

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9915 OF 2017

'X'

Petitioner

Versus

1. Union of India
Through Secretary for Public Health
& Administration
New Delhi
2. The State of Maharashtra
Through Secretary for Public Health &
Administration
Mantralaya, Mumbai
3. The Dean
Government Hospital & training institute,
Aurangabad
Mill Corner, Aurangabad

Respondents

Mr. R.S. Deshmukh, advocate instructed by Mr. P.S. Pawar and Mr.
M.S. Biyani, advocates for petitioner.
Mr. Bhushan Kulkarni, ASG for respondent no. .
Mr. A.V. Deshmukh, AGP for respondents 2 and 3.

**CORAM : R.M.BORDE &
S.M. GAVHANE, JJ.**
DATE : 10th AUGUST, 2017

JUDGMENT : (PER R. M. BORDE)

1. Rule. Rule made returnable forthwith.
2. Heard finally with the consent of learned counsel for the respective parties.
3. The unfortunate victim who has already suffered physical abuse and mental torture has approached this Court seeking direction in the nature of writ of mandamus directing respondent no. 3 to carry out termination of unwanted pregnancy which is result of physical abuse thrust against her.
4. Petitioner contends that she has been physically abused by accused in crime registered at Cidco Police station, Aurangabad on 30.07.2017. Accused are stated to be father and son. Petitioner states that pregnancy is carried by her as a result of physical abuse committed against her by accused and that, she is entitled to terminate the unwanted pregnancy.
5. Petitioner, at her request, was referred for medical examination to the Board constituted at Government Medical College and Hospital, Aurangabad. Petitioner was medically examined by five members Expert Committee constituting of
 - 1) Dr. Shrinivas Gadappa (Chairman) Prof. & HOD, OBGY,
 - 2) Dr. P.S. Patil, (Member) Prof. & HOD Paediatrics,
 - 3) Dr. Varsha Rote, (Member) Prof. & HOD, Radiology,
 - 4) Dr. Suhas Jewalikar (Member) HOD, Anaesthesia, and
 - 5) Dr. Pradip Deshmukh, (Member) HOD, Psychiatry.
6. The Committee has recorded following findings in the report

tendered to this Court :

1. From general medical examination she has no active medical complaints.

2. Obstetric examination her vital parameters are within normal limits with 22-24 weeks of pregnancy.

3. Ultrasonographic examination suggestive of single live intrauterine foetus of approximate 24 weeks 2 days +/- 1 week. No gross lethal foetal anomaly.

4. Psychiatric examination, clinically she is of average intelligence. No active current psychopathology. Her concept and judgment are intact. She is aware about the incident and consequences about the continuation of pregnancy.

7. The conclusions of the Committee are as follows :

1. Current pregnancy, on clinical and ultrasonographical examination is around 24 weeks by gestation. No gross congenital anomalies in the foetus.

2. Her Physical and Mental Health is within normal limits.

3. Risk of termination of pregnancy is within normal acceptable limits.

8. The Medical Termination of Pregnancy Act, 1971 provides for termination of certain pregnancy by the registered Medical Practitioner. Sections 3, 4 and 5 of the Act are relevant which read thus :

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 suffer from such physical or mental abnormalities as to be seriously handicapped.

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

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

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 a 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. Sections 3 and 4 when not to apply -

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

immediately necessary to save the life of the pregnant woman.

(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of pregnancy by 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, 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.

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 relate to the possession, by registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply.

9. Although section 3 of the Act provides the limit of 12 weeks for medically terminating pregnancy by a medical practitioner and, where the length of pregnancy exceeds 12 weeks but does not exceed 20 weeks and if, not less than two medical practitioners are of opinion, formed in good faith, the continuance of pregnancy would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health or that there is a substantial risk that if the child were born, it would suffer from

such physical or mental abnormalities as to be seriously handicapped, it would be permissible to terminate the pregnancy. It must be noted that section 5 of the Act is not controlled by the limitation in respect of duration of pregnancy contained in sections 3 and 4 of the Act. If in the opinion of medical experts, arrived at in good faith, the termination of pregnancy is immediately necessary to save the life of the pregnant woman, such a pregnancy can be terminated. It also must be noted that Explanation 1 to section 3 records that where the pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy can be presumed to constitute a grave injury to the mental health of the pregnant woman. Sub-section (1)(b)(i) of section 3 refers to the risk involved to the pregnant woman which includes even injury in respect of mental health. There shall not be reason to doubt that since pregnancy in the instant matter is as a result of offence of rape, it causes a huge mental trauma and such inference is in consonance with explanation 1 to section 3(1) of the Act of 1971.

10. Honourable Supreme Court in the case of **Suchita Srivastava Vs. Chandigarh Administration** reported in **2009(9) SCC 1**, has observed that there is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choice can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. In the instant matter, the medical board has reported that the the risk of termination of pregnancy is

within normal acceptable limits. It is further reported that petitioner, the victim of rape, has reportedly told before the board that if she is forced to continue with the pregnancy she would have no other option but to commit suicide. It must be noted that the pregnancy carried by petitioner is as a result of physical abuse thrust against her and that she has a choice whether to continue with such pregnancy which is result of offence against her person. The freedom of making choice by a woman which is integral part of personal liberty cannot be taken away. It shall also be taken into consideration that besides physical injury, the legislature has widened the scope of term injury by including injury to mental health of a pregnant woman. If continuation of pregnancy is harmful to mental health of a pregnant woman, then it shall be construed as a good legal ground for permitting her to terminate pregnancy and, since in the instant matter, pregnancy is alleged to be as a result of physical abuse, in view of section 5 of the Act of 1971, the choice of the victim of rape of terminating unwanted pregnancy needs to be respected. Observations made by Division Bench of this Court in *Suo Motu Public Interest Litigation no. 1/2016 in the matter of **High Court on its own motion Vs. The State of Maharashtra*** reported in **LEX(BOM) 