaecologists and obstetricians;
(iii) eminent paediatricians;
(iv) eminent social scientists; and
(v) representatives of women welfare organisations;

(f) three women Members of Parliament, of whom two shall be elected by the House of the People and one by the Council of States;

(g) four members to be appointed by the Central Government by rotation to represent the States and the Union territories, two in the alphabetical order and two in the reverse alphabetical order:
Provided that no appointment under this clause shall be made except on the recommendation of the State Government or, as the case may be, the Union territory;

(h) an officer, not below the rank of a Joint Secretary or equivalent of the Central Government, in charge of Family Welfare, who shall be the Member-Secretary, ex officio.

Section 8 - Term of office of members

(1) The term of office of a member, other than an ex officio member, shall be,-
(a) in case of appointment under clause (e) or clause (f) of sub-section (2) of section 7, three years; and
(b) in case of appointment under clause (g) of the said subsection, one year.

(2) If a casual vacancy occurs in the office of any other members, whether by reason of his death, resignation or inability to discharge his functions owing to illness or other incapacity, such vacancy shall be filled by the Central Government by making a fresh appointment and the member so appointed shall hold office for the remainder of the term of office of the person in whose place he is so appointed.

(3) The Vice-Chairman shall perform such functions as may be assigned to him by the Chairman from time to time.

(4) The procedure to be followed by the members in the discharge of their functions shall be such as may be prescribed.

Section 9 - Meetings of the Board

(1) The Board shall meet at such time and place, and shall observe such rules of procedure in regard to the transaction of business at its meetings (including the quorum at such meetings) as may be provided by regulations:
Provided that the Board shall meet at least once in six months.

(2) The Chairman and in his absence the Vice-Chairman shall preside at the meetings of the Board.

(3) If for any reason the Chairman or the Vice-Chairman is unable to attend any meeting of the Board, any other member chosen by the members present at the meeting shall preside at the meeting.

(4) All questions which come up before any meeting of the Board shall be decided by a majority of the votes of the members present and voting, and in the event of an equality of votes, the Chairman, or in his absence, the person presiding, shall have and exercise a second or casting vote.

(5) Members other than ex officio members shall receive such allowances, if any, from the Board as may be prescribed.

Section 10 - Vacancies, etc., not to invalidate proceedings of the Board

No act or proceeding of the Board shall be invalid merely by reason of-

(a) any vacancy in, or any defect in the constitution of, the Board; or

(b) any defect in the appointment of a person acting as a member of the Board; or

(c) any irregularity in the procedure of the Board not affecting the merits of the case.

Section 11 - Temporary association of persons with the Board for particular purposes

(1) The Board may associate with itself, in such manner and for such purposes as may be determined by regulations, any person whose assistance or advice it may desire in carrying out any of the provisions of this Act.

(2) A person associated with it by the Board under sub-section (1) for any purpose shall have a right to take part in the discussions relevant to that purpose, but shall not have a right to vote at a meeting of the Board and shall not be a member for any other purpose.

Section 12 - Appointment or officers and other employees of the Board

(1) For the purpose of enabling it efficiently to discharge its functions under this Act, the Board may, subject to such regulations as may be made in this behalf, appoint (whether on deputation or otherwise) such number of officers and other

employees as it may consider necessary:
Provided that the appointment of such category of officers, as may be specified in such regulations, shall be subject to the approval of the Central Government.

(2) Every officer or other employee appointed by the Board shall be subject to such conditions of service and shall be entitled to such remuneration as may be specified in the regulations.

Section 13 - Authentication of orders and other instruments of the Board

All orders and decisions of the Board shall be authenticated by the signature of the Chairman or any other member authorised by the Board in this behalf, and all other instruments issued by the Board shall be authenticated by the signature of the Member-Secretary or any other officer of the Board authorised in like manner in this behalf.

Section 14 - Disqualifications for appointment as member

A person shall be disqualified for being appointed as a member if, he-
(a) has been convicted and sentenced to imprisonment for an offence which, in the opinion of the Central Government, involves moral turpitude; or
(b) is an undischarged insolvent; or
(c) is of unsound mind and stands so declared by a competent court; or
(d) has been removed or dismissed from the service of the Government or a Corporation owned or controlled by the Government; or
(e) has, in the opinion of the Central Government, such financial or other interest in the Board as is likely to affect prejudicially the discharge by him of his functions as a member; or
(f) has, in the opinion of the Central Government, been associated with the use or promotion of pre-natal diagnostic technique for determination of sex.

Section 15 - Eligibility of member for reappointment

Subject to the other terms and conditions of service as may be prescribed, any person ceasing to be a member shall be eligible for reappointment as such member.

Section 16 - Functions of the Board

The Board shall have the following functions, namely:-
(i) to advise the Government on policy matters relating to use of pre-natal diagnostic techniques;
(ii) to review implementation of the Act and the rules made thereunder and recommend changes in the said Act and rules to the Central Government;
(iii) to create public awareness against the practice of pre-natal determination of sex and female foeticide;
(iv) to lay down code of conduct to be observed by persons working at Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics;
(v) any other functions as may be specified under the Act.

Section 17 - Appropriate Authority and Advisory Committee

(1) The Central Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for each of the Union territories for the purposes of this Act.

(2) The State Government shall appoint, by notification in the Official Gazette, one or more Appropriate Authorities for the whole or part of the State for the purposes of this Act having regard to the intensity of the problem of pre-natal sex determination leading to female foeticide.

(3) The officers appointed as Appropriate Authorities under sub-section (1) or sub-section (2) shall be,-

(a) when appointed for the whole of the State or the Union territory, of or above the rank of the Joint Director of Health and Family Welfare; and
(b) when appointed for any part of the State or the Union territory, of such other rank as the State Government or the Central Government, as the case may be, may deem fit.

(4) The Appropriate Authority shall have the following functions, namely:-
(a) to grant, suspend or cancel registration of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic;
(b) to enforce standards prescribed for the Genetic Counselling Centre, Genetic Laboratory and Genetic Clinic;
(c) to investigate complaints of breach of the provisions of this Act or the rules made thereunder and take immediate action; and
(d) to seek and consider the advice of the Advisory Committee, constituted under sub-section (5), on application for registration and on complaints for suspension or cancellation of registration.

(5) The Central Government or the State Government, as the case may be, shall constitute an Advisory Committee for each Appropriate Authority to aid and advise the Appropriate Authority in the discharge of its functions, and shall appoint one of the members of the Advisory Committee to be its Chairman.

(6) The Advisory Committee shall consist of--
(a) three medical experts from amongst gynaecologists, obstericians, paediatricians and medical geneticists;
(b) one legal expert;
(c) one officer to represent the department dealing with information and publicity of the State Government or the Union territory, as the case may be;
(d) three eminent social workers of whom not less than one shall be from amongst representatives of women's organisations.

(7) No person who, in the opinion of the Central Government or the State Government, as the case may be, has been associated with the use or promotion of pre-natal diagnostic technique for determination of sex shall be appointed as a member of the Advisory Committee.

(8) The Advisory Committee may meet as and when it thinks fit or on the request of the Appropriate Authority for consideration of any application for registration or any complaint for suspension or cancellation of registration and to give advice thereon:
Provided that the period intervening between any two meetings shall not exceed the prescribed period.

(9) The terms and conditions subject to which a person may be appointed to the Advisory Committee and the procedure to be followed by such Committee in the discharge of its functions shall be such as may be prescribed.

Section 18 - Registration of Genetic Counselling Centres, Genetic Laboratories or Genetic Clinics

(1) No person shall open any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic after the commencement of this Act unless such Centre, Laboratory or Clinic is duly registered separately or jointly under this Act.

(2) Every application for registration under sub-section (1), shall be made to the Appropriate Authority in such form and in such manner and shall be accompanied by such fees as may be prescribed.

(3) Every Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic engaged, either partly or exclusively, in counselling or conducting pre-natal diagnostic techniques for any of the purposes mentioned in section 4, immediately before the commencement of this Act, shall apply for registration within sixty days from the date of such commencement.

(4) Subject to the provisions of section 6, every Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic engaged in counselling or conducting pre-natal diagnostic techniques shall cease to conduct any such counselling or technique on the expiry of six months from the date of commencement of this Act unless such Centre, Laboratory or Clinic has applied for registration and is so registered separately or jointly or till such application is disposed of, whichever is earlier.

(5) No Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall be registered under this Act unless the Appropriate Authority is satisfied that such Centre, Laboratory or Clinic is in a position to provide such facilities, maintain such equipment and standards as may be prescribed.

Section 19 - Certificate of registration

(1) The Appropriate Authority shall, after holding an inquiry and after satisfying itself that the applicant has complied with all the requirements of this Act and the rules made thereunder and having regard to the advice of the Advisory Committee in this behalf, grant a certificate of registration in the prescribed form jointly or separately to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, as the case may be.

(2) If, after the inquiry and after giving an opportunity of being heard to the applicant and having regard to the advice of the Advisory Committee, the Appropriate Authority is satisfied that the applicant has not complied with the requirements of this Act or the rules, it shall, for reasons to be recorded in writing, reject the application for registration.

(3) Every certificate of registration shall be renewed in such manner and after such period and on payment of such fees as may be prescribed.

(4) The certificate of registration shall be displayed by the registered Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic in a conspicuous place at its place of business.

Section 20 - Cancellation or suspension of registration

(1) The Appropriate Authority may suomoto, or on complaint, issue a notice to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic to show cause why its registration should not be suspended or cancelled for the reasons mentioned in the notice.

(2) If, after giving a reasonable opportunity of being heard to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and having regard to the advice of the Advisory Committee, the Appropriate Authority is satisfied that there has been a breach of the provisions of this Act or the rules, it may, without prejudice to any criminal action that it may take against such Centre, Laboratory or Clinic, suspend its registration for such period as it may think fit or cancel its registration, as the case may be.

(3) Notwithstanding anything contained in sub-sections (1) and (2), if the Appropriate Authority is, of the opinion that it is necessary or expedient so to do in the public interest, it may, for reasons to be recorded in writing, suspend the registration of any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic without issuing any such notice referred to in sub-section (1).

Section 21 - Appeal

The Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic may, within thirty days from the date of receipt of the order of suspension or cancellation of registration passed by the Appropriate Authority under section 20, prefer an appeal against such order to-

(i) the Central Government, where the appeal is against the order of the Central Appropriate Authority; and

(ii) the State Government, where the appeal is against the order of the State Appropriate Authority, in the prescribed manner.

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

(1) No person, organisation, Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall issue or cause to be issued any advertisement in any manner regarding facilities of pre-natal determination of sex available at such Centre, Laboratory, Clinic or any other place.

(2) No person or organisation shall publish or distribute or cause to be published or distributed any advertisement in any manner regarding facilities of pre-natal determination of sex available at any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other place.

(3) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees.

Explanation - For the purposes of this section, "advertisement" includes any notice, circular, label wrapper or other document and also includes any visible representation made by means of any light, sound, smoke or gas.

Section 23 - Offences and penalties

(1) Any medical geneticist, gynaecologist, registered medical practitioner or any person who owns a Genetic Counselling Centre, a Genetic Laboratory or a Genetic Clinic or is employed in such a Centre, Laboratory or Clinic and renders his professional or technical services to or at such a Centre, Laboratory or Clinic, whether on an honorary basis or otherwise, and who contravenes any of the provisions of this Act or rules made thereunder shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.

(2) The name of the registered medical practitioner who has been convicted by the court under subsection (1), shall be reported by the Appropriate Authority to the respective State Medical Council for taking necessary action including the removal of his name from the register of the Council for a period of two years for the first offence and permanently for the subsequent offence.

(3) Any person who seeks the aid of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic or of a medical geneticist, gynaecologist or registered medical practitioner for conducting prenatal diagnostic techniques on any pregnant woman (including such woman unless she was compelled to undergo such diagnostic techniques) for purposes other than those specified in clause(2) of section 4, shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction with imprisonment which may extend to five years and with fine which may extend to fifty thousand rupees.

Section 24 - Presumption in the case of conduct of pre-natal diagnostic techniques

Notwithstanding anything in the Indian Evidence Act, 1872 (1 of 1872), the court shall presume unless the contrary is proved that the pregnant woman has been compelled by her husband or the relative to undergo prenatal diagnostic technique and such person shall be liable for abetment of offence under sub-section (3) of section 23 and shall be punishable for the offence specified under that section.

Section 25 - Penalty for contravention of the provisions of the Act or rules for which no specific punishment is provided

Whoever contravenes any of the provisions of this Act or any rules made thereunder, for which no penalty has been elsewhere provided in this Act, shall be punishable with imprisonment for a term which may extend to three months or with fine, which may extend to one thousand rupees or with both and in the case of continuing contravention with an additional fine which may extend to five hundred rupees for every day during which such contravention continues after conviction for the first such contravention.

Section 26 - Offences by companies

(1) Where any offence, punishable under this Act has been committed by a company, every person who, at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence punishable under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or

other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation - For the purposes of this section,-
(a) "company" means any body corporate and includes a firm or other association of individuals, an
(b) "director", in relation to a firm, means a partner in the firm.

Section 27 - Offence to be cognizable, non-bailable and non-compoundable

Every offence under this Act shall be cognizable, non-bailable and non-compoundable.

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 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 thirty 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 subsection (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.

Section 29 - Maintenance of records

(1) All records, charts, forms, reports, consent letters and all other documents required to be maintained under this Act and the rules shall be preserved for a period of two years or for such period as may be prescribed:
Provided that, if any criminal or other proceedings are instituted against any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, the records and all other documents of such Centre, Laboratory or Clinic shall be preserved till the final disposal of such proceedings.

(2) All such records shall, at all reasonable times, be made available for inspection to the Appropriate Authority or to any other person authorised by the Appropriate Authority in this behalf.

Section 30 - Power to search and seize records, etc

(1) If the Appropriate Authority has reason to believe that an offence under this Act has been or is being committed at any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, such Authority or any officer authorised thereof in this behalf may, subject to such rules as may be prescribed, enter and search at all reasonable times with such assistance, if any, as such authority or officer considers necessary, such Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and examine any record, register, document, book, pamphlet, advertisement or any other material object found therein and seize the same if such Authority or officer has reason to believe that it may furnish evidence of the commission of an office punishable under this
Act.

(2) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to searches and seizures shall, so far as may be, apply to every search or seizure made under this Act

Section 31 - Protection of action taken in good faith

No suit, prosecution or other legal proceeding shall lie against the Central or the State Government or the Appropriate Authority or any officer authorised by the Central or State Government or by the Authority for anything which is in good faith done or intended to be done in pursuance of the provisions of this Act.

Section 32 - Power to make rules

(1) The Central Government may make rules for carrying out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for-
(i) the minimum qualifications for persons employed at a registered Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic under clause (1) of section 3;
(ii) the form in which consent of a pregnant woman has to be obtained under section 5;
(iii) the procedure to be followed by the members of the Central Supervisory Board in the discharge of their functions under sub-section (4) of section 8;
(iv) allowances for members other than ex officio members admissible under sub-section (5) of section 9;
(v) the period intervening between any two meetings of the Advisory Committee under the proviso to sub-section (8) of section 17;
(vi) the terms and conditions subject to which a person may be appointed to the Advisory Committee and the procedure to be followed by such Committee under sub-section (9) of section 17;
(vii) the form and manner in which an application shall be made for registration and the fee payable thereof under sub-section (of section 18;
(viii) the facilities to be provided, equipment and other standards to be maintained by the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic under sub-section (5) of section 18;
(ix) the form in which a certificate of registration shall be issued under sub-section (1) of section 19;
(x) the manner in which and the period after which a certificate of registration shall be renewed and the fee payable for such renewal under sub-section (3) of section 19;
(xi) the manner in which an appeal may be preferred under section 21;
(xii) the period up to which records, charts, etc., shall be preserved under sub-section (1) of section 29;
(xiii) the manner in which the seizure of documents, records, objects, etc., shall be made and the manner in which seizure list shall be prepared and delivered to the person from whose custody such documents, records or objects were seized under sub-section (1) of section 30;
(xiv) any other matter that is required to be, or may be, prescribed.

Section 33 - Power to make regulations

The Board may, with the previous sanction of the Central Government, by notification in the Official Gazette, make regulations not inconsistent with the provisions of this Act and the rules made thereunder to provide for-
(a) the time and place of the meetings of the Board and the procedure to be followed for the transaction of business at such meetings and the number of members which shall form the quorum under sub-section (1) of section 9;

(b) the manner in which a person may be temporarily associated with the Board under sub-section (1) of section 11;

(c) the method of appointment, the conditions of service and the scales of pay and allowances of the officer and other employees of the Board appointed under section 12;

(d) generally for the efficient conduct of the affairs of the Board.

Section 34 - Rules and regulations to be laid before Parliament

Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or

regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation

PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) AMENDMENT ACT, 2001

Preamble 1 - THE PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) AMENDMENT ACT, 2001

THE PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) AMENDMENT ACT, 2001

[Act, No. 32 of 2001]

PREAMBLE

An Act to amend the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.

BE it enacted by Parliament in the Fifty-second Year of the Republic of India as follows:-

Section 1 - Short title

This Act may be called the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2001.

Section 2 - Amendment of section 8 of Act 57 of 1994

In the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, in section 8, in sub-section (1) in clause (a), -

(i) the word "and" shall be omitted;

(ii) the following proviso shall be inserted, namely;-

"Provided that the term of office of a member elected under clause (1) of sub-section (2) of section 7 shall come to an end as soon as the member becomes a Minister or Minister of State or Deputy Minister, or the Speaker or the Deputy Speaker of the House of the People, or the Deputy Chairman of the Council of States or ceases to be a member of the House from which she was elected; and".

PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) AMENDMENT ACT, 2002

Preamble 1 - PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) AMENDMENT ACT, 2002

THE PRE-NATAL DIAGNOSTIC TECHNIQUES (REGULATION AND PREVENTION OF MISUSE) AMENDMENT ACT, 2002

[Act, No. 14 of 2003]

PREAMBLE

An Act further to amend the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994.

BE it enacted by Parliament in the Fifty-third Year of the Republic of India as follows:-

Section 1 - Short title and commencement

(1) This Act may be called the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Section 2 - Substitution of long title

In the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (57 of 1994) (hereinafter referred to as the principal Act), for the long title, the following long title shall be substituted, namely:-

"An Act to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental there to".

Section 3 - Amendment of section 1

In section 1 of the principal Act, in sub-section (1), for the words and brackets "the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse)", the words and brackets "the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection)" shall be substituted.

Section 4 - Amendment of section 2

In section 2 of the principal Act,-

(i) after clause (b), the following clauses shall be inserted, namely:-

(ba) "conceptus" means any product of conception at any stage of development from fertilisation until birth including extra embryonic membranes as well as the embryo or foetus;

(bb) "embryo" means a developing human organism after fertilisation [ill the end of eight weeks (fifty-six days);

(bc) "foetus" means a human organism during the period of its development beginning on the fifty-seventh day following fertilisation or creation (excluding any time in which its development has been suspended) and ending at the birth;';(ii) in clause (d), the following Explanation shall be added, namely:-

Explanation - For the purposes of this clause, "Genetic Clinic" includes a vehicle, where ultrasound machine or imaging machine or scanner or other equipment capable of determining sex of the foetus or a portable equipment which has the potential for detection of sex during pregnancy or selection of sex before conception, is used;

(iii) in clause (e), the following Explanation shall be added, namely:-

Explanation - For the purposes of this clause, "Genetic Laboratory" includes a place where ultrasound machine or imaging machine, or scanner or other equipment capable of determining sex of the foetus or a portable equipment which has the potential for detection of sex during pregnancy or selection of sex before conception, is used;

(iv) for clause (g), the following clause shall be substituted, namely:-

(g) "medical geneticist" includes a person who possesses a degree or diploma in genetic science in the fields of sex selection and pre-natal diagnostic techniques or has experience of not less than two years in any of these fields after obtaining-

(i) any one of the medical qualifications recognised under the Indian Medical Council Act, 1956 (102 of 1956); or

(ii) a post-graduate degree in biological sciences;

(v) for clause (i), the following clause shall be substituted, namely:-

(i) "pre-natal diagnostic procedures" means all gynaecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, embryo, blood or any other tissue or fluid of a man, or of a woman before or after conception, for being sent to a Genetic Laboratory or Genetic Clinic for conducting any type of analysis or pre-natal diagnostic tests for selection of sex before or after conception;';

(vi) for clause (k), the following clause shall be substituted, namely:-

(k) "pre-natal diagnostic test" means ultrasonography or any test or analysis of amniotic fluid, chorionic villi, blood or any tissue or fluid of a pregnant woman or conceptus conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex linked diseases;

(vii) after clause (n), the following clauses shall be inserted, namely:-

(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;

(p) "sonologist or imaging specialist" means a person who possesses any one of the medical qualifications recognised under the Indian Medical Council Act, 1956 (102 of 1956) or who possesses a post-graduate qualification in ultrasonography or imaging techniques or radiology;

(q) "State Board" means a State Supervisory Board or a Union territory Supervisory Board constituted under section 16A;

(r) "State Government" in relation to Union territory with Legislature means the Administrator of that Union territory appointed by the President under article 239 of the Constitution.'.

Section 5 - Amendment of section 3

In section 3 of the principal Act, for clause (2), the following clause shall be substituted, namely:-

(2) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall employ or cause to be employed or take services of any person, whether on honorary basis or on payment who docs not possess the qualifications as may be prescribed.".

Section 6 - Insertion of new sections 3A and 3B

After section 3 of the principal Act, the following sections shall be inserted, namely:-

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

3B. Prohibition on sale of ultrasound machine, etc., to persons, laboratories, clinics, etc., not registered under the Act .-
No person shall sell any ultrasound machine or imaging machine or scanner or any other equipment capable of detecting sex of the foetus to any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other person not registered under the Act".

Section 7 - Amendment of section 4

In section 4 of the principal Act, for clauses (3) and (4), the following clauses shall be substituted, namely:-

(3) no pre-natal diagnostic techniques shall be used or conducted unless the person qualified to do so is satisfied for reasons to be recorded in writing that any of the following conditions are fulfilled, namely:-

(i) age of the pregnant woman is above thirty-five years;

(ii) the pregnant woman has undergone two or more spontaneous abortions or foetal loss;

(iii) the pregnant woman had been exposed to potentially teratogenic agents such as drugs, radiation, infection or chemicals;

(iv) the pregnant woman or her spouse has a family history of mental retardation or physical deformities such as, spasticity or any other genetic disease;

(v) any other condition as may be specified by the Board:

Provided that the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic in such manner, as may be prescribed, and any deficiency or inaccuracy found therein shall amount to contravention of the provisions of section 5 or section 6 unless contrary is proved by the person conducting such ultrasonography;

(4) no person including a relative or husband of the pregnant woman shall seek or encourage the conduct of any pre-natal diagnostic techniques on her except for the purposes specified in clause (2);

(5) no person including a relative or husband of a woman shall seek or encourage the conduct of any sex selection technique on her or him or both.".

Section 8 - Amendment of section 5

In section 5 of the principal Act, for sub-section (2), the following sub-section shall be substituted, namely:-

(2) No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs, or in any other manner.

Section 9 - Amendment of section 6

In section 6 of the principal Act, after clause (b), the following clause shall be inserted, namely:-

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

Section 10 - Amendment of section 7

In section 7 of the principal Act,-

(i) in sub-section (2), for clause (c), the following clause shall be substituted, namely:-

(c) three members to be appointed by the Central Government to represent the Ministries of Central Government in charge of Women and Child Development, Department of Legal Affairs or Legislative Department in the Ministry of Law and Justice, and Indian System of Medicine and Homoeopathy, ex officio;

(ii) in clause (e), for sub-clause (ii), the following sub-clause shall be substituted, namely:-

(ii) eminent gynaecologist and obstetrician or expert of stri-roga or prasuti-tantra.

Section 11 - Amendment of section 14

In section 14 of the principal Act, for clause (f), the following clause shall be substituted, namely:-

(f) has, in the opinion of the Central Government, been associated with the use or promotion of pre-natal diagnostic technique for determination of sex or with any sex selection technique.

Section 12 - Amendment of section 15

In section 15 of the principal Act, the following proviso shall be inserted, namely:--

"Provided that no member other than an ex officio member shall be appointed for more than two consecutive terms".

Section 13 - Substitution of new section for section 16

For section 16 of the principal Act, the following section shall be substituted, namely:-

16. Functions of the Board .-

The Board shall have the following functions, namely:-

(i) to advise the Central Government on policy matters relating to use of pre-natal diagnostic techniques, sex selection techniques and against their misuse;

(ii) to review and monitor implementation of the Act and rules made thereunder and recommend to the Central Government changes in the said Act and rules;

(iii) to create public awareness against the practice of pre-conception sex selection and pre-natal determination of sex of foetus leading to female foeticide;

(iv) to lay down code of conduct to be observed by persons working at Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics;

(v) to oversee the performance of various bodies constituted under the Act and take appropriate steps to ensure its proper and effective implementation;

(vi) any other functions as may be prescribed under the Act.

Section 14 - Insertion of new section 16A

After section 16 of the principal Act, the following section shall be inserted, namely:-

16A. Constitution of State Supervisory Board and Union territory Supervisory Board .-

(1) Each State and Union territory having Legislature shall constitute a Board to be known as the State Supervisory Board or the Union territory Supervisory Board, as the case may be, which shall have the following functions:-

(i) to create public awareness against the practice of pre-conception sex selection and pre-natal determination of sex of the foetus leading to female foeticide in the State;

(ii) to review the activities of the Appropriate Authorities functioning in the State and recommend appropriate action against them;

(iii) to monitor the implementation of provisions of the Act and the rules and make suitable recommendations relating thereto, to the Board;

(iv) to send such consolidated reports as may be prescribed in respect of the various activities undertaken in the State under the Act to the Board and the Central Government; and

(v) any other functions as may be prescribed under the Act. (2) The State Board shall consist of;

(a) the Minister in charge of Health and Family Welfare in the State, who shall be the Chairperson, ex officio;

(b) Secretary in charge of the Department of Health and Family Welfare who shall be the Vice-Chairperson, ex officio;

(c) Secretaries or Commissioners in charge of Departments of Women and Child Development, Social Welfare, Law and Indian System of Medicines and Homoeopathy, ex officio, or their representatives;

(d) Director of Health and Family Welfare or Indian System of Medicines and Homoeopathy of the State Government, ex officio;

(e) three women members of Legislative Assembly or Legislative Council;

(f) ten members to be appointed by the State Government out of which two each shall be from the following categories,--

(i) eminent social scientists and legal experts;

(ii) eminent women activists from non-governmental organisations or otherwise;

(iii) eminent gynaecologists and obstetricians or experts of stri-roga or prasuti-tantra;

(iv) eminent paediatricians or medical geneticists;

(v) eminent radiologists or sonologists;

(g) an officer not below the rank of Joint Director in charge of Family Welfare, who shall be the Member Secretary, ex officio.

(3) The State Board shall meet at least once in four months.

(4) The term of office of a member, other than an ex officio member, shall be three years.

(5) If a vacancy occurs in the office of any member other than an ex officio member, it shall be filled by making fresh appointment.

(6) If a member of the Legislative Assembly or member of the Legislative Council who is a member of the State Board, becomes Minister or Speaker or Deputy Speaker of the Legislative Assembly or Chairperson or Deputy Chairperson of the Legislative Council, she shall cease to be a member of the State Board.

(7) One-third of the total number of members of the State Board shall constitute the quorum.

(8) The State Board may co-opt a member as and when required, provided that the number of co-opted members does not exceed one-third of the total strength of the State Board.

(9) The co-opted members shall have the same powers and functions as other members, except the right to vote and shall abide by the rules and regulations.

(10) In respect of matters not specified in this section, the State Board shall follow procedures and conditions as are applicable to the Board.

Section 15 - Amendment of section 17

In section 17 of the principal Act,-

(i) in sub-section (3), for clause (a), the following clause shall be substituted, namely:-

(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 organisation; and

(iii) an officer of Law Department of the State or the Union territory concerned:

Provided that it shall be the duty of the State or the Union territory concerned to constitute multi-member State or Union territory level Appropriate Authority within three months of the coming into force of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002:

Provided further that any vacancy occurring therein shall be filled within three months of the occurrence.

(ii) in sub-section (4), after clause (d), the following clauses shall be inserted, namely:-

(e) to take appropriate legal action against the use of any sex selection technique by any person at any place, suomotu or brought to its notice and also to initiate independent investigations in such matter;

(f) to create public awareness against the practice of sex selection or prenatal determination of sex;

(g) to supervise the implementation of the provisions of the Act and rules;

(h) to recommend to the Board and State Boards modifications required in the rules in accordance with changes in technology or social conditions;

(i) to take action on the recommendations of the Advisory Committee made after investigation of complaint for suspension or cancellation of registration.";

(iii) for sub-section (7), the following sub-section shall be substituted, namely:-

(7) No person who has been associated with the use or promotion of prenatal diagnostic techniques for determination of sex or sex selection shall be appointed as a member of the Advisory Committee.

Section 16 - Insertion of new section 17A

After section 17 of the principal Act, the following section shall be inserted, namely:-

17A. Powers of Appropriate Authorities .-

The Appropriate Authority shall have the powers in respect of the following matters, namely:-

(a) summoning of any person who is in possession of any information relating to violation of the provisions of this Act or the rules made thereunder;

(b) production of any document or material object relating to clause (a);

(c) issuing search warrant for any place suspected to be indulging in sex selection techniques or pre-natal sex determination; and

(d) any other matter which may be prescribed.

Section 1 - Short title, extent and commencement

In section 18 of the principal Act, for sub-section (1), the following sub-section shall be substituted, namely:-

(1) No person shall open any Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic, including clinic, laboratory or centre having ultrasound or imaging machine or scanner or any other technology capable of undertaking determination of sex of foetus and sex selection, or render services to any of them, after the commencement of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 unless such Centre, Laboratory or Clinic is duly registered under the Act.".

Section 18 - Substitution of new section for section 22

For section 22 of the principal Act, the following section shall be substituted, namely:-

22. Prohibition of advertisement relating to preconception and pre-natal determination of sex and punishment for contravention .--

(1) No person, organisation, 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 the 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 of pre-natal determination of sex or sex selection before conception available at such Centre, Laboratory, Clinic or at any other place.

(2) No person or organisation including Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic shall issue, publish, distribute, communicate or cause to be issued, published, distributed or communicated any advertisement in any manner regarding pre-natal determination or pre-conception selection of sex by any means whatsoever, scientific or otherwise.

(3) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees.

Explanation - For the purposes of this section, "advertisement" includes any notice, circular, label, wrapper or any 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.

Section 19 - Amendment of section 23

In section 23 of the principal Act, for sub-sections (2) and (3), the following sub-sections shall be substituted, namely:-

(2) The name of the registered medical practitioner shall be reported by the Appropriate Authority to the State Medical Council concerned for taking necessary action including suspension of the registration if the charges are framed by the court and till the case is disposed of and on conviction for removal of his name from the register of the Council for a period of five years for the first offence and permanently for the subsequent offence.

(3) Any person who seeks the aid of any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or ultrasound clinic or imaging clinic or of a medical geneticist, gynaecologist, sonologist or imaging specialist or registered medical practitioner or any other person for sex select ion or for conducting pre-natal diagnostic techniques on any pregnant women for the purposes other than those specified in sub-section (2) of section 4, he shall, be punishable with imprisonment for a term which may extend to three years and with fine which may extend to fifty thousand rupees for the first offence and for any subsequent offence with imprisonment which may extend to five years and with fine which may extend to one lakh rupees.

(4) For the removal of doubts, it is hereby provided that the provisions of sub-section (3) shall not apply to the woman who was compelled to undergo such diagnostic techniques or such selection.

Section 20 - Substitution of new section for section 24

For section 24 of the principal Act, the following section shall be substituted, namely:-

24. Presumption in the case of conduct of pre-natal diagnostic techniques .-

Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), the court shall presume unless the contrary is proved that the pregnant woman was compelled by her husband or any other relative, as the case may be, to undergo prenatal diagnostic technique for the purposes other than those specified in sub-section (2) of section 4 and such person shall be liable for abetment of offence under sub-section (3) of section 23 and shall be punishable for the offence specified under that section.".

Section 21 - Amendment of section 28

In section 28 of the principal Act, in sub-section (1), in clause (b), for the words "thirty days", the words "fifteen days" shall be substituted.

Section 22 - Amendment of section 30

In section 30 of the principal Act, for sub-section (1), the following sub-section shall be substituted, namely:-

(1) If the Appropriate Authority has reason to believe that an offence under this Act has been or is being committed at any Genetic Counselling Centre, Genetic Laboratory, Genetic Clinic or any other place, such Authority or any officer authorised in this behalf may, subject to such rules as may be prescribed, enter and search at all reasonable times with such assistance, if any, as such Authority or officer considers necessary, such Genetic Counselling Centre Genetic Laboratory, Genetic Clinic or any other place and examine any record, register, document, book, pamphlet, advertisement or any other material object found therein and seize and seal the same if such Authority or officer has reason to believe that it may furnish evidence of the commission of an offence punishable under this Act.".

Section 23 - Insertion of new section 31A

After section 31 of the principal Act, the following section shall be inserted, namely:-

31A. Removal of difficulties-

(1) If any difficulty arises in giving effect to the provisions of the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002, the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of the said Act as appear to it to be necessary or expedient for removing the difficulty:

Provided that no order shall be made under this section after the expiry of a period of three years from the date of commencement of the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002.

(2) Every order made under this section shall be laid, as soon as may be after it is made, before each House of Parliament.

Section 24 - Amendment of section 32

In section 32 of the principal Act, in sub-section (2),

(i) for clause (i), the following clauses shall be substituted, namely:-

(i) the minimum qualifications for persons employed at a registered Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic under clause (2) of section 3;

(ia) the manner in which the person conducting ultrasonography on a pregnant woman shall keep record thereof in the clinic under the proviso to sub-section (3) of section 4;

(ii) after clause (iv), the following clauses shall be inserted, namely:-

(iva) code of conduct to be observed by persons working at Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics to be laid down by the Central Supervisory Board under clause (iv) of section 16;

(ivb) the manner in which reports shall be furnished by the State and Union territory Supervisory Boards to the Board and the Central Government in respect of various activities undertaken in the State under the Act under clause (iv) of sub-section (1) of section 16A;

(ivc) empowering the Appropriate Authority in any other matter under clause (d) of section 17A.


Justice Santosh Pandey
B.SC, LLB
District Judge

Advocate Suhas Shetty
B.COM, LLB
Advocate-High Court

जेकब मॅथ्यूज विरुध्द पंजाब राज्य या केसमध्ये, सुप्रीम कोर्टाच्या तीन न्यायाधिशांच्या खंडपीठाने एका आदेशानुसार भारतीय दंड संहितेच्या कलम ३०४-ए/ ३४ अन्वये एका वैद्यक व्यावसायिकावरील फौजदारी खटल्याचे कामकाज रद्दबातल ठरवले आणि दुस-या एखाद्या सक्षम डॉक्टरांकडून, विशेषत्वाने अविचाराच्या आणि निष्काळजीपणाच्या कृतीच्या आरोपांना पुष्टी देणारा त्याच क्षेत्रातल्या सरकारी डॉक्टरांचा विश्वासार्ह मताच्या स्वरुपातला प्रथमदर्शनी (प्रायमा-फेसी) पुरावा कोर्टासमोर सादर झाला नसेल, तर डॉक्टरांना गुन्हेगारीच्या दृष्टीने जबाबदार धरले जाऊ नये अशा स्वरुपाचे इंटरलोक्यूटरी (कोर्टाचे कामकाज चाललेले असताना कोर्टाने दिलेला निर्णय, असा निर्णय अखेरचा नसतो) अर्ज निकालात काढले.

या स्वरुपाच्या कोर्टाच्या निकालांचा आढावा पुढीलप्रमाणे सांगता येतील :

(१) निष्काळजीपणा म्हणजे सर्वसाधारणपणे मानवी व्यवहार ज्या विचारार्ह बाबींमुळे नियमित होतात, त्या बाबींनुसार चालणारा विचारी माणूस बजावेल अशा कर्तव्यात चूक करण्यामुळे घडणारी गोष्ट किंवा कोणताही शहाणा आणि समंजस माणूस करणार नाही अशा प्रकारची कृती होय. ज्या व्यक्तीविरुध्द दावा दाखल झाला आहे अशा व्यक्तीला लागू पडेल अशा निष्काळजीपणाला कारणीभूत असलेली कर्तव्यातील चूक किंवा कृती यामुळे झालेल्या इजेमुळे, निष्काळजीपणा म्हणजे दाव्याचे कारण उदभवणारी चुकीची कृती ठरते. निष्काळजीपणाचे तीन महत्त्वाचे घटक पुढीलप्रमाणे असतात : 'कर्तव्य', 'भंग' आणि 'उदभवणारी इजा किंवा नुकसान'.

(२) वैद्यकीय व्यवसायाच्या संदर्भात निष्काळजीपणाचा विचार करायचा असेल तर त्याची वेगळी हाताळणी आवश्यक ठरते. एखाद्या व्यावसायिकाच्या बाबतीत, विशेषत: डॉक्टरच्या बाबतीत, अविचार किंवा निष्काळजीपणा निश्चित करायचा असेल, तर आणखी काही मुद्दे लागू पडतात. नोकरी-उद्योगातील निष्काळजीपणाचे (ऑक्युपेशनल निग्लिजन्स) प्रकरण हे व्यावसायिक निष्काळजीपणापेक्षा (प्रोफेशनल निग्लिजन्स) वेगळे असते. साध्या काळजीचा अभाव, निर्णयप्रक्रियेतील चूक किंवा अपघात म्हणजे वैद्यकीय व्यवसायातील निष्काळजीपणाचा पुरावा नव्हे. एखादा डॉक्टर प्रचलित वैद्यकीय व्यवसायाच्या क्षेत्राला स्वीकारार्ह असलेली व्यवसायाची पध्दत अनुसरत असेल तर केवळ उपचाराचा आणखी एखादा चांगला मार्ग वा पध्दत उपलब्ध असणे किंवा आरोपीने अनुसरलेली व्यवसायाची पध्दत किंवा रीत, त्यापेक्षा जास्त कुशल डॉक्टरने न अनुसरण्याची शक्यता असणे, यावरुन डॉक्टरला निष्काळजीपणाबद्दल जबाबदार धरता येत नाही. काळजी घेण्यातली चूक किंवा अपयशाचा विचार करताना, माणसांच्या सर्वसाधारण अनुभवाच्या दृष्टीने पुरेशी काळजी घेतली गेली आहे का, याचा विचार करणे महत्त्वाचे ठरते; एखादी विशिष्ट घटना ज्यामुळे टळली असती अशी विशेष किंवा असाधारण स्वरुपाची काळजी घेण्यातली चूक किंवा अपयश हा कथित निष्काळजीपणासंबंधी मत निश्चिती करणारा निकष होऊ शकत नाही.

(३) एखाद्या व्यावसायिकाला पुढील दोन निष्कर्षांपैकी एकामुळे निष्काळजीपणाबद्दल जबाबदार धरता येऊ शकते: त्याच्याकडे आवश्यक ते कौशल्य असल्याचा त्याने दावा करुनही ते कौशल्य नसणे, किंवा त्या विशिष्ट घटनेच्या-प्रकरणाच्या बाबतीत त्याच्याकडे आवश्यक ते कौशल्य असूनही त्याने पुरेशा सक्षमतेने त्या कौशल्याचा उपयोग न करणे. म्हणजेच ज्या व्यक्तीवर आरोप आहे, तो निष्काळजी आहे का नाही हे ठरवताना न्यायदानाच्या दृष्टीने लागू पडणारे मापदंड म्हणजे त्या विशिष्ट व्यवसायात सर्वसाधारण कौशल्य उपयोगात आणणारी सर्वसाधारणत: सक्षम व्यक्ती विचारात घ्यावा लागतो.

(४) निष्काळजीपणाची न्यायतत्त्वशास्त्रीय संकल्पना दिवाणी आणि फौजदारी कायद्यांत वेगळी असते. दिवाणी कायद्यात निष्काळजीपणाची जी संकल्पना असेल ती फौजदारी कायद्यात तशी असेलच असे नाही. निष्काळजीपणाचा आरोप ठेवण्याच्या दृष्टीने mens rea म्हणजेच गुन्हेगारीचा हेतु अस्तित्त्वात असल्याचे दाखवणे आवश्यक असते. गुन्हेगारीच्या पातळीवरची निष्काळजीपणाची कृती ठरण्यासाठी निष्काळजीपणाचे प्रमाण खूप जास्त पातळीवरचे असावे लागते, म्हणजेच संपूर्णत: किंवा कमालीच्या जास्त पातळीवरचे असावे लागते. संपूर्ण पातळीवरचा नसलेला किंवा मोठ्या प्रमाणातला नसलेला निष्काळजीपणा दिवाणी कायद्यानुसार कारवाईस पात्र ठरू शकतो पण तो खटला चालवण्यासाठी लागणारा आधार होऊ शकत नाही.

(५) एखाद्या वैद्यकीय व्यावसायिकावर निष्काळजीपणाच्या आरोपावरुन फौजदारी कायद्यान्वये खटला चालवायचा तर त्या विशिष्ट परिस्थितीत कोणत्याही वैद्यकीय व्यावसायिकाने त्याच्या सर्वसाधारण जाणीवा आणि बुध्दीला अनुसरुन केले नसते किंवा त्याला अपयश आले नसते असे काहीतरी आरोपीने केले असल्याचे किंवा करण्यात अपयश आले असल्याचे दाखवणे आवश्यक असते. आरोपी असलेल्या डॉक्टरने पत्करलेला धोका हा अशा स्वरुपाचा असावा लागतो, की त्यामुळे जी इजा उदभवलेली असते ती बहुतांशी अतिशय धोकादायक असण्याची शक्यता असते.

निष्कर्ष आणि सूचना

वैद्यकीय व्यावसायिकांवर गुन्हेगारी स्वरुपाच्या निष्काळजीपणावरुन अविवेकाने खटला चालवणे अनुत्पादक ठरते आणि त्यामुळे समाजाचे काहीही भले होत नाही. दोष, आरोप आणि न्यायासाठी आवश्यक असलेल्या बाबी यांच्यामध्ये दुवा असणे आवश्यक असते. वैद्यक व्यवसाय आणि निष्काळजीपणा यांच्या संदर्भात मएरर्स, मेडिसीन अँड द लॉफ या ग्रंथाच्या सुविद्य लेखकांनी नैतिक दोष, दोषारोप आणि न्याय यांच्यातील दुव्यावर विशेष भर दिला आहे. या बाबी आपल्या समोर असलेल्या मुद्यांच्या दृष्टीने महत्त्वपूर्ण आणि सुसंगत आहेत. हे मुद्दे पुढीलप्रमाणे :

(१) हेतुपुरस्सर करण्यात आलेल्या गुन्हेगारीच्या विशिष्ट प्रकरणांच्या बाबतीत दोषारोप आणि संबंधित शिक्षांचे सामाजिक सामर्थ्य ही बाब विवादास्पद असेलही पण तत्त्वत:

नैतिक दृष्टीकोनातून त्यांची - शिक्षांची - आवश्यकता स्वीकारली गेली आहे. शिक्षा ही संकल्पना अभिरुची संपन्नतेला धरुन नसेलही परंतु माणसांना त्यांच्या दुष्कृत्यांबद्दल शिक्षा करण्याची आवश्यकता, प्रसंगी खूपच कडक स्वरुपाची शिक्षा करण्याची, सामाजिक आणि कदाचित नैतिकसुध्दा आवश्यकता टाळता येत नाही. आपल्या कृती तक्रारीस पात्र ठरतील का काय याचीच चिंता सतत आपल्याला असेल आणि अशा तक्रारीमुळे कायदेशीर कारवाई किंवा शिस्तीची कारवाई उगारली जाण्याची शक्यता असेल तर व्यक्तींमध्ये संशयास्पद औपचारिकतेचे नाते निर्माण होणे अटळ असते.

(२) हीन दर्जाचे पूर्वगामी वर्तन हेतुपुरस्सर असते अशा परिस्थितीत गुन्ह्याचा संबंध दोषांच्या परिणामांशी असू शकतो आणि असा गुन्हा, दोष उदभवणे किंवा त्याचे परिणाम उदभवणे अशा बाबींना सहाय्यभूत ठरलेला आहे. दोषांच्या बाबतीत, जे काही करायला पाहिजे असते त्यासंबंधीच्या सर्वसाधारण प्रचलित मापदंडाच्या बाबतीत चूक हीच केवळ चूकच असते. समंजस व्यक्ती आणि दोषमुक्त व्यक्ती यांची गल्लत करण्याची एक प्रवृत्ती असते. चुका करायच्या नाहीत असे केवळ ठरवून केवळ कोणालाच चुका टाळता येत नाहीत, त्याचप्रमाणे नियमांचे उल्लंघन न करण्याची निवड माणसे करु शकतात. नियमांचे उल्लंघन दोषार्ह, दंडनीय असते.

(३) पुरेशी सक्षमता असलेल्या वैद्यकीय व्यावसायिकाने - डॉक्टरने - वर्तन करावे तसे वर्तन करण्यात खरोखर चूक असेल अशा प्रकरणांच्या बाबतीतच टॉर्ट (ज्यामुळे दुस-या व्यक्तीच्या नागरी हक्कावर अतिक्रमण येते अशी नागरी दुखापत) लागू पडेल याची खात्री वादीचे हितसंबंध आणि प्रतिवादींचे हितसंबंध यांच्यातील अचूक तोल सांभाळून घेतली पाहिजे. काळजी घेण्याच्या मापदंडात अयोग्य अशी वाढ केली तर हा तोल धोक्यात येतो. व्यावसायिकांकडून असलेल्या अपेक्षा वास्तववादी आणि अपेक्षित मापदंड आवाक्यातले असणे आवश्यक असते, त्यातच गुंतागुंतीची कामे करताना मानवी मर्यादा आणि आणि साधारण मानवी दोषांच्या स्वरुपास असलेली मान्यता दडलेली आहे.

(४) कोणत्याही महत्त्वाच्या गुन्हेगारी कृत्याबद्दल शिक्षा व्हायची असेल तर आरोपी व्यक्तीकडून नैतिकदृष्ट्या दोषारोपार्ह मन:स्थितीत कृती घडलेली असणे आवश्यक असते. अविवेक आणि हेतुपुरस्सर दुष्कृत्ये नैतिकदृष्ट्या दोषारोपार्ह ठरतात पण कोणतेही वर्तन त्या पातळीपेक्षा कमी पातळीवरचे असेल तर ते गुन्हेगारीच्या स्वरुपाचे धरुन चालणार नाही. संपूर्णत: निष्काळजीपणाच्या म्हणून पारंपारिकरित्या वर्णन करण्यात आलेल्या मापदंडापेक्षा निष्काळजीपणाची पातळी कमालीची जास्त असते. अशा वेळी सर्वसाधारण कायद्याच्या यंत्रणेने केवळ पारंपारिकरित्याच निष्काळजीपणा हा मुद्दा गुन्हेगारीस होणा-या शिक्षांच्या अखत्यारीतला मानला आहे. प्रत्यक्षात त्या पातळीवरचा निष्काळजीपणा अविवेकापासून वेगळा न करता येण्याची शक्यता असते.

(५) दोषारोप हे एक सामर्थ्यशाली शस्त्र असते. या शस्त्राचा अयोग्य वापर माणसांमधील सहिष्णु आणि विधायक संबंधांना बाधा आणतो. (अ) ज्यांच्या बाबतीत नैतिकदृष्ट्या कोणीच जबाबदार नाही असे आयुष्यातले दुर्दैवी अपघात, (ब) गुन्हेगारी वर्तनात जमा होणारी आणि ज्याची नुकसान भरपाई द्यावी अशा स्वरुपाची दुष्कृत्ये आणि (क) शिक्षेस पात्र अशा संपूर्णत: किंवा अतिशय उच्च स्वरुपाच्या दुष्कृत्यांच्या बाबतीत, नैतिकदृष्ट्या भावनाशील आणि शास्त्रीयदृष्ट्या चांगल्या माहितीवर आधारित अशा विश्लेषणाची आवश्यकता असते, अन्यथा समाजाच्या व्यापक हितसंबंधांच्या बाबतीत अन्याय होत आहे असे दिसून येईल.

याचा अर्थ डॉक्टरांकडून घडलेल्या गुन्ह्यात अविवेक किंवा निष्काळजीपणा हेच घटक विशेषत: अंतर्भूत असतील तर त्यांच्यावर कधीही फौजदारी खटला चालवला जाऊ नये असा समज करुन घेऊ नये. मुख्यत: गरज असते ती समाजाच्या हितसंबंधांची काळजी घेण्याची आणि सावधगिरी बाळगण्याची. याचे कारण म्हणजे वैद्यकीय व्यवसायाकडून मनुष्यजातीची जी सेवा केली जाते, ती सगळ्यात जास्त उदात्त स्वरुपाची असते. त्यामुळे खोडसाळ किंवा अन्यायकारक खटल्यांपासून डॉक्टर मंडळींना संरक्षण देण्याची गरज असते. अशा प्रकारच्या आकसयुक्त खटल्यांपासून संरक्षण दिले पाहिजे, तसेच अस्सल तक्रारींमध्ये आत्यंतिक दंडात्मकता असणेही आवश्यक असते. अशा प्रकारे आरोपी डॉक्टरवरील अविवेक किंवा निष्काळजीपणाच्या आरोपांना पुष्टी देणारे प्रथमदर्शनी (प्रायमा फेसी) पुरावे तक्रारदाराने सादर करणे आवश्यक असते.


Justice Santosh Pandey
B.SC, LLB
District Judge

Advocate Suhas Shetty
B.COM, LLB
Advocate-High Court

In the case of **Jacob Mathew v. State of Punjab** three Judge Bench of Supreme Court by order quashed prosecution of a medical professional under Section 304-A/34 IPC and disposed of all the interlocutory applications that doctors should not be held criminally responsible unless there is a prima-facie evidence before the Court in the form of a credible opinion from another competent doctor, preferably a Government doctor in the same field of medicine supporting the charges of rash and negligent act.

The result of the decisions can be summed up as:

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices.

(4) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mensrea i.e. Criminal intent must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(5) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

Conclusions and Suggestions

An indiscriminate prosecution of medical professionals for criminal negligence is counter-productive and does no service or good to the society. There must be a link between fault, blame and justice requirements. The learned authors of Errors, Medicine and the Law highlight the link between moral fault, blame and justice in reference to medical profession and negligence. These are of significance and relevant to the issues before us. These are:

(i) The social efficacy of blame and related sanctions in particular cases of deliberate wrongdoings may be a matter of dispute, but their necessity in principle from a moral point of view, has been accepted. Distasteful as punishment may be, the social, and possibly moral, need to punish people for wrongdoing, occasionally in a severe fashion, cannot be escaped. If we are constantly concerned about whether our actions will be the subject of complaint, and that such complaint is likely to lead to legal action or disciplinary proceedings, a relationship of suspicious formality between persons is inevitable.

(ii) Culpability may attach to the consequence of an error in circumstances where substandard antecedent conduct has been deliberate, and has contributed to the generation of the error or to its outcome. In case of errors, the only failure is a failure

defined in terms of the normative standard of what should have been done. There is a tendency to confuse the reasonable person with the error-free person. While nobody can avoid errors on the basis of simply choosing not to make them, people can choose not to commit violations. A violation is culpable.

(iii) A correct balance of the interests of the plaintiff and the interests of the defendant should ensure that tort liability is restricted to those cases where there is a real failure to behave as a reasonably competent practitioner would have behaved. An inappropriate raising of the standard of care threatens this balance. While expectations from the professionals must be realistic and the expected standards attainable, this implies recognition of the nature of ordinary human error and human limitations in the performance of complex tasks.

(iv) Conviction for any substantial criminal offence requires that the accused person should have acted with a morally blameworthy state of mind. Recklessness and deliberate wrongdoing are morally blameworthy, but any conduct falling short of that should not be the subject of criminal liability. Common-law systems have traditionally only made negligence the subject of criminal sanction when the level of negligence has been high a standard traditionally described as gross negligence. In fact, negligence at that level is likely to be indistinguishable from recklessness.

(v) Blame is a powerful weapon. Its inappropriate use distorts tolerant and constructive relations between people. Distinguishing between (a) accidents which are life's misfortune for which nobody is morally responsible, (b) wrongs amounting to culpable conduct and constituting grounds for compensation, and (c) wrongs calling for punishment on account of being gross or of a very high degree requires and calls for careful, morally sensitive and scientifically informed analysis; else there would be injustice to the larger interest of the society.

This may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. There is a need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Such malicious proceedings have to be guarded against and genuine complaints must be ensued with extreme punitive stings. Thus, a complainant has to produce prima facie evidence before the Court to support the charge of rashness or negligence on the part of the accused doctor.

Observation by Supreme Court:

1) Prosecuting medical professionals, as we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase.

2) Sometimes such prosecutions are filed by private complainants and sometimes by police on an FIR being lodged and cognizance taken. The investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law under Section 304-A of IPC.

3) The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him.

4) At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards.

Guidelines by Supreme Court

Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it is not done, we propose to lay down certain guidelines.

1) A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.

2) The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam's test to the facts collected in the investigation.

3) A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him).

4) Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld.

Equivalent Citation:

IN THE SUPREME COURT OF INDIA

Civil Appeal Nos. 5460 and 5466 of 2004

Decided On: 07.04.2007

Moran Mar Baselios Marthoma Mathews II and Ors.

Vs.

State of Kerala and Ors.

Hon'ble Judges/Coram:

S.B. Sinha and Markandey Katju, JJ.

Subject: Constitution

Catch Words

Mentioned IN

Acts/Rules/Orders:

Constitution of India - Article 12, Constitution of India - Article 136, Constitution of India - Article 144, Constitution of India - Article 226

Cases Referred:

Most. Rev. P.M.A. Metropolitan and Ors. v. Moran Mar Marthoma and Ors.: A.I.R. 1995 S.C. 2001; P.R. Murlidharan and Ors. v. Swami Dharamananda Theertha Padar and Ors.: 2006 (4) S.C.C. 501; St George Jacobite Syrian Christian Church and Ors. v. State of Kerala and Ors. Writ Petition (C) No. 3214/2006

Citing Reference:

Affirmed	1
Relied On	2

***Case Note:**

Constitution of India - Article 226--Writ of police protection--Disputed questions with regard to title cannot be the subject- matter of adjudication by the High Court in a petition for police protection filed under Article 226.

Appellants challenged dismissal of the writ petition filed by them for police protection to enable the 1st Appellant to exercise his rights and privileges as the Catholicos-cum-Malankara Metropolitan of the Malankara Church. Ancilliary reliefs were also sought. Respondents contended that nearly 200 Civil Suits are pending in respect of the reliefs prayed for in the writ petition and since the facts are seriously disputed, writ petition is not maintainable. The High Court examined the case on merits and refused to grant police protection but made some observations about rights of contesting parties. Aggrieved by refusal to grant police protection, Petitioners in the writ petition took the matter in appeal. Dismissing the appeal, the Hon'ble Supreme Court held that High Court should not have examined the matter on merits and cautioned High Courts to be circumspect while entertaining writ petitions for police protection, when the facts are in dispute or when the rights of the Petitioner itself is pending adjudication of Civil Court.

Held:

We have no doubt in our mind that such disputed questions in regard to title of the properties or the right of one group against the other in respect of the management of such a large number of Churches could not have been the subject-matter for determination by a Writ Court under Article 226 of the Constitution of India in the garb of police protection to one or the other Appellants. We are of the opinion that the High Court committed a manifest error in going into the disputed questions of title as also the disputed questions in regard to the rights of a particular group to manage the Churches, in exercise of its writ jurisdiction, particularly, when such questions are pending consideration before competent Civil Courts. We, therefore, are of the opinion that any observation made by the High Court should not influence the Courts concerned in arriving at their independent decisions and in respect thereof, all contentions of the parties shall remain open.

Subject Category :
RELIGIOUS AND CHARITABLE ENDOWMENTS

JUDGMENT

S.B. Sinha, J.

1. Dispute between the parties, centres round the management of a large number of Churches known as "Syrian Churches". The present controversy arises in regard to the interpretation of a decision of this Court in Most. Rev. P.M.A. Metropolitan and Ors. v. Moran Mar Marthoma and Ors. A.I.R. 1995 S.C. 2001. A writ petition was filed by the Appellants herein before the Kerala High Court, praying inter alia, for the following reliefs:

a. In the above facts and circumstances of the case this Hon'ble Court may kindly be pleased to issue a writ of mandamus or any other appropriate writ order or directions commanding Respondents 1 to 4 and their subordinates to give effective and adequate police protection to the First Petitioner to exercise his rights, duties and privileges as The Catholicos-cum-Malankara Metropolitan of the Malankara Church with respect to the Parishes mentioned in Exhibit P-4 and Institutions of the Malankara Church without any threat or obstruction from Respondents 5 to 13 or their agents or servants in any manner.

b. To issue a writ of mandamus or any other appropriate writ order or directions commanding Respondents 1 to 4 to give effective and adequate police protection to Petitioners to exercise their rights, duties and privileges as Metropolitans of the Malankara Orthodox Syrian Church under the First Petitioner without any threat or obstruction from the Respondents 5 to 13 or their agents or servants in any manner.

c. To issue a writ of mandamus or any other appropriate writ order or directions commanding Respondents 1 to 4 to give effective and adequate police protection to other Bishops similarly placed as well as to the faithful members of the Malankara Church for the purpose of participating in the conduct of religious services in the said Parish Churches of the Malankara Church by Petitioners without any threat or obstruction from Respondents 5-13 or their agents or servants in any manner.

d. Issue a writ of mandamus or any other appropriate writ order or direction commanding Respondents 1 to 4 to take steps to see that Respondents 5 to 13 do not enter into any of the churches of the Malankara Orthodox Syrian Church mentioned in Exhibit P-4 and Institutions of the Malankara Church in any capacity either as Catholicose, Bishop, Priest or in any other manner.

e. Issue appropriate directions to Respondents 1 to 4 to restrain Respondents 5 to 13 from in any way obstructing the Petitioners from exercising the powers in accordance with the provisions of 1934 Constitution of the Malankara Church with respect to the Parish Churches of the Malankara Church mentioned in Exhibit P-4 and Institutions of the Church.

f. Direct Respondents 5 to 13 to pay the cost of this petition to the Petitioners." One of the contentions which has been raised before the High Court was the maintainability of the writ petition on the premise that it could not have gone into the disputed questions of fact and, particularly, the application of the said judgment in relation to Parish Churches. Appellants, however, raised a contention that the writ petition was maintainable as the State and its officers having regard to the provisions contained in Article 144 of the Constitution of India are duty bound to give effect to the decision of this Court.

The High Court in view of the rival contention of the parties formulated two questions for its consideration:
1. Are the contesting Respondents bound by the judgment of Their Lordships of the Supreme Court in Most. Rev. P.M.A. Metropolitan v. Moran Mar Marthoma: A.I.R. 1995 S.C. 2001)?

2. Is a case for the issue of a writ of mandamus as prayed for by the Petitioners made out?

2. Upon noticing the contentions raised on behalf of the parties, including the one that the Appellants herein had raised claims over the properties of the aforesaid Churches; in relation whereto there exists serious dispute and about 200 civil suits arte pending in different Courts in the State of Kerala.

The High Court, however, went into the merit of the matter and opined that so far as the rights of Parish Churches are concerned, there was no declaration as against them, having not been impleaded in the proceedings before the Supreme Court Having opined so, the High Court held:
i. The rights of the Parish Churches were not determined by the Supreme Court in the 1995 decision. Thus, it cannot be said that the contesting Respondents have no right to manage their properties or that the 1st Petitioner has any right over the Churches which were not parties in the case;

ii. All the Churches lifted in Ext. P-4 having not been impleaded as parties, no order affecting the rights of those who are not before the Court can be passed;

iii. The Churches had the right to form a separate Association. They were also entitled to leave the Malankara Association under Arts. 19,25 and 26. It has not been shown that they had acted illegally in doing so;

iv. Police help cannot be ordered for the mere asking. It involves expense for the State. It is not a substitute for proceedings before an appropriate authority or Court. It can be normally granted only when there is clear evidence of an existing danger to person or property. In matters involving religious institutions, it would be normally inappropriate to order the grant of police protection unless a clear case for allowing the entry of the police is made out;

v. Keeping in view the peculiar facts and circumstances as noticed above, no ground for the issue of a writ of mandamus as prayed for by the Petitioners is made out.

3. Before we embark upon the rival contentions raised by the leaned Counsel appearing on behalf of the parties before us, we may notice that Appellant No.1 is said to have resigned from the post of Catholicos of the Malankara Metropolitan in 2005. He died on 26-1-2006. An application for substitution has been filed by his successor who is Chief Catholico and Malankara Metropolitan, which has been marked as I.A. No. 16 of 2006. The said substitution application is being opposed by the Respondents herein contending that the question in regard to the validity or otherwise of the election of the Catholicos is pending consideration in a suit. Having regard to the fact that there exists dispute as to whether the applicant herein is a validly elected person for holding the aforementioned post, and furthermore, in view of the fact that, in his absence, whether we can proceed with the appeals, we do not intend to pass any order in the substitution application.

4. The short question which arises for consideration, in our opinion, is as to whether in a situation of this nature, the High Court should have gone into the rival contentions of the parties. Our answer is 'No'. There cannot be any doubt whatsoever that prayer for issuance of a writ of mandamus may be granted against the State commanding it to perform its legal duties when it fails and/or neglects to do so. It is, however, Anr. thing that while considering only that aspect of the matter, the Court in the garb of rendering a decision on that limited aspect would go into the disputed question of title and/or interpretation of a judgment of this Court where for other remedies are not only available but, as noticed hereinbefore, in fact, more than 200 suits, touching one aspect of the matter or the other, are pending in different Civil Courts.

5. A distinction, in our opinion, must be borne in mind in regard to the exercise of jurisdiction under Article 226 of the Constitution of India in relation to the matters providing for public law remedy vis-a-vis private law remedy. The High Court while exercising its jurisdiction under Article 226 of the Constitution, no doubt, exercises a plenary power but then certain limitations in regard thereto are well-accepted. Ordinarily, a writ of or in the nature of mandamus would be issued against a 'State' within the meaning of Article 12 of the Constitution of India or the public authorities discharging public functions or a public utility concern or where the functions of the Respondents are referable to a statute, which a fortiorari would mean that save and except for good reasons Court would not entertain a matter involving private law remedy.

6. The question as regards grant of a relief for providing police protection in a somewhat similar case, came up for consideration before this Court in P.R. Murlidharan and Ors. v. Swami Dharamananda Theertha Padar and Ors. 2006 (4) S.C.C. 501 wherein one of us was a party. It was held therein:

Furthermore, the jurisdiction of the civil Court is wide and plenary. In a case of this nature, a writ proceeding cannot be a substitute for a civil suit.

Balasubramanyan, J., in his concurring opinion observed:

A writ petition under the guise of seeking a writ of mandamus directing the police authorities to give protection to a writ Petitioner, cannot be made a forum for adjudicating on civil rights. It is one thing to approach the High Court, for issuance of such a writ on a plea that a particular party has not obeyed a decree or an order of injunction passed in favour of the writ Petitioner, was deliberately flouting that decree or order and in spite of the Petitioner applying for it, or that the police authorities are not giving him the needed protection in terms of the decree or order passed by a Court with jurisdiction. But, it is quite Anr. thing to seek a writ of mandamus directing protection in respect of property, status or right which remains to be adjudicated upon and when such an adjudication can only be got done in a properly instituted civil suit. It would be an abuse of process for a writ Petitioner to approach the High Court under Article 226 of the Constitution seeking a writ of mandamus directing the police authorities to protect his claimed possession of a property without first establishing his possession in an appropriate civil Court The temptation to grant relief in cases of this nature should be resisted by the High Court. The wide

jurisdiction under Article 226 of the Constitution would remain effective and meaningful only when it is exercised prudently and in appropriate situations.

7. Learned senior Counsel appearing on behalf of the Respondents herein contend that the Appellants before us cannot be permitted to take a different stand now, nor can they be allowed to play fast and loose. The High Court had arrived at its opinion only at their behest. Our attention in this behalf has also been drawn even to the grounds taken by the Appellants before us to contend that a writ of or in the nature of mandamus was sought for for enforcing the purported legal right of the Appellant vis-a-vis the State and its officers and not as against the private persons.

8. Such might have been the contentions of the Appellants before the High Court or before us in the special leave petitions, but we have no doubt in our mind that such disputed questions in regard to title of the properties or the right of one group against the other in respect of the management of such a large number of Churches could not have been the subject-matter for determination by a Writ Court under Article 226 of the Constitution of India in the garb of grant of police protection to one or the other Appellants.

9. We, therefore, are of the opinion that despite the fact that the Appellants had insisted upon before the High Court for issuance of a writ or in the nature of mandamus upon the State or its officers for the purpose of grant of police protection as this Court has exercised its appellate jurisdiction under Article 136 of the Constitution of India, it can and should go into that question as well, viz. as to whether the writ Petitioner itself could have been entertained or not, particularly, when the appeal is a continuation of the original proceedings.

10. Learned senior Counsel appearing on behalf of the Respondents would moreover submit that different Benches of the High Court may take different views in regard to the interpretation of the judgments of this Court in Most Rev. P.M.A. Metropolitan (supra), and in support thereof has placed before us a judgment of the learned Single Judge of the said Court in St George Jacobite Syrian Christian Church and Ors. v. State of Kerala and Ors., passed in Writ Petition (C) No. 32114/2006, wherein a view different from the one taken by the Division Bench of the High Court of Kerala in the impugned judgment, has been taken. We, however, having regard to the opinion expressed hereinbefore and furthermore in view of the fact that, admittedly, a Letters Patent Appeal there against has been filed by the aggrieved parties before the Division Bench of the Kerala High Court, do not intend to go into the said contention.

11. For the reasons stated hereinbefore, we are of the opinion that the High Court committed a manifest error in going into the disputed questions of title as also the disputed questions in regard to the rights of a particular group to manage the Churches, in exercise of its writ jurisdiction, particularly, when such questions are pending consideration before competent Civil Courts. We, therefore, are of the opinion that any observation made by the High Court should not influence the Courts concerned in arriving at their independent decisions and in respect thereof, all contentions of the parties shall remain open.

12. We are making these observations, particularly in view of the fact that even a large number of persons who have filed different suits in different Courts of law were not parties before the High Court in the writ petition and thus any observation and findings of the High Court would otherwise also not be binding on them.

13. It must be clarified that we have expressed no opinion on the merit of the issue pending before the Civil Courts.

The appeals are disposed of accordingly. Application for impleadment is dismissed.
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Justice Santosh Pandey
B.SC,LLB
District Judge

Advocate Suhas Shetty
B.COM,LLB
Advocate-High Court

मार्टीन एफ डिसूझा विरुध्द मोहमद इस्फाक

सारांश

दुस-या एखाद्या सक्षम डॉक्टरांकडून, विशेषत्वाने अविचाराच्या आणि निष्काळजीपणाच्या कृतीच्या आरोपांना पुष्टी देणारा त्याच क्षेत्रातल्या सरकारी डॉक्टरांचा विश्वासार्ह मताच्या स्वरुपातला प्रथमदर्शनी (प्रायमा-फेसी) पुरावा कोर्टासमोर सादर झाला नसेल, तर डॉक्टरांना गुन्हेगारीच्या दृष्टीने जबाबदार धरले जाऊ नये असा निर्णय माननीय सर्वोच्च न्यायालयाने एका महत्त्वपूर्ण अशा ऐतिहासिक निकालात दिला आहे. वैद्यकीय उपचारांच्या बाबतीत प्रथमदर्शनी निष्काळजीपणा दिसत नाही अशा किरकोळ प्रकरणांच्या बाबतीत भारतीय दंड विधानाच्या कलम ३०४-ए आणि अगदी ३०४ अन्वये वैद्यकीय व्यावसायिकांविरुध्द - डॉक्टरांविरुध्द दाखल झालेल्या गुन्हेगारीच्या प्रक्रियांच्या संदर्भातला हा निकाल स्पृहणीय असा आहे.

वैद्यकीय निष्काळजीपणाच्या संबंधातील सर्वसाधारण तत्त्वे :

डॉक्टर व्यक्तीने आपल्या कामात कौशल्य आणि ज्ञान यांचे पुरेसे प्रमाण बनवून घेणे आवश्यक आहे, तसेच पुरेशी काळजी घेण्याची प्रवृत्तीसुध्दा अंगीकारणे आवश्यक आहे. प्रत्येक प्रकरणाच्या त्या त्या विशिष्ट परिस्थितीचा विचार करता अतिशय उच्चतम किंवा अतिशय नीचतम अशी काळजी आणि सक्षमता कायद्याच्या दृष्टीने आवश्यक नसते. तसेच त्यापेक्षा अधिक कौशल्य आणि ज्ञान असलेल्या आणखी कोणा डॉक्टरने वेगळ्या उपचाराची शिफारस केली असती किंवा वेगळ्या पध्दतीने शस्त्रक्रिया केली असती म्हणूनही एखाद्या व्यक्तीवर निष्काळजीपणाचा आरोप लागू होत नाही. त्याचप्रमाणे, त्या विशिष्ट क्षेत्रातले विशेष कौशल्य असलेल्या डॉक्टरांच्या जबाबदार अशा गटाने योग्य म्हणून स्वीकारलेल्या पध्दतीप्रमाणे त्या विशिष्ट डॉक्टरने काम केले असेल तरीसुध्दा निष्काळजीपणाचा दोष त्याला लागत नाही. अगदी डॉक्टरांच्याच विश्वात एका गटामध्ये विरोधी मत असले तरीही दोष लागत नाही.

सर्वसाधारणपणे प्रचलित असलेल्या पध्दतींपासून हरकत घेणे म्हणजे अटळ असा निष्काळजीपणाचा पुरावा नव्हे. त्या आधारावर जबाबदारी प्रस्थापित करण्यासाठी पुढील मुद्दे आवश्यक ठरतात : (१) नेहमीच्या रुळलेल्या आणि सर्वसाधारण अशा पध्दती अस्तित्वात आहेत, (२) प्रतिवादीने या पध्दती अवलंबिलेल्या नाहीत; आणि (३) कोणत्याही सर्वसाधारण कौशल्ये असलेल्या व्यावसायिक व्यक्तीने सर्वसाधारण स्वरुपाची काळजी घेत काम करत असताना अनुसरला नसता असा मार्ग प्रत्यक्षात अवलंबण्यात आलेला आहे.

केवळ अपघाताने किंवा आपत्तीने किंवा उपचारांच्या दोन पध्दतींपैकी एक योग्य तो मार्ग निवडण्यासाठी झालेल्या निर्णयातल्या चुकीमुळे परिस्थितीने चुकीचे वळण घेतले असेल तर केवळ तेवढ्यासाठीच वैद्यकीय व्यावसायिकाला निष्काळजीपणासाठी जबाबदार धरता येत नाही. अशा डॉक्टरने अनुसरलेली पध्दत, त्याच्या क्षेत्रातल्या एखाद्या पुरेशा अशा सक्षम डॉक्टरच्या मापदंडांच्या मानाने खूपच खालच्या स्तरावरची असेल तेव्हा तो जबाबदार ठरतो. उदा. अशा डॉक्टरकडून शस्त्रक्रियेनंतर पेशंटच्या शरीरात एखादे शस्त्रक्रियेसाठी लागणारे तलम कापड राहिले तर तो निष्काळजीपणाला जबाबदार ठरेल. (संदर्भ : अच्युतराव हरीभाऊ खोडवा विरुध्द महाराष्ट्र राज्य आणि इतर. त्याचप्रमाणे त्याने रुग्णाच्या शरीराच्या चुकीच्या भागावर शस्त्रक्रिया केली तसेच त्याने बेकायदेशीर व्यापारासाठी कोणाचा तरी अवयव काढून घेण्यासाठी कोणावर शस्त्रक्रिया केली तरीसुध्दा तो गुन्हेगारीस जबाबदार ठरेल. समंजस व्यक्ती आणि दोषमुक्त व्यक्ती यांची गल्लत करण्याची एक प्रवृत्ती असते. निर्णयप्रक्रियेतील दोष निष्काळजीपणा ठरु शकतो किंवा ठरु शकतही नाही. दोषाच्या स्वरुपावर ते अवलंबून असते.

आरोपी डॉक्टरचा निर्णय चुकीचा असल्याचे मत नोंदवणारा सक्षम डॉक्टरांचा एक गट असल्याचे केवळ दाखवणे पुरेसे नसते. तर त्याचबरोबर त्या परिस्थितीत तो निर्णय सूज्ञपणाचा आहे अशी पुष्टी देणारा तितकाच सक्षम असलेल्या व्यावसायिक मतांचा एक गटसुध्दा असणे आवश्यक असते.

हंटर विरुध्द हॅन्ले १९५५ एसएलटी २१३ : मध्ये लॉर्ड क्लाईड यांनी सादर केल्याप्रमाणे :

निदान आणि उपचार या बाबतीत मतांमध्ये ख-या भिन्नतेला बराच वाव असतो आणि एखाद्या व्यक्तीचे निर्णय दुस-या व्यावसायिक व्यक्तीपेक्षा वेगळे असतील तर ती वेगळा निर्णय घेणारी व्यक्ती नि:संशयपणे निष्काळजी नसते.

निदान किंवा उपचार यांच्या बाबतीत एखाद्या डॉक्टरचा निष्काळजीपणा प्रस्थापित करण्यासाठी खरी परीक्षा असते ती म्हणजे सर्वसाधारण कौशल्य असलेला कोणताही डॉक्टर सर्वसाधारण काळजी घेत काम करत असताना दोषी ठरणार नाही, अशा परिस्थितीत तो डॉक्टर दोषी ठरला आहे का ते पाहणे...

काळजीच्या मापदंडाचा विचार तो विशिष्ट प्रसंग घडण्याच्या वेळी उपलब्ध असलेल्या ज्ञानाच्या संदर्भात केला जाणे आवश्यक आहे, खटल्याच्या वेळी उपलब्ध असलेल्या ज्ञानाच्या संदर्भात नव्हे. तसेच, निष्काळजीपणाचा आरोप जेव्हा कोणतेही विशिष्ट उपकरण वापरण्याच्या बाबतीतील चूक होण्याशी संबंधित असतो तेव्हा त्या विशिष्ट वेळी ते उपकरण सर्वसाधारणपणे उपलब्ध नसेल तर तो आरोप निराधार ठरतो.

आणीबाणीची तीव्रता अधिक असेल, तसेच गुंतागुंत जास्त असेल तर निर्णय घेताना चूक होण्याची शक्यता जास्त असते. काही वेळा एकीकडे आग तर दुसरीकडे फुफाटा यांच्यात निवड करण्याचा समरप्रसंग डॉक्टर व्यक्तींसमोर उभा राहतो आणि त्यातल्या त्यात कमी धोकादायक मार्ग निवडावा लागतो. डॉक्टर व्यक्तीला अनेकदा मोठा धोका असलेल्या पध्दतीचा अवलंब करावा लागतो, मात्र कमी धोका असलेल्या पण अपयशाची शक्यता मोठी असलेल्या पध्दतीपेक्षा रुग्णाला दुखण्यातून मुक्त करण्याची मोठी शक्यता असलेल्या मोठा धोका असलेल्या पध्दतीवर तो प्रामाणिकपणे विश्वास ठेवतो. कोणता मार्ग अवलंबण्याच्या दृष्टीने योग्य, ते त्या विशिष्ट केसचे तपशील आणि परिस्थितीवर अवलंबून असेल मात्र अपयशी

ठरली तरी मोठा धोका असलेली आधीची पध्दती अवलंबल्याबद्दल डॉक्टर व्यक्ती शिक्षेस पात्र ठरु शकत नाही. त्यामुळे आता ती विशिष्ट उपचाराची पध्दती अवलंबण्याआधी रुग्णाची संमती घेण्याची किंवा रुग्ण संमती देण्याच्या अवस्थेत नसेल तर त्याची काळजी घेणा-या व्यक्तीची संमती घेण्याची पध्दत प्रचलित आहे.

एखाद्या रुग्णाचा जीव वाचवण्यासाठी उपचारांची कोणतीही ज्ञात पध्दत उपलब्ध नसेल तर तोपर्यंत कोणीही अवलंबण्याचा प्रयत्न केलेला नाही अशा उपचारपध्दतीची शिफारस करणारे किंवा शस्त्रक्रिया करणारे अपवादात्मक असे बुध्दिमान डॉक्टर असतात, अशीही काही उदाहरणे आहेत. अशा वेळी रुग्णाचा मृत्यू झाला किंवा त्याला काही गंभीर स्वरुपाची इजा झाली तर डॉक्टरला जबाबदार समजायचे का ? कोर्टांचे मत असे असते की डॉक्टरला जबाबदार धरता कामा नये. विज्ञानाची प्रगती प्रयोगशीलतेमुळे झालेली असली तरी काही वेळा प्रयोग अयशस्वी होतात, उदा. जन्मत: डोके चिकटलेल्या इराणी जुळ्या बहिणींवरील शस्त्रक्रिया किंवा दक्षिण आफ्रिकेतील डॉ. बर्नार्ड यांनी केलेली पहिली हरुदयरोपणाची शस्त्रक्रिया. तरीसुध्दा अशा केसेसमध्ये रुग्णाला सगळी परिस्थिती समजावून सांगणे आणि त्याची लेखी संमती घेणे असा सल्ला डॉक्टरांना देणे इष्ट ठरते.

केवळ एखाद्या डॉक्टरने दिलेल्या उपचारांना रुग्णाने सकारात्मक प्रतिसाद दिला नाही किंवा शस्त्रक्रिया अपयशी ठरली म्हणून res ipsa loquitur (काही प्रकारचे अपघात निव्वळ उदभवण्यातही निष्काळजीपणा सूचित करण्यास पुरेसा असतो असे सांगणारे तत्त्व) च्या न्यायाने वैद्यकीय निष्काळजीपणाबद्दल त्या डॉक्टरला तडक जबाबदार धरता येत नाही. कोणत्याही डॉक्टरचा व्यावसायिक लौकिक पणाला लागत असल्याने तो रुग्णाचे नुकसान होईल किंवा त्याला इजा होईल अशा प्रकारची चूक हेतुपुरस्सर करणार नाही.

जेकब मॅथ्यूच्या केसमध्ये सुप्रीम कोर्टाने नोंदवलेल्या निरीक्षणाप्रमाणे :
कोणताही डॉक्टर गंभीर परिस्थिती समोर आल्यास सर्वसाधारणपणे रुग्णाला त्याच्या वेदनांमधून मुक्त करण्यासाठी प्रयत्नांची पराकाष्ठा करतो. निष्काळजीपणाने परिस्थिती हाताळून किंवा एखादी उपाययोजना करण्यात चूक करुन त्याला काहीच लाभ होणार नसतो. त्यामुळे एखाद्या डॉक्टरवर गुन्हेगारीचा आरोप ठेवण्याआधी किंवा खटला दाखल करण्याआधी ती विशिष्ट केस निष्काळजीपणाची असल्याचे दाखवण्याचे काम नि:संशयपणे फिर्यादीचे असते हे उघड आहे. कायदेशीर कारवाईच्या भीतीने हात थरथरणारा सर्जन यशस्वी शस्त्रक्रिया करु शकत नाही तसेच थरथर कापणारा डॉक्टरसुध्दा त्याच्या रुग्णाला औषधाचा नेमका प्रभावी असा डोस देऊ शकत नाही.

कोणत्याही कारणामुळे - त्या डॉक्टरलाच लागू असणारे कारण असो वा नसो - अपयशाच्या बाबतीत गुन्हेगारीसंबंधीच्या खटल्याला तोंड देण्याच्या भीतीच्या टांगत्या तलवारीमुळे हात थरथरत असतील तर आवश्यक ती शस्त्रक्रिया करण्यासाठी सर्जन यशस्वीरित्या त्याचे जीवनदायक उपकरण चालवू शकत नाही तसेच कुठलाही डॉक्टर यशस्वीरित्या जीवनदायक डोस यशस्वीरित्या देऊ शकत नाही. यशाची शक्यता दहा टक्के (किंवा त्याच्या आसपास) असेल तर गंभीर परिस्थितीत अशा रुग्णाला वाचवण्यासाठी शेवटचे प्रयत्न करण्याचा आणि त्यात अपयश आले तर फौजदारी खटल्याला तोंड देण्याचा धोका पत्करण्याऐवजी, धाडसाने धोका पत्करण्याऐवजी विचारपूर्वक पावले टाकण्याचा सूज्ञपणा दाखवून अशा अवस्थेतल्या रुग्णाला त्याच्याच नशिबाच्या भरवशावर सोडण्याचा सल्ला डॉक्टरांना दिलेला केव्हाही उत्तम ! डॉक्टरांवर अशी भीतीची टांगती तलवार ठेवली तर त्यात समाजाचे नुकसानच जास्त होईल.

एखादा रुग्ण मरतो किंवा कुठल्याशा दुर्घटनेमुळे त्याला फटका बसतो तेव्हा त्याबद्दल डॉक्टरवर दोषारोप ठेवण्याची प्रवृत्ती असते. परिस्थितीने वाकडे वळण घेतले आहे आणि म्हणून त्याबद्दल कोणाला तरी शिक्षा झाली पाहिजे अशी प्रवृत्ती त्यामागे असते. तरीसुध्दा, सर्वसाधारण पातळीवरचे डॉक्टरच काय, अगदी सर्वोत्कृष्ट डॉक्टरांनासुध्दा कधीतरी अपयश येते, ही बाब सर्वश्रुत आहे. कोणताही वकील त्याच्या व्यावसायिक कारकीर्दीत प्रत्येक केस जिंकू शकत नाही पण तो त्या केसमध्ये कोर्टात हजर झाला असेल आणि त्याने त्याचे युक्तीवाद सादर केले असतील तर केस हरल्याबद्दल नक्कीच तो शिक्षेस पात्र ठरु शकत नाही.

फौजदारी दाव्याच्या बाबतीत जबाबदार धरण्याआधी, म्हणजेच भारतीय दंड विधानाच्या कलम ३०४ ए अन्वये दावा दाखल होण्यासाठी निष्काळजीपणाची पातळी दिवाणी दावा लागू होण्याकरिता पुरेशा असलेल्या पातळीपेक्षा खूपच जास्त असावी लागते. म्हणजेच दिवाणी दाव्याच्या दृष्टीने जबाबदार धरण्यासाठी वर उल्लेख केलेल्या तत्त्वांनुसार डॉक्टरांनी पुरेशी काळजी घेतली नाही, एवढेच सिध्द करणे फिर्यादीला पुरेसे असते, मात्र फौजदारी दाव्याच्या बाबतीत एखाद्या डॉक्टरला शिक्षा होण्यासाठी हा संपूर्ण निष्काळजीपणा बेपर्वाईच्या स्वरुपाचा असतो हेही सिध्द करावे लागते.

व्यावसायिक डॉक्टर म्हणजे काहीतरी विशेष कौशल्य असल्याची ग्वाही देतो. एक डॉक्टर सूचकतेने त्याच्याशी संबंध येणाऱ्यांना पुढील गोष्टींची ग्वाही देतो : (१) तो ज्याची ग्वाही देतो ते कौशल्य त्याच्याकडे आहे आणि (२) हे कौशल्य पुरेशी काळजी आणि सावधगिरी घेऊन उपयोगात आणले जाईल.

या मापदंडांनुसार विशिष्ट डॉक्टर जी ग्वाही देतो तसे आवश्यक ते कौशल्य त्याच्याकडे नसल्याच्या मुद्यावर त्या डॉक्टरला निष्काळजीपणाबद्दल जबाबदार धरता येते. अशा प्रकारे आयुर्वेदिक किंवा होमिओपाथिक ज्ञानशाखेची शैक्षणिक अर्हता असताना त्याने ऍलोपाथिक उपचार दिले आणि त्यामुळे काही इजा झाली तर असा डॉक्टर निष्काळजीपणाबद्दल जबाबदार ठरतो. उदा. पूनम वर्मा विरुध्द अश्विन पटेल आणि इतर. . डॉ शिवकुमार गौतम विरुध्द अलिमा या १०.१०.२००६ रोजी निकाल लागलेल्या रिव्हीजन पिटीशन क्र.५८६ नुसार राष्ट्रीय ग्राहक आयोगाने (नॅशनल कन्झ्युमर कमिशन) एका होमिओपाथ डॉक्टरला ऍलोपाथिक औषधे आणि ग्लुकोज ड्रीप तसेच इंजेक्शन दिल्याबद्दल जबाबदार धरले.

फौजदारी केसेसमधील डॉक्टरांना संरक्षण
मा. सुप्रीम कोर्टाने वैद्यकीय निष्काळजीपणाच्या क्षुल्लक फिर्यादीपासून डॉक्टर मंडळींना संरक्षण दिले पाहिजे हे ओळखून त्या अनुषंगाने काही नियम घालून दिले ते पुढीलप्रमाणे :

(१) आरोपी डॉक्टरवरील अविवेक किंवा निष्काळजीपणाच्या आरोपाला पुष्टी देण्यासाठी अन्य कुठल्याही सक्षम डॉक्टरने दिलेल्या विश्वासार्ह मताच्या स्वरुपातील प्रथमदर्शनी पुरावा फिर्यादीने सादर केल्याशिवाय खाजगी फिर्यादीचा विचार केला जाऊ नये.

(२) चौकशी अधिका-याने अविवेकाचे किंवा निष्काळजीपणाचे कृत्य किंवा चूक याबद्दल आरोप असलेल्या डॉक्टरविरुध्द कारवाई सुरु करण्याआधी संपूर्णपणे स्वतंत्र आणि सक्षम वैद्यकीय मत प्राप्त केले पाहिजे. हे मत विशेषत: सरकारी सेवेतल्या एखाद्या डॉक्टरचे असावे. मतप्रदर्शन करणारा हा डॉक्टर आरोपी डॉक्टरच्याच ज्ञानशाखेतला असावा आणि त्याने बोलम टेस्ट लागू करुन नि:पक्षपाती मत द्यावे अशी सर्वसाधारण अपेक्षा असते.

(३) निष्काळजीपणाचा आरोप ज्याच्यावर आहे अशा डॉक्टरला केवळ त्याच्यावर आरोप ठेवला आहे म्हणून सर्वसाधारण पध्दतीने अटक करु नये. चौकशी पुढे चालवण्यासाठी किंवा पुरावे गोळा करण्यासाठी अशा डॉक्टरला अटक करणे आवश्यक नसेल किंवा त्याला अटक केल्याशिवाय खटल्याला सामोरे जाण्यासाठी आरोपी डॉक्टर उपलब्ध होणार नाही असे चौकशी अधिका-याला वाटत नसेल तर अटक रोखली जावी.

डॉक्टर/रुग्णालये/नर्सिंग होम्स यांनी घ्यावयाची सावधगिरी :

(अ) चालू पध्दती, पायाभूत सुविधा, पॅरामेडिकल आणि अन्य कर्मचारी, स्वच्छता आणि निर्जंतुकीकरण यांचे कठोर पालन होणे आवश्यक असते. अशा प्रकारे सरवत अली खान विरुध्द प्रा. आर गोगी आणि कं. मूळचा पिटीशन क्र. १८१/१९९७ अन्वये दि.१८/०७/२००७ रोजी राष्ट्रीय ग्राहक आयोगाने (नॅशनल कन्झ्यूमर कमिशन) निकाल जाहीर केलेल्या या प्रकरणात २६ आणि २७ सप्टेंबर, १९९५ रोजी एका डोळ्यांच्या हॉस्पिटलमध्ये झालेल्या एकूण ५२ मोतीबिंदूच्या शस्त्रक्रियांपैकी १४ व्यक्तींना डोळ्यावर झालेल्या शस्त्रक्रियांमध्ये अंधत्व आले. या प्रकरणाच्या चौकशीअंती असे आढळून आले, की ऑपरेशन थिएटरमधले निर्जंतुकीकरण करणारे दोन ऑटोक्लेव्हज योग्य पध्दतीने काम करत नव्हते. वेगवेगळी उपकरणे, कॉटन, पॅडस, लिनन इ.चे निर्जंतुकीकरण करण्यासाठी ही यंत्रणा अतिशय आवश्यक असते, अशा परिस्थितीत ही यंत्रणा काम करु न शकल्याने नुकसान घडून आले. त्यामुळे डॉक्टरांना जबाबदार धरण्यात आले.

(ब) प्रत्यक्ष तपासणी केल्याशिवाय सर्वसाधारणपणे औषधांची शिफारस करु नये. अगदी निकडीच्या अशा गंभीर प्रसंगांचा अपवाद वगळता टेलिफोनवरुन प्रिस्क्रिप्शन देणे टाळणे इष्ट ठरते.

(क) डॉक्टरने केवळ रुग्णाच्या आजाराच्या लक्षणांवरुन विचार करु नये तर शक्य तेथे त्याबरोबरच टेस्ट आणि चिकित्सेसह स्वत:चे विश्लेषणही करावे.

(ड) डॉक्टरने आवश्यकता नसेल तर प्रयोग करु नयेत आणि केले तरी सर्वसाधारणपणे रुग्णाकडून लेखी संमती घ्यावी.

(इ) कुठलीही शंका असेल तर तज्ञाचा सल्ला घ्यावा. अशा प्रकारे, श्रीमती इंद्राणी मुखर्जी, मूळ पिटीशन क्र.२३३/१९९६ बाबतीत ०९.०८.२००७ रोजी राष्ट्रीय ग्राहक आयोगाने (नॅशनल कन्झ्युमर कमिशन) निर्णय दिलेल्या प्रकरणात रुग्णाला ममाइल्ड लॅटरल वॉल इश्केमियाफ विकार असल्याचे निदान झाले होते. डॉक्टरने गॅस्ट्रो-एनटायर्टीसवर औषधे दिली पण रुग्णाचा मृत्यू झाला. या प्रकरणात डॉक्टर जबाबदार असल्याचा निकाल देण्यात आला कारण त्याने कार्डिओलॉजिस्टचा सल्ला घेण्याची लेखी शिफारस करायला हवी होती.

(फ) निदान, उपचार इ.चे सगळे रेकॉर्ड सांभाळणे आवश्यक आहे.


Justice Santosh Pandey
B.SC, LLB
District Judge

Advocate Suhas Shetty
B.COM, LLB
Advocate-High Court

Martin F. D'souzaV/s Mohd.Isfaque

ABSTRACT

In a land mark historical judgment the Hon'ble Supreme Court has ruled that doctors should not be held criminally responsible unless there is prime facie evidence before the Court in the form of a credible opinion from another competent doctor, preferably a Government doctor in the same field of medicine supporting the charges of a rash and negligent act. It is a laudable judgment in the light of criminal procedures filed against the medical professionals in trivial cases under Section 304. A and even 304 IPC where prima-facie there seems to be no neglect in these medical treatments.

General Principles Relating to Medical Negligence

The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.

Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown **(1)** that there is a usual and normal practice; **(2)** that the defendant has not adopted it; and **(3)** that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care.

A medical practitioner is not liable to be held negligent simply because things went wrong from
mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. For instance, he would be liable if he leaves a surgical gauze inside the patient after an operation vide **AchutraoHaribhauKhodwa and Ors.** v. **State of Maharashtra and Ors .** or operates on the wrong part of the body, and he would be also criminally liable if he operates on someone for removing an organ for illegitimate trade. There is a tendency to confuse a reasonable person with an error free person. An error of judgment may or may not be negligent. It depends on the nature of the error.

It is not enough to show that there is a body of competent professional opinion which considers that the decision of the accused professional was a wrong decision, provided there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances.

As Lord Clyde stated in **Hunter** v. **Hanley** 1955 SLT 213 :
In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men....
The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care....

The standard of care has to be judged in the light of knowledge available at the time of the incident and not at the date of the trial. Also, where the charge of negligence is of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time.

The higher the acuteness in an emergency and the higher the complication, the more are the chances of error of judgment. At times, the professional is confronted with making a choice between the devil and the deep sea and has to choose the lesser evil. The doctor is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Which course is more appropriate to follow, would depend on the facts and circumstances of a given case but a doctor cannot be penalized if he adopts the former procedure, even if it results in a failure. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not in a position to give consent

before adopting a given procedure.

There may be a few cases where an exceptionally brilliant doctor performs an operation or prescribes a treatment which has never been tried before to save the life of a patient when no known method of treatment is available. If the patient dies or suffers some serious harm, should the doctor be held liable? In the courts opinion he should not. Science advances by experimentation, but experiments sometime end in failure e.g. the operation on the Iranian twin sisters who were joined at the head since birth, or the first heart transplant by Dr. Barnard in South Africa. However, in such cases it is advisable for the doctor to explain the situation to the patient and take his written consent.

Simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightway liable for medical negligence by applying the doctrine of res ipsa loquitur. No sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake. A single failure may cost him dear in his lapse.

As observed by the Supreme Court in **Jacob Mathew's** case:
A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally. A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end dose of medicine to his patient.
If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason - whether attributable to himself or not, neither can a surgeon successfully wield his lifesaving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society.

When a patient dies or suffers some mishap, there is a tendency to blame the doctor for this. Things have gone wrong and, therefore, somebody must be punished for it. However, it is well known that even the best professionals, what to say of the average professional, sometimes have failures. A lawyer cannot win every case in his professional career but surely he cannot be penalized for losing a case provided he appeared in it and made his submissions.

To fasten liability in criminal proceedings e.g. under Section 304A IPC the degree of negligence has to be higher than the negligence which is enough to fasten liability in civil proceedings. Thus for civil liability it may be enough for the complainant to prove that the doctor did not exercise reasonable care in accordance with the principles mentioned above, but for convicting a doctor in a criminal case, it must also be proved that this negligence was gross amounting to recklessness.

The professional is one who professes to have some special skill. A professional impliedly assures the person dealing with him **(i)** that he has the skill which he professes to possess, **(ii)** that skill shall be exercised with reasonable care and caution.

Judged by this standard, the professional may be held liable for negligence on the ground that he was not possessed of the requisite skill which he professes to have. Thus a doctor who has a qualification in Ayurvedic or Homeopathic medicine will be liable if he prescribes Allopathic treatment which causes some harm vide **Poonam Verma** v. **Ashwin Patel and Ors.** In **Dr. Shiv Kumar Gautam** v. **Alima,** Revision Petition No. 586 of 1999 decided on 10.10.2006, the National Consumer Commission held a homeopath liable for negligence for prescribing allopathic medicines and administering glucose drip and giving injections.

Protection to Doctors in Criminal Cases
The Hon'ble Supreme Court realizing that doctors have to be protected from frivolous complaints of medical negligence, has laid down certain rules in this connection:

(i) A private complaint should not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.

(ii) The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion, preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial opinion applying the Bolam test.

(iii) A doctor accused of negligence should not be arrested in a routine manner simply because a charge has been leveled against him. Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest should be withheld.

Precautions which Doctor/Hospitals/Nursing Homes should take:

(a) Current practices, infrastructure, paramedical and other staff, hygiene and sterility should be observed strictly. Thus, in **Sarwat Ali Khan** v. **Prof. R. Gogi and Ors.** Original Petition No. 181 of 1997, decided on 18.7.2007 by the National Consumer Commission, the facts were that out of 52 cataract operations performed between 26th and 28th September, 1995 in an eye hospital 14 persons lost their vision in the operated eye. An enquiry revealed that in the Operation Theatre two autoclaves were not working properly. This equipment is absolutely necessary to carry out sterilization of instruments, cotton, pads, linen, etc., and the damage occurred because of its absence in working condition. The doctors were held liable.

(b) No prescription should ordinarily be given without actual examination. The tendency to give prescription over the telephone, except in an acute emergency, should be avoided.

(c) A doctor should not merely go by the version of the patient regarding his symptoms, but should also make his own analysis including tests and investigations where necessary.

(d) A doctor should not experiment unless necessary and even then he should ordinarily get a written consent from the patient.

(e) An expert should be consulted in case of any doubt. Thus, in Smt. IndraniBhattacharjee, Original Petition No. 233 of 1996 decided by the National Consumer Commission on 9.8.2007, the patient was diagnosed as having `Mild Lateral Wall Eschemia'. The doctor prescribed medicine for gastro-entiritis, but he expired. It was held that the doctor was negligent as he should have advised consulting a Cardiologist in writing.

(f) Full record of the diagnosis, treatment, etc. should be maintained.

IN THE SUPREME COURT OF INDIA

Civil Appeal No. 3541 of 2002

Decided On: 17.02.2009

Martin F. D'Souza

Vs.

Mohd.Ishfaq

Hon'ble Judges/Coram:

MarkandeyKatjuandG.S. Singhvi, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Manu Aggarwal, ManikKaranjawala and PragyaOhri, Advs

For Respondents/Defendant: Mala GoelandAsheesh Kumar Mishra, Advs. for RajinderMathur, Adv.

Subject: Consumer

Subject: Law of Medicine

Catch Words

Mentioned IN

Acts/Rules/Orders:

Consumer Protection Act, 1986 - Section 23; Indian Medical Council Act. 1956 - Section 3, Indian Medical Council Act. 1956 - Section 20A, Indian Medical Council Act. 1956 - Section 33; Indian Penal Code (IPC) - Section 34, Indian Penal Code (IPC) - Section 304A, Indian Penal Code (IPC) - Section 314; BOLAM Rule ;Constitution of India - Article 21; Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002

1. This appeal against the judgment of the National Consumer Disputes Redressal Commission, New Delhi dated 22.3.2002 has been filed under Section 23 of the Consumer Protection Act, 1986.

2. Heard learned counsel for the parties and perused the record.

3. The brief facts of the case are narrated below :

4. In March 1991, the respondent who was suffering from chronic renal failure was referred by the Director, Health Services to the Nanavati Hospital, Mumbai for the purpose of a kidney transplant.

5. On or about 24.4.1991, the respondent reached Nanavati Hospital, Bombay and was under the treatment of the appellant Doctor. At that stage, the respondent was undergoing haemodialysis twice a week on account of chronic renal failure. Investigations were underway to find a suitable donor. The respondent wanted to be operated by Dr. Sonawala alone who was out of India from 1.6.1991 to 1.7.1991.

6. On 20.5.1991, the respondent approached the appellant Doctor. At the time, the respondent, who was suffering from high fever, did not want to be admitted to the Hospital despite the advice of the appellant. Hence, a broad spectrum antibiotic was prescribed to him.

7. From 20.5.1991 to 29.5.1991, the respondent attended the Haemodialysis Unit at Nanavati Hospital on three occasions. At that time, his fever remained between 1010-1040F. The appellant constantly requested the complainant to get admitted to hospital but the respondent refused.

8. On 29.5.1991 the respondent who had high fever of 1040F finally agreed to get admitted to hospital due to his serious condition.

9. On 30.5.1991 the respondent was investigated for renal package. The medical report showed high creatinine 13 mg., blood urea 180 mg. The Haemoglobin of the respondent was 4.3%. The following chart indicates the results of the study in comparison to the normal range :-

Normal Range S. Creatinine 13.0 mgs. % 0.7 - 1.5 mgs. % Blood Urea 180 mgs. % 10-50 mgs. % Haemoglobin 4.3 gms. % 11.5-13.5 gms. %

10. On 30.5.1991, the respondent was investigated for typhoid fever, which was negative. He was also investigated for ESR, which was expectedly high in view of renal failure and anemia infection. Urine analysis was also carried out which showed the presence of bacteria.

11. On 3.6.1991, the reports of the urine culture and sensitivity were received. The report showed severe urinary tract infection due to Klebsiella species (1 lac/ml.). The report also showed that the infection could be treated by Amikacin and Methenamine Mandelate and that the infection was resistant to other antibiotics. Methnamine Mandelate cannot be used in patients suffering from renal failure.

12. On 4.6.1991, the blood culture report of the respondent was received, which showed a serious infection of the blood stream (staphylococcus species).

13. On 5.6.1991, Amikacin injection was administered to the respondent for three days (from 5th to 7th June, 1991), since the urinary infection of the respondent was sensitive to Amikacin. Cap. Augmentin (375 mg.) was administered three times a day for the blood infection and the respondent was transfused one unit of blood during dialysis. Consequent upon the treatment, the temperature of the respondent rapidly subsided.

14. From 5.6.1991 to 8.6.1991, the respondent insisted on immediate kidney transplant even though the respondent had advised him that in view of his blood and urine infection no transplant could take place for six weeks.

15. On 8.6.1991, the respondent, despite the appellant's advice, got himself discharged from Nanavati Hospital. Since the respondent was suffering from blood and urinary infection and had refused to come for haemodialysis on alternate days, the appellant suggested Injection Amikacin (500 mg.) twice a day. Certain other drugs were also specified to be taken under the supervision of the appellant when he visited the Dialysis Unit.

16. On 11.6.1991, the respondent attended the Haemodialysis Unit and complained to the appellant that he had slight tinnitus (ringing in the ear). The appellant has alleged that he immediately told the respondent to stop taking the Amikacin and Augmentin and scored out the treatment on the discharge card. However, despite express instructions from the appellant, the respondent continued to take Amikacin till 17.6.1991. Thereafter, the appellant was not under the treatment of the appellant.

17. On 14.6.1991, 18.6.1991 and 20.6.1991 the respondent received haemodialysis at Nanavati Hospital and allegedly did not complain of deafness during this period.

18. On 25.6.1991, the respondent, on his own accord, was admitted to Prince Aly Khan Hospital, where he was also treated with antibiotics. The complainant allegedly did not complain of deafness during this period and conversed with doctors normally, as is evident from their evidence.

19. On 30.7.1991, the respondent was operated upon for transplant after he had ceased to be under the treatment of the appellant. On 13.8.1991, the respondent was discharged from Prince Aly Khan Hospital after his transplant. The respondent returned to Delhi on 14.8.1991, after discharge.

20. On 7.7.1992, the respondent filed a complaint before the National Consumer Disputes Redressal Commission, New Delhi (being Original Petition No. 178 of 1992) claiming compensation of an amount of Rs. 12,00,000/- as his hearing had been affected. The appellant filed his reply stating, inter alia, that there was no material brought on record by the respondent to show any co- relationship between the drugs prescribed and the state of his health. Rejoinder was filed by the respondent.

21. The National Consumer Disputes Redressal Commission (hereinafter referred to as `the Commission') passed an order on 6.10.1993 directing the nomination of an expert from the All India Institute of Medical Sciences, New Delhi (AIIMS) to examine the complaint and give an opinion. This was done in order to get an unbiased and neutral opinion.

22. AIIMS nominated Dr. P. Ghosh, and the report of Dr. P. Ghosh of the All India Institute of Medical Sciences was submitted before the Commission, after examining the respondent. Dr. Ghosh was of the opinion that the drug Amikacin was administered by the appellant as a life saving measure and was rightly used. It is submitted by the appellant that the said report further makes it clear that there has been no negligence on the part of the appellant.

23. Evidence was thereupon led before the Commission. Two affidavits by way of evidence were filed on behalf of the respondent, being that of his wife and himself. The witnesses for the respondent were :-
i) The respondent Mohd. Ishfaq
ii) The wife of the respondent
iii) Dr. Ashok Sareen
iv) Dr. Vindu Amitabh

24. On behalf of the appellant, six affidavits by way of evidence were filed. These were of the appellant himself, Dr. Danbar (a doctor attached to the Haemodialysis Department of Nanavati Hospital), Dr. Abhijit Joshi (a Resident Senior Houseman of Nanavati Hospital), Mrs. Mukta Kalekar (a Senior sister at Nanavati Hospital), Dr. Sonawala (the Urologist who referred the respondent to the appellant) and Dr. Ashique Ali Rawal (a Urologist attached to Prince Aly Khan Hospital). The witnesses for the appellant were:-

i) The appellant-Dr. M.F. D'Souza
ii) Dr. Danbar
iii) Dr. Upadhyay
iv) Mrs. Mukta Kalekar
v) Dr. Ashique Ali Rawal

25. The respondent also filed an opinion of the Chief of Nephrology at Fairview General Hospital, Cleveland, Ohlo, which was heavily relied upon in the impugned judgment. The appellant has alleged that the said opinion was written without examining the respondent and, in any case, the appellant was not afforded an opportunity of cross-examining the person who gave the opinion.

26. The case of the respondent, in brief, is that the appellant was negligent in prescribing Amikacin to the respondent of 500 mg twice a day for 14 days as such dosage was excessive and caused hearing impairment. It is also the case of the respondent that the infection he was suffering from was not of a nature as to warrant administration of Amikacin to him.

27. The appellant submitted before the Commission that at the time of admission of the respondent on 29.5.1991 to the hospital, he had fever of 1040F and, after investigation, it was found that his serum creatinine level was 13 mg%, blood urea 180 mg% and Haemoglobin 4.3 mg. Amikacin was prescribed to him only after obtaining blood and urine culture reports on 3rd and 4th June, 1991, which showed the respondent resistant to other antibiotics. Even the witness of the respondent (Dr. Sareen) conceded that he would have prescribed Amikacin in the facts of the case. However, the Commission allowed the complaint of the respondent by way of the impugned order dated 9.4.2002 and awarded Rs.4 lakh with interest @ 12% from 1.8.1992 as well as Rs.3 lakh as compensation as well as Rs.5000/- as costs.

28. Before discussing the facts of the case, we would like to state the law regarding Medical Negligence in India.

29. Cases, both civil and criminal as well as in Consumer Fora, are often filed against medical practitioners and hospitals, complaining of medical negligence against doctors/hospitals/nursing homes and hence the latter naturally would like to know about their liability.

30. The general principles on this subject have been lucidly and elaborately explained in the three Judge Bench decision of this Court in Jacob Mathew vs. State of Punjab and Anr. (2005) 6 SCC 1. However, difficulties arise in the application of those general principles to specific cases.

31. For instance, in para 41 of the aforesaid decision it was observed :
"The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence is what the law requires."

32. Now what is reasonable and what is unreasonable is a matter on which even experts may disagree. Also, they may disagree on what is a high level of care and what is a low level of care.

33. To give another example, in paragraph 12 to 16 of Jacob Mathew's case (Supra), it has been stated that simple negligence may result only in civil liability, but gross negligence or recklessness may result in criminal liability as well. For civil liability only damages can be imposed by the Court but for criminal liability the Doctor can also be sent to jail (apart from damages which may be imposed on him in a civil suit or by the Consumer Fora). However, what is simple negligence and what is gross negligence may be a matter of dispute even among experts.

34. The law, like medicine, is an inexact science. One cannot predict with certainty an outcome of many cases. It depends on the particular facts and circumstances of the case, and also the personal notions of the Judge concerned who is hearing the case. However, the broad and general legal principles relating to medical negligence need to be understood.

35. Before dealing with these principles two things have to be kept in mind : (1) Judges are not experts in medical science, rather they are lay men. This itself often makes it somewhat difficult for them to decide cases relating to medical negligence. Moreover, Judges have usually to rely on testimonies of other doctors which may not necessarily in all cases be objective,

since like in all professions and services, doctors too sometimes have a tendency to support their own colleagues who are charged with medical negligence. The testimony may also be difficult to understand, particularly in complicated medical matters, for a layman in medical matters like a Judge; and (2) A balance has to be struck in such cases. While doctors who cause death or agony due to medical negligence should certainly be penalized, it must also be remembered that like all professionals doctors too can make errors of judgment but if they are punished for this no doctor can practice his vocation with equanimity. Indiscriminate proceedings and decisions against doctors are counter productive and serve society no good. They inhibit the free exercise of judgment by a professional in a particular situation.

36. Keeping the above two notions in mind we may discuss the broad general principles relating to medical negligence.
General Principles Relating to Medical Negligence

37. As already stated above, the broad general principles of medical negligence have been laid down in the Supreme Court Judgment in Jacob Mathew vs. State of Punjab and Anr. (supra). However, these principles can be indicated briefly here :

38. The basic principle relating to medical negligence is known as the BOLAM Rule. This was laid down in the judgment of Justice McNair in Bolam vs. Friern Hospital Management Committee (1957) 1 WLR 582 as follows:
"Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill..... It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."
Bolam's test has been approved by the Supreme Court in Jacob Mathew's case.

39. In Halsbury's Laws of England the degree of skill and care required by a medical practitioner is stated as follows :
"The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care.
Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is what the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.
Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown **(1)** that there is a usual and normal practice; **(2)** that the defendant has not adopted it; and **(3)** that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care."
(emphasis supplied)

40. Eckersley vs. Binnie (1988) 18 Con LR 1 summarized the Bolam test in the following words :
"From these general statements it follows that a professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinary assiduous and intelligent members of his profession in the knowledge of new advances, discoveries and developments in his field. He should have such an awareness as an ordinarily competent would have of the deficiencies in his knowledge and the limitations on his skill. He should be alert to the hazards and risks in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members of his profession would bring, but need bring no more. The standard is that of the reasonable average. The law does not require of a professional man that he be a paragon combining the qualities of a polymath and prophet."

41. A medical practitioner is not liable to be held negligent simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference to another. He would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field. For instance, he would be liable if he leaves a surgical gauze inside the patient after an operation vide Achutrao Haribhau Khodwa & others vs. State of Maharashtra & others, AIR 1996 SC 2377 or operates on the wrong part of the body, and he would be also criminally liable if he operates on someone for removing an organ for illegitimate trade.

42. There is a tendency to confuse a reasonable person with an error free person. An error of judgment may or may not be negligent. It depends on the nature of the error.

43. It is not enough to show that there is a body of competent professional opinion which considers that the decision of the accused professional was a wrong decision, provided there also exists a body of professional opinion, equally competent, which supports the decision as reasonable in the circumstances.As Lord Clyde stated in Hunter vs. Hanley 1955 SLT 213 :
"In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion and one man clearly is not negligent merely because his conclusion differs from that of other professional men....The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care...."
(emphasis supplied)

44. The standard of care has to be judged in the light of knowledge available at the time of the incident and not at the date of the trial. Also, where the charge of negligence is of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that point of time.

45. The higher the acuteness in an emergency and the higher the complication, the more are the chances of error of judgment.At times, the professional is confronted with making a choice between the devil and the deep sea and has to choose the lesser evil. The doctor is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure.Which course is more appropriate to follow, would depend on the facts and circumstances of a given case but a doctor cannot be penalized if he adopts the former procedure, even if it results in a failure. The usual practice prevalent nowadays is to obtain the consent of the patient or of the person in-charge of the patient if the patient is not in a position to give consent before adopting a given procedure.

46. There may be a few cases where an exceptionally brilliant doctor performs an operation or prescribes a treatment which has never been tried before to save the life of a patient when no known method of treatment is available. If the patient dies or suffers some serious harm, should the doctor be held liable? In our opinion he should not. Science advances by experimentation, but experiments sometime end in failure e.g. the operation on the Iranian twin sisters who were joined at the head since birth, or the first heart transplant by Dr. Barnard in South Africa. However, in such cases it is advisable for the doctor to explain the situation to the patient and take his written consent.

47. Simply because a patient has not favourably responded to a treatment given by a doctor or a surgery has failed, the doctor cannot be held straightway liable for medical negligence by applying the doctrine of res ipsa loquitur. No sensible professional would intentionally commit an act or omission which would result in harm or injury to the patient since the professional reputation of the professional would be at stake.A single failure may cost him dear in his lapse.

48. As observed by the Supreme Court in Jacob Mathew's case :
"A medical practitioner faced with an emergency ordinarily tries his best to redeem the patient out of his suffering. He does not gain anything by acting with negligence or by omitting to do an act. Obviously, therefore, it will be for the complainant to clearly make out a case of negligence before a medical practitioner is charged with or proceeded against criminally.A surgeon with shaky hands under fear of legal action cannot perform a successful operation and a quivering physician cannot administer the end-dose of medicine to his patient.
If the hands be trembling with the dangling fear of facing a criminal prosecution in the event of failure for whatever reason - whether attributable to himself or not, neither can a surgeon successfully wield his life-saving scalpel to perform an essential surgery, nor can a physician successfully administer the life-saving dose of medicine. Discretion being the better part of valour, a medical professional would feel better advised to leave a terminal patient to his own fate in the case of emergency where the chance of success may be 10% (or so), rather than taking the risk of making a last ditch effort towards saving the subject and facing a criminal prosecution if his effort fails. Such timidity forced upon a doctor would be a disservice to society."

49. When a patient dies or suffers some mishap, there is a tendency to blame the doctor for this.Things have gone wrong and, therefore, somebody must be punished for it. However, it is well known that even the best professionals, what to say of the average professional, sometimes have failures.A lawyer cannot win every case in his professional career but surely he cannot be penalized for losing a case provided he appeared in it and made his submissions.

50. To fasten liability in criminal proceedings e.g. under Section 304A IPC the degree of negligence has to be higher than the negligence which is enough to fasten liability in civil proceedings. Thus for civil liability it may be enough for the complainant to prove that the doctor did not exercise reasonable care in accordance with the principles mentioned above, but for convicting a doctor in a criminal case, it must also be proved that this negligence was gross amounting to recklessness.

51. The difference between simple negligence and gross negligence has broadly been explained in paragraphs 12 to 16 of

Jacob Mathew's case, though difficulties may arise in the application of the principle in particular cases. For instance, if a mop is left behind in the stomach of a patient while doing an operation, would it be simple negligence or gross negligence? If a scissors or sharp edged medical instrument is left in the patient's body while doing the operation would that make a difference from merely leaving a mop?

52. The professional is one who professes to have some special skill. A professional impliedly assures the person dealing with him (i) that he has the skill which he professes to possess, (ii) that skill shall be exercised with reasonable care and caution.

53. Judged by this standard, the professional may be held liable for negligence on the ground that he was not possessed of the requisite skill which he professes to have. Thus a doctor who has a qualification in Ayurvedic or Homeopathic medicine will be liable if he prescribes Allopathic treatment which causes some harm vide Poonam Verma vs. Ashwin Patel & Ors. (1996) 4 SCC 332. In Dr. Shiv Kumar Gautam vs. Alima, Revision Petition No.586 of 1999 decided on 10.10.2006, the National Consumer Commission held a homeopath liable for negligence for prescribing allopathic medicines and administering glucose drip and giving injections.

Protection to Doctors in Criminal Cases

54. In para 52 of Jacob Mathew's case the Supreme Court realizing that doctors have to be protected from frivolous complaints of medical negligence, has laid down certain rules in this connection :

(i) A private complaint should not be entertained unless the complainant has produced prima facie evidence before the court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor.

(ii) The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion, preferably from a doctor in government service, qualified in that branch of medical practice who can normally be expected to give an impartial opinion applying the Bolam test.

(iii) A doctor accused of negligence should not be arrested in a routine manner simply because a charge has been leveled against him. Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigating officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest should be withheld.

Precautions which Doctor/Hospitals/Nursing Homes should take :

(a) Current practices, infrastructure, paramedical and other staff, hygiene and sterility should be observed strictly. Thus, in Sarwat Ali Khan vs. Prof. R. Gogi and others Original Petition No.181 of 1997, decided on 18.7.2007 by the National Consumer Commission, the facts were that out of 52 cataract operations performed between 26th and 28th September, 1995 in an eye hospital 14 persons lost their vision in the operated eye. An enquiry revealed that in the Operation Theatre two autoclaves were not working properly. This equipment is absolutely necessary to carry out sterilization of instruments, cotton, pads, linen, etc., and the damage occurred because of its absence in working condition. The doctors were held liable.

(b) No prescription should ordinarily be given without actual examination. The tendency to give prescription over the telephone, except in an acute emergency, should be avoided.

(c) A doctor should not merely go by the version of the patient regarding his symptoms, but should also make his own analysis including tests and investigations where necessary.

(d) A doctor should not experiment unless necessary and even then he should ordinarily get a written consent from the patient.

(e) An expert should be consulted in case of any doubt. Thus, in Smt. Indrani Bhattacharjee, Original Petition No.233 of 1996 decided by the National Consumer Commission on 9.8.2007, the patient was diagnosed as having `Mild Lateral Wall Eschemia'. The doctor prescribed medicine for gastro-entiritis, but he expired. It was held that the doctor was negligent as he should have advised consulting a Cardiologist in writing.

(f) Full record of the diagnosis, treatment, etc. should be maintained. Application of the above mentioned general principles to particular cases :

Decisions of the Court

55. In Pt. Parmanand Katara vs. Union of India & Others AIR 1989 SC 2039, the petitioner referred to a report published in the newspaper "The Hindustan Times" in which it was mentioned that a scooterist was knocked down by a speeding car. Seeing the profusely bleeding scooterist, a person who was on the road, picked up the injured and took him to the nearest hospital. The doctors refused to attend and told the man that he should take the patient to another hospital located 20 kilometers away authorized to handle medico-legal cases. The injured was then taken to that hospital but by the time he could reach, the victim succumbed to his injuries.

56. The Supreme Court referred to the Code of Medical Ethics drawn up with the approval of the Central Government under Section 33 of the Indian Council Medical Act and observed "Every doctor whether at a Government Hospital or otherwise has the professional obligation to extend his services for protecting life. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise cannot be sustained and, therefore, must give way."

57. The Supreme Court held that it is the duty of the doctor in an emergency to begin treatment of the patient and he should not await the arrival of the police or to complete the legal formalities. The life of a person is far more important than legal formalities. This view is in accordance with the Hippocratic oath of doctors.

58. Although this decision has laid down that it is the duty of a doctor to attend to a patient who is brought to him in an emergency, it does not state what penalty will be imposed on a doctor who refuses to attend the said patient. Consequently it will depend on the fact and circumstances of the case. However, this case is important because nowadays health care has often become a business, as is mentioned in George Bernard Shaw's play "The Doctor's Dilemma". The medical profession is a noble profession and it should not be brought down to the level of a simple business or commerce. The truth of the matter, sadly, is that today in India many doctors (though not all) have become totally money-minded, and have forgotten their Hippocratic oath. Since most people in India are poor the consequence is that for them proper medical treatment is next to impossible, and hence they have to rely on quacks. This is a disgrace to a noble profession.

59. In Paschim Banga Khet Mazdoor Samity and others vs. State of West Bengal and Another AIR 1996 SC 2426, the Supreme Court held that the denial of emergency aid to the petitioner due to the non availability of bed in the Government Hospital amounts to the violation of the right to life under Article 21 of the Constitution. The Court went on to say that the Constitutional obligation imposed on the State by Article 21 cannot be abdicated on the ground of financial constraint.

60. In Md. Suleman Ansari (D.M.S.) vs. Shankar Bhandari (2005) 12 SCC 430 the respondent suffered a fracture of his hand. He went to the appellant who held himself out to be a qualified medical practitioner. The appellant bandaged the respondent's hand and prescribed certain medicines. He was ultimately taken to another doctor but by this time the damage to his hand was permanent. It was found that the appellant was not a qualified doctor to give treatment to the respondent. The Supreme Court had directed him to pay Rs.80,000 as compensation to the respondent.

61. In Surendra Chauhan vs. State of M.P. (2000) 4 SCC 110, the appellant was having a degree of Bachelor of Medicine in Electrohomoeopathy from the Board of Electrohomoeopathy Systems of Medicines, Jabalpur (M.P.). He did not possess any recognized medical qualification as defined in the Indian Medical Council Act, 1956. Yet he performed an operation to terminate the three month pregnancy in a woman, who died in the clinic due to shock due to non application of anesthesia. The Supreme Court confirmed his sentence but reduced it to one and a half years rigorous imprisonment under Section 314/34 IPC and a fine of Rs.25000 payable to the mother of the deceased.

62. In State of Haryana and others vs. Raj Rani (2005) 7 SCC 22 it was held that if a child is born to a woman even after she had undergone a sterilization operation by a surgeon, the doctor was not liable because there cannot be a 100% certainty that no child will be born after a sterilization operation. The Court followed the earlier view of another three Judge Bench in State of Punjab vs. Shiv Ram & others (2005) 7 SCC 1. These decisions will be deemed to have overruled the two Judge Bench decision in State of Haryana and Others vs. Smt. Santra AIR 2000 SC 1888 in which it was held that if a child is born after the sterilization operation the surgeon will be liable for negligence.

63. In P.N. Rao vs. G. Jayaprakasu AIR 1990 AP 207, the plaintiff was a brilliant young boy who had passed the pre-University course securing 100% marks in Mathematics and 93.5% in physical sciences. He was also getting a monthly scholarship. He was offered a seat in B.E. Degree course in four Engineering Colleges. He had a minor ailment - chronic nasal discharge - for which his mother took him to a doctor for consultation who diagnosed the disease as Nasal Allergy and suggested operation for removal of tonsils. He was admitted in the Government General Hospital, Guntur and the operation was performed. He did not regain consciousness even after three days and thereafter for another 15 days he was not able to speak coherently. When he was discharged from hospital, he could only utter a few words and could not read or write and lost all his knowledge and learning. His father took him to Vellore where he was examined by a Professor of Neuro Surgery and it was found that his brain had suffered due to cerebral anoxia, which was a result of improper induction of anaesthetics and failure to take immediate steps to reduce anaesthesia. The court after examining the witnesses including the Professor of Anaesthesiology held that defendants were clearly negligent in discharging their duties and the State Government was vicariously liable.

64. In Dr. Laxman Balkrishna Joshi vs. Dr. Trimbak Bapu Godbole and Another AIR 1969 SC 128, a patient had suffered from fracture of the femur. The accused doctor while putting the leg in plaster used manual traction and used excessive force for this purpose, with the help of three men, although such traction is never done under morphia alone but done under proper general anaesthesia. This gave a tremendous shock causing the death of the boy. On these facts the Supreme Court held that the doctor was liable to pay damages to the parents of the boy.

65. In Dr. Suresh Gupta vs. Government of N.C.T. of Delhi and another AIR 2004 SC 4091, the appellant was a doctor accused under Section 304A IPC for causing death of his patient. The operation performed by him was for removing his nasal deformity. The Magistrate who charged the appellant stated in his judgment that the appellant while conducting the operation for removal of the nasal deformity gave incision in a wrong part and due to that blood seeped into the respiratory passage and because of that the patient collapsed and died. The High Court upheld the order of the Magistrate observing that adequate care was not taken to prevent seepage of blood resulting in asphyxia. The Supreme Court held that from the medical opinions adduced by the prosecution the cause of death was stated to be `not introducing a cuffed endotracheal tube of proper size as to prevent aspiration of blood from the wound in the respiratory passage.' The Supreme Court held that this act attributed to the doctor, even if accepted to be true, can be described as a negligent act as there was a lack of care and precaution. For this act of negligence he was held liable in a civil case but it cannot be described to be so reckless or grossly negligent as to make him liable in a criminal case. For conviction in a criminal case the negligence and rashness should be of such a high degree which can be described as totally apathetic towards the patient.

66. In Dr. Sr. Louie and Anr. vs. Smt. Kannolil Pathumma & Anr. the National Consumer Commission held that Dr. Louie showed herself as an M.D. although she was only M.D. Freiburg, a German Degree which is equivalent to an M.B.B.S. degree in India. She was guilty of negligence in treating a woman and her baby which died. There was vacuum slip, and the baby was delivered in an asphyxiated condition.

67. In Nihal Kaur vs. Director, P.G.I.M.S.R. (1996) CPJ 112 a patient died a day after surgery and the relatives found a pair of scissors utilized by the surgeon while collecting the last remains. The doctor was held liable and a compensation of Rs. 1.20 lakhs was awarded by the State Consumer Forum, Chandigarh.

68. In Spring Medows Hospital & Another vs. Harjol Ahluwalia thr' K.S. Ahluwalia & Another (1998) CPJ 1, a minor child was admitted by his parents to a nursing home as he was suffering fever. The patient was admitted and the doctor diagnosed typhoid and gave medicines for typhoid fever. A nurse asked the father of the patient to get an injection Lariago which was administered by the nurse to the patient who immediately collapsed. The doctor was examined and testified that the child suffered a cardiac arrest on account of the medicine having being injected which led to brain damage. The National Commission held that the cause of cardiac arrest was intravenous injection of Lariago of such a high dose. The doctor was negligent in performing his duty because instead of administering the injection himself he permitted the nurse to give the injection. There was clear dereliction of duty on the part of the nurse who was not even a qualified nurse and was not registered with any nursing council of any State. Both the doctor and nurse and the hospital were found liable and Rs. 12.5 lakhs was awarded as compensation to the parents.

69. In Consumer Protection Council and Others vs. Dr. M. Sundaram and Another (1998) CPJ 3, the facts were that one Mrs. Rajalaxmi was admitted to a nursing home which diagnosed the ailment as Hodgkin's Lymphoma. She was administered Endoxan injection five doses in five days. She was referred to another doctor who was an ENT specialist, who after examination opined that no lymph glands were seen. A sample of her bone marrow was sent to an Oncologist who opined that the picture does not fit with Hodgkin's disease but the patient had megaloblastic anemia in the bone marrow. Subsequently she was discharged from the nursing home and was advised to visit CMC Vellore for treatment. The patient consulted another doctor who diagnosed the same as renal failure. The complainant alleged that the first doctor failed and neglected to refer the matter to a Cancer Specialist but wrongly diagnosed the ailment of the patient as Hodgkin's Lymphoma and had unnecessarily administered injection of Endoxan and because of the toxicity of that drug the kidney cells of the patient got destroyed resulting in renal failure for which she had to undergo kidney transplantation which led to her death. The National Commission, upholding the State Commission decision, held that there was no negligence on the part of the doctor who had consulted a pathologist, and in the light of discussion with him and on inspection of some more slides of bone marrow specimens which also revealed the same finding, namely, existence of deposits of Hodgkin's Lymphoma, proceeded to administer the patient injections of Endoxan. It was held on the basis of medical opinion that any prudent consultant physician would not delay the commencement of chemotherapy where repeated examination of the bone marrow slides had yielded the report that the Hodgkin's deposits were present. Endoxan is a drug of choice in the treatment of Hodgkin's Lymphoma and there was no negligence on the part of the doctor.

70. In Sethuraman Subramaniam Iyer vs. Triveni Nursing Home and Another (1998) CPJ 110, the complainant's wife suffered from Sinusitis and was advised surgery by the doctor. She had suffered a massive heart attack while in the operation theatre. The State Commission found that necessary precautions and effective measures were taken to save the deceased and dismissed the complaint. The State Commission relied on the affidavits of four doctors who opined that there was no negligence. The complainant had not given any expert evidence to support his allegation and in these circumstances it was held that no case was made out against the doctor.

71. In A. S. Mittal & Anr. vs. State of U.P. & Ors. JT 1989 (2) SC 419, 1989 (3) SCC 223 a free eye camp was organized for ophthalmic surgical treatment to patients. However, the eyes of several patients after operation were irreversibly damaged, owing to post-operative infection of the intra ocular cavities of the eyes, caused by normal saline used at the time of surgery. The Supreme Court directed the State Government to pay Rs. 12,500/- as compensation to each victim as there was a clear negligence.

72. In Indian Medical Association vs. V.P. Shantha 1995(6) SCC 651 (vide para 37) it has been held that the following acts are clearly due to negligence :

(i) Removal of the wrong limb;
(ii) Performance of an operation on the wrong patient;
(iii) Giving injection of a drug to which the patient is allergic without looking into the out-patient card containing the warning;
(iv) Use of wrong gas during thecourse of an anaesthetic, etc.

73. From the aforementioned principles and decisions relating to medical negligence, with which we agree, it is evident that doctors and nursing homes/hospitals need not be unduly worried about the performance of their functions. The law is a watchdog, and not a bloodhound, and as long as doctors do their duty with reasonable care they will not be held liable even if their treatment was unsuccessful.

74. However, every doctor should, for his own interest, carefully read the Code of Medical Ethics which is part of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 issued by the Medical Council of India under Section 20A read with Section 3(m) of the Indian Medical Council Act. 1956.

75. Having mentioned the principles and some decisions relating to medical negligence (with which we respectfully agree), we may now consider whether the impugned judgment of the Commission is sustainable. In our opinion the judgment of the Commission cannot be sustained and deserves to be set aside.

76. The basic principle relating to the law of medical negligence is the Bolam Rule which has been quoted above. The test in fixing negligence is the standard of the ordinary skilled doctor exercising and professing to have that special skill, but a doctor need not possess the highest expert skill. Considering the facts of the case we cannot hold that the appellant was guilty of medical negligence.

77. The facts of the case reveal that the respondent was suffering from chronic renal failure and was undergoing haemodialysis twice a week on that account. He was suffering from high fever which remained between 1010-1040F. He refused to get admitted to hospital despite the advice of the appellant. The appellant prescribed antibiotics for him. The respondent was also suffering from severe urinary tract infection which could only be treated by Amikacin or Methenamine Mandelate. Since Methenamine Mandelate cannot be used in patients suffering from renal failure, Amikacin injection was administered to him.

78. A perusal of the complaint filed by the respondent before the National Commission shows that his main allegation is that he suffered hearing impairment due to the negligence of the appellant herein who allegedly prescribed overdose of Amikacin injections without caring about the critical condition of the respondent which did not warrant that much dose. The complainant (respondent herein) has alleged that due to this medical negligence the complainant has suffered mental torture and frustration and other signs of helplessness and is feeling totally handicapped, and his efficiency in office has got adversely affected. It may be mentioned that the respondent is working as Export Promotion Officer in the Ministry of Commerce, Udyog Bhawan, New Delhi.

79. The case of the appellant, however, is that the complainant was referred to the appellant by Dr. F. P. Soonawalla, the renowned Urologist of Bombay. The complainant had consulted Dr. F. P. Soonawalla who had referred the complainant to the appellant for routine Haemodialysis and pre-transplant treatment. In our opinion, the very fact that Dr. Soonawalla referred the complainant to the appellant is an indication that the appellant has a good reputation in his field, because Dr. Soonawalla is an eminent doctor of India of international repute, and he would not have ordinarily referred a patient to an incompetent

doctor.This is one factor which goes in favour of the appellant, though of course it is not conclusive.

80. It appears that after the complainant was referred to the appellant by Dr. Soonawalla he met the appellant for the first time on 24.4.1991 as an outdoor patient in the Haemodialysis Unit attached to Bulabhai Nanavati Hospital, Bombay. After examining the complainant, the appellant found that the complainant was a patient of Chronic Renal Failure due to Bilateral Poly Cystic Kidneys. Hence the appellant suggested to the complainant to have Haemodialysis twice a week as an outdoor patient.The complainant was also investigated to find a suitable kidney donor.

81. The appellant has alleged in his written statement filed before the National Commission that the complainant was in a hurry to have a quick kidney transplant by Dr. Soonawalla and he was very obstinate, stubborn and short- tempered. Dr. Soonawalla was out of India from 1.6.1991 to 1.7.1991. On 20.5.1991, the complainant approached the appellant with high fever of 101-103OF, and the appellant suggested immediate admission of the complainant in the hospital for detailed investigation and treatment but the complainant refused to get himself admitted and refused to comply with the advice. Hence the appellant was obliged to put the complainant on a Broad Spectrum Antibiotic Ampoxim 500 mg four times a day and Tab. Crocin - SOS fever.

82. From 21.5.1991, the complainant attended the Haemodialysis unit of the hospital on three occasions and informed the appellant that the fever had not yet remitted. The appellant again advised the complainant to get admitted in hospital, but he refused the advice on account of his obstinacy.

83. On 29.5.1991, the complainant was in a serious condition having high fever of 104OF. After much persuasion he finally agreed to be admitted for final investigation and got admitted in the hospital on 29.5.1991.

84. The complainant was investigated on 30.5.1991 and his report showed High Creatinine - 13 mg., Blood Urea - 180 mg and Haemoglobin 4.3% which was 5 days prior to the commencement of the injection Amikacin and not after the said injection.

85. In our opinion it is clear that the respondent already had high Blood Creatinine, Blood Urea and low Haemoglobin before the injection of Amikacin. He had also high fever which was on account of serious blood and urinary tract infection. The appellant was of the view that the respondent's infection could only be treated by injection of Amikacin, as Methenamine Mandelate could not be used due to his chronic renal failure. The respondent's report also established his resistance to all other antibiotics. Gastroscopy was done on 4.6.1991 and Amikacin was administered after test dosage only from 5.6.1991. Amikacin was administered on 5th, 6th and 7th June, 1991 and at this stage he did not complain of any side effects and his temperature subsided rapidly. On 5.6.1991, he was administered Cap. Augmentin 375 mg three times a day for his serious Blood Infection and he was also transferred one Unit of Blood during dialysis and his temperature subsided rapidly and he felt much better.

86. The appellant advised the respondent in view of his blood infection that he should not get transplanted for six weeks, but the complainant/respondent insisted on getting the transplant although he was not medically in fit condition. Hence the appellant advised the respondent to further stay in the hospital for some time, but the respondent did not agree and he started shouting at the top of his voice and insisted to be discharged from the hospital on his own on 8.6.1991 at 9 a.m..

87. In view of his insistence the respondent was discharged from the hospital on his own on 8.6.1991 at 9 a.m..The appellant suggested alternate day Haemodialysis but the respondent refused saying that he was staying too far away and could not come three times a week for Haemodialysis. In this situation, the appellant was left with no choice but to suggest Injection Amikacin (500 mg) twice a day in view of the respondent's infection and delicate condition and his refusal to visit the Haemodialysis facility on alternate dates. The appellant also suggested the following drugs under the supervision of the doctor when he would visit the dialysis unit:

1. Injection Amikacin 500 mg twice a day x 10 days for urinary tract infection.
2. Cap.Augmentine 375 mg 3 times a day for 6 weeks for blood infection
3. Cap. Becosule tab daily
4. Tab. Folvite 1 tab. Daily
5. Syrup Alludux
6. Injection Engrex once a month for 2 months
7. Cap. Bantes 100 mg twice a day"

88. It appears that the respondent attended the Haemodyalsis unit where he met the appellant on 11th, 14th, 18th and 20th June, 1991.Thereafter the respondent did not come to the hospital.

89. On 11.6.1991 the respondent complained to the appellant of slight tinnitus or ringing in the ear. The appellant immediately reviewed the treatment on the discharge card in possession of the respondent and asked the said respondent and also asked his attendant i.e. his wife to stop Injection Amikacin and Cap. Augmantine verbally, and also marked `X' on the discharge card in his own hand writing on 11.6.1991 i.e. 3 days after discharge. Hence, as per direction of the appellant the respondent should have stopped receiving Injection Amikacin after 10.6.1991, but on his own he kept on taking Amikacin Injections. The Discharge Card as per the respondent's complaint clearly shows that the said injection had been `X' crossed, and he was directed not to take the said injection from 11.6.1991 i.e. on his very first complaint when he made mention of ringing in the ears or tinnitus.

90. On perusal of the Xerox copies of the papers of the Cash Memo supplied by the respondent as per annexure `4' it is in our opinion evident that the respondent continued to take the medicine against the advice of the appellant, and had unilaterally been getting injected as late as 17.6.1991, i.e. 7 days after he had been instructed verbally and in writing in the presence of his attendant i.e. his wife and staff members of the said hospital to stop Injection Amikacin/Cap. Augmantine because of tinnitus as early as on 11.6.1991.

91. On 19.6.1991 a relative of the respondent who identified himself on the phone as one Mr. Khan from Byculla rang up and stated that the said respondent was once again running high fever. The appellant once again immediately advised him urgent admission to the said hospital which the respondent refused to comply and said that he would go elsewhere.

92. From the above facts it is evident that the appellant was not to blame in any way and it was the non-cooperative attitude of the respondent, and his continuing with the Amikacin injection even after 11.6.1991 which was the cause of his ailment, i.e. the impairment of his hearing. A patient who does not listen to his doctor's advice often has to face the adverse consequences.

93. It is evident from the fact that the respondent was already seriously ill before he met the appellant. There is nothing to show from the evidence that the appellant was in any way negligent, rather it appears that the appellant did his best to give good treatment to the respondent to save his life but the respondent himself did not cooperate.

94. Several doctors have been examined by the National Commission and we have read their evidence which is on record. Apart from that, there is also the opinion of Prof. P. Ghosh of All India Institute of Medical Sciences who had been nominated by AIIMS as requested by the Commission, which is also on record. It has been stated by Dr. Ghosh that many factors in the case of renal diseases may cause hearing loss. Prof. Ghosh has stated that it is impossible to foretell about the sensitivity of a patient to a drug, thereby making it difficult to assess the contributions towards toxicity by the other factors involved. Hearing loss in renal patients is complex problem which is a result of many adverse and unrelated factors. Generally, the state of hearing of a renal patient at any time is more likely to be the result of a multifactorial effect than the response to a single agent.

95. Prof Ghosh has no doubt mentioned that concomitant use of Aminoglycoside antibiotics (e.g. Amikacin) and loop diuretic may lead to summation and potentiation of ototoxic effect, and the patient has a higher risk factor of hearing impairment if there is a higher dose of Amikacin. However, he has stated that such gross impairment of the balancing function has perhaps been wrought by a combination of factors.

96. Prof Ghosh has also opined that the Amikacin dose of 500 mg twice a day for 14 days prescribed by the doctor was a life saving measure and the appellant did not have any option but to take this step. Life is more important than saving the function of the ear. Prof Ghosh was of the view that antibiotics was rightly given on the report of the sensitivity test which showed that the organisms were sensitive to Amikacin. Hence the antibiotic, was not blindly used on a speculation or as a clinical experiment.

97. Prof Ghosh mentioned that in the literature on Amikacin it has been mentioned that in a life threatening infection adult dosage may be increased to 500 mg every eight hours but should not be administered for longer than 10 days.

98. In view of the opinion of Prof Ghosh, who is an expert of the All India Institute of Medical Sciences, we are clearly of the view that the appellant was not guilty of medical negligence and rather wanted to save the life of the respondent. The appellant was faced with a situation where not only was there kidney failure of the patient, but also urinary tract infection and blood infection. In this grave situation threatening the life of the patient the appellant had to take drastic steps. Even if he prescribed Amikacin for a longer period than is normally done, he obviously did it to save the life of the respondent.

99. We have also seen the evidence of other doctors as well as the affidavits filed before the National Commission. No doubt some of the doctors who have deposed in this case have given different opinions, but in cases relating to allegations of medical negligence this Court has to exercise great caution.

100. Dr. Ashok Sareen who is MD in medicine and trained in Nephrology has in his evidence stated that for Kidney failure patients one has to be very careful with the drug Amikacin. He stated that he uses the drug only when other antibiotics have failed or cannot be used. It should be used with wide intervals and only when absolutely necessary and when no other drug is available. When asked whether Amikacin should be given to a patient with 10 days stretch, as was prescribed by the appellant in this case, Dr. Sareen replied that it was difficult to give an answer to that question because it depends entirely on the treating physician. Dr. Sareen has admitted that giving Amikacin injection twice a day for 14 days can cause nerve deafness which means losing one's hearing. No doubt, Dr. Sareen in his cross- examination stated that he would have prescribed the dose given to the respondent differently but he has not stated what would be the dose he would have prescribed.

101. We have also perused the evidence of Dr. Vindu Amitabh, who is a MD in medicine in Safdarjung hospital and looking after Nephrology also. He has stated that normally Amikacin is given for 5 to 7 days twice daily. However, he has also stated that in severe circumstances it can be given for a longer period but if the patient is developing complications then the doses should be stopped immediately. If there is no substitute for it then Amikacin should be given in a very guarded dose. He has admitted that Amikacin can lead to deafness.

102. In the affidavit of Dr. Raval of the Bombay Indian Inhabitant, who has been practicing in Urology for several years it is stated that the respondent had undergone a kidney transplant operation under Dr. Raval's supervision on 30th July 1991 at the Prince Alikhan Hospital, Bombay and he was discharged on 13th August, 1991. Dr. Raval has stated in his affidavit that during the time the respondent was under his care he had a free conversation in English and Urdu without the aid of interpreter and he did not complain of suffering any hearing problem until he was discharged in the middle of August 1991. An affidavit to the same effect has been given by Dr. Kirti L. Upadhyaya, of Bombay Indian Inhabitant, who is also a Nephrologist. He stated that the respondent did not complain of any hearing problem to him also.

103. An affidavit has also been filed by Dr. Sharad M. Sheth, of Bombay Indian Inhabitant who is also MD qualified in Nephrology. He also stated in paragraph 3 of his affidavit as follows:-
"I state that in the circumstances of the case when Klebsiella Organism was found resistant to all powerful drugs inclusive of Augmentin with the exception of Amikacin any nephrologist of a reasonable standard of proficiency would have prescribed "Amikacin" drug in measured doses as a life saving drug despite the well established fact that this drug might cause `tinnitus' or partial hearing impairment which is reversible, to almost complete extent in most of the cases after discontinuation of the drug as soon as any of the above symptoms makes its appearance. I state that in this situation, `Amikacin' could not have been avoided if the danger to the life of the patient had to be thwarted. The diagnosis of Dr. M.F. D'Souza and the line of treatment adopted and administered to the said Shri Mohd. Ishaq, who was suffering from a renal failure in addition to the above specific infections appears to be correct."

104. The appellant has also filed his own affidavit before the National Consumer Commission which we have perused. We have also seen the affidavit of Dr. Ashok L. Kirpalani of Lady Ratan Tata Medical Centre, Bombay, who is MD in Nephrology. He stated that the medicine prescribed by the appellant was absolutely right in the circumstances in view of the fact, that the patient was suffering serious life threatening infection.

105. We may also refer to the affidavit of Mrs. Mukta Kolekar of Bombay Indian Inhabitant, who is a Senior Sister attached to the hospital. She has stated in her affidavit as follows :-
"I know Dr. Martin F.D'Souza who is a Nephrologist and who is attached to the said hospital since 1984. I say that I know Mr. Mohd. Ishaq. I distinctly remember him, as very few patients are as ill-tempered arrogant and obstinate like him. The said Mohd. Ishaq came to the said hospital as an outdoor as well as indoor patient for Haemodialysis on a number of occasions commencing from the month of April, 14th 1991 till 20th June, 1991 till 8th June, 1991 until suo moto he left the hospital. I say that on 11th June, 1991 the said Mohd. Ishaq came to the hospital for the purpose of Haemodialysis. He had come of his own and he had no problem either in walking or in hearing. Nothing abnormal was found in him. However, during Haemodialysis, he complained to the Doctor of ringing in the ears and thereupon Dr. Martin F.D'Souza called for the Discharge Card of the said Mohd. Ishaq and verified the medicine and injections which were prescribed and on verification, Dr. Martin F.D'Souza immediately deleted injection Amikacine and Cap. Augmentin and put a cross against the prescription of the said injection, and immediately gave instructions to me as well as to the other staff members not to give that injection at all, and also told the said Mohd. Ishaq and his wife who had accompanied him, not to take or get administered the said injection.
I say that after 11th June, 1991, the said Mohd. Ishaq came to the hospital as an outdoor patient on 14th June, 17th June and 20th June, 1991 and did not make any complaint of any nature whatsoever with regard to his hearing faculties. On the contrary, he used to have conversation and used to respond to the same as an ordinary man. The said Mohd. Ishaq used to come to hospital on his own without the assistance or help of anybody and after the dialysis also he used to go on his own. Thus, until 20th June, 1991, the said Mohd. Ishaq had no problems either in hearing or in movement of the limbs or parts of his body or in lifting parts of his body or in walking."

106. From these deposition and affidavits it cannot be said that the appellant was negligent. In fact most of the doctors who have deposed or given their affidavits before the Commission have stated that the appellant was not negligent.

107. In his written statement filed before the National Commission the appellant has stated in paragraph 9 (q-r) as follows :
"(q) On the 11th June,1991 the Complainant complained to Opposite Party of slight tinnitus or ringing in the ear. Opposite Party immediately reviewed the treatment on the discharge card in possession of the Complainant and asked the said Complainant and also made his attendant i.e. his wife to understand and asked her also to stop Injection Amikacin and Cap. Augmentin verbally as well as marked `X' on the discharge card in his own hand writing i.e. on 11th June, 1991 i.e. 3 days after discharge.Therefore, as per direction Opposite Party Complainant could have taken or received Injection Amikacin only upto 10th June, 1991 when he showed the very first and Preliminary side effect of Injection Amikacin. Discharge Card as per the Complainant's Complaint Annexure `3'speaks clearly that the said Injection has been `X' crossed and he was directed not to take the said Injection from 11th June, 1991 i.e. on his very first complaint he made of ringing in the ears, or tinnitus.
(r) On perusal of the Xerox copies of the papers of the Cash Memo supplied by the Complainant as per Annexure `4' it is evident that the Complainant against the advice of the Opposite Party and in breach of assurances, high handedly and unilaterally had been getting injected as late as 17th June, 1991 i.e. 7 days after he had been instructed verbally and in writing in the presence of his attendant i.e. his wife and staff members of the said hospital to stop Injection Amikacin/Cap. Augmentin because of tinnitus as early as 11th June, 1991"108.We see no reason to disbelieve the above allegations of the appellant that on 11.6.1991 he had asked the respondent to stop taking Amikacin injections, and in fact this version is corroborated by the testimony of the Senior Sister Mukta Kolekar in her affidavit, relevant part of which has been quoted above. Hence, it was the respondent himself who is to blame for having continued Amikacin after 11.6.1991 against the advice of the appellant.

108. We see no reason to disbelieve the above allegations of the appellant that on 11.6.1991 he had asked the respondent to stop taking Amikacin injections, and in fact this version is corroborated by the testimony of the Senior Sister Mukta Kolekar in her affidavit, relevant part of which has been quoted above. Hence, it was the respondent himself who is to blame for having continued Amikacin after 11.6.1991 against the advice of the appellant

109. Moreover, in the statement of Dr. Ghosh before the National Consumer Dispute Redressal Commission it has been stated that it is by no means established that Amikacin alone can cause deafness. Dr. Ghosh stated that there are 8 factors that can cause loss of hearing. Moreover, there are conflicting versions about the deafness of the respondent. While the respondent stated that he became deaf in June 1991, most of the Doctors who filed affidavits before the Commission have stated that they freely conversed with him in several meetings much after 21st June and in fact up to the middle of August 1991.

110. The National Commission had sought the assistance of AIIMS to give a report about the allegations of medical negligence against the appellant. AIIMS had appointed Dr. Ghosh to investigate the case and submit a report and Dr. Ghosh submitted a report in favour of appellant. Surprisingly, the Commission has not placed much reliance on the report of Dr. Ghosh, although he is an outstanding ENT specialist of international repute.

111. We have carefully perused the judgment of the National Commission and we regret that we are unable to concur with the views expressed therein. The Commission, which consists of laymen in the field of medicine, has sought to substitute its own views over that of medical experts, and has practically acted as super-specialists in medicine. Moreover, it has practically brushed aside the evidence of Dr. Ghosh, whose opinion was sought on its own direction, as well as the affidavits of several other doctors (referred to above) who have stated that the appellant acted correctly in the situation he was faced.

112. The Commission should have realized that different doctors have different approaches, for instance, some have more radical while some have more conservative approaches. All doctors cannot be fitted into a straight-jacketed formula, and cannot be penalized for departing from that formula.

113. While this Court has no sympathy for doctors who are negligent, it must also be said that frivolous complaints against doctors have increased by leaps and bounds in our country particularly after the medical profession was placed within the purview of the Consumer Protection Act.To give an example, earlier when a patient who had a symptom of having a heart attack would come to a doctor, the doctor would immediately inject him with Morphia or Pethidine injection before sending him to the Cardiac Care Unit (CCU) because in cases of heart attack time is the essence of the matter. However, in some cases the patient died before he reached the hospital.After the medical profession was brought under the Consumer Protection Act vide Indian Medical Association vs. V.P. Shantha 1995 (6) SCC 651 doctors who administer the Morphia or Pethidine injection are often blamed and cases of medical negligence are filed against them. The result is that many doctors have stopped giving (even as family physicians) Morphia or Pethidine injection even in emergencies despite the fact that from the symptoms the doctor honestly thought that the patient was having a heart attack. This was out of fear that if the patient

died the doctor would have to face legal proceedings.

114. Similarly in cases of head injuries (which are very common in road side accidents in Delhi and other cities) earlier the doctor who was first approached would started giving first aid and apply stitches to stop the bleeding. However, now what is often seen is that doctors out of fear of facing legal proceedings do not give first aid to the patient, and instead tell him to proceed to the hospital by which time the patient may develop other complications.

115. Hence Courts/Consumer Fora should keep the above factors in mind when deciding cases related to medical negligence, and not take a view which would be in fact a disservice to the public. The decision of this Court in Indian Medical Association vs. V.P. Shantha (Supra) should not be understood to mean that doctors should be harassed merely because their treatment was unsuccessful or caused some mishap which was not necessarily due to negligence. In fact in the aforesaid decision it has been observed (vide para 22) :-
"In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control".

116. It may be mentioned that the All India Institute of Sciences has been doing outstanding research in Stem Cell Therapy for the last eight years or so for treating patients suffering from paralysis, terminal cardiac condition, parkinsonism, etc, though not yet with very notable success. This does not mean that the work of Stem Cell Therapy should stop, otherwise science cannot progress.

117. We, therefore, direct that whenever a complaint is received against a doctor or hospital by the Consumer Fora (whether District, State or National) or by the Criminal Court then before issuing notice to the doctor or hospital against whom the complaint was made the Consumer Forum or Criminal Court should first refer the matter to a competent doctor or committee of doctors, specialized in the field relating to which the medical negligence is attributed, and only after that doctor or committee reports that there is a prima facie case of medical negligence should notice be then issued to the concerned doctor/hospital. This is necessary to avoid harassment to doctors who may not be ultimately found to be negligent. We further warn the police officials not to arrest or harass doctors unless the facts clearly come within the parameters laid down in Jacob Mathew's case (supra), otherwise the policemen will themselves have to face legal action.

118. In the present case the appellant was faced with an extremely serious situation. Had the appellant been only suffering from renal failure it is possible that a view could be taken that the dose prescribed for the appellant was excessive. However, the respondent was not only suffering from renal failure but he was also suffering from urinary tract infection and also blood infection i.e Septicaemia which is blood poisoning caused by bacteria or a toxin. He had also extremely high urea. In this extremely serious situation, the appellant had naturally to take a drastic measure to attempt to save the life of the respondent. The situation was aggravated by the non-cooperation of the respondent who seems to be of an assertive nature as deposed by the witnesses. Extraordinary situations require extraordinary remedies. Even assuming that such a high dose of Amikacin would ordinarily lead to hearing impairment, the appellant was faced with a situation between the devil and the deep sea. If he chose to save the life of the patient rather than his hearing surely he cannot faulted.

119. In the present case the blood urea of the respondent was found to be 180 mgs.% whereas normally it should not exceed 10-50 mgs.%. This shows that very serious infection in the kidney of the respondent was taking place which required drastic measures.

120. The allegation against the appellant is that he gave overdose of the antibiotic. In this connection it may be mentioned that antibiotics are usually given for a minimum of five days, but there is no upper limit to the number of days for which they should continue, and it all depends on the condition of the patient. Giving lesser dose of antibiotic may create other complications because it can cause resistance in the bacteria to the drug, and then it will be more difficult to treat.

121. As regards the impairment of hearing of the respondent it may be mentioned that there is no known antibiotic drug which has no side effect. Hence merely because there was impairment in the hearing of the respondent that does not mean that the appellant was negligent. The appellant was desperately trying to save the life of the respondent, which he succeeded in doing. Life is surely more important than side effects.

122. For example many Anti Tubercular drugs (e.g. Streptomycin) can cause impairment of hearing. Does this mean that TB patients should be allowed to die and not be given the Anti Tubercular drug because it impairs the hearing? Surely the answer will be in the negative.

123. The courts and Consumer Fora are not experts in medical science, and must not substitute their own views over that of specialists. It is true that the medical profession has to an extent become commercialized and there are many doctors who depart from their Hippocratic oath for their selfish ends of making money. However, the entire medical fraternity cannot be blamed or branded as lacking in integrity or competence just because of some bad apples.

124. It must be remembered that sometimes despite their best efforts the treatment of a doctor fails. For instance, sometimes despite the best effort of a surgeon, the patient dies. That does not mean that the doctor or the surgeon must be held to be guilty of medical negligence, unless there is some strong evidence to suggest that he is.

125. On the facts of this particular case, we are of the opinion that the appellant was not guilty of medical negligence. Resultantly, the appeal is allowed; the impugned judgment and order of the National Commission is set aside. No costs.

.....J.

[MARKANDEY KATJU] .....J.

[R.M. LODHA] New Delhi, February 17, 2009.

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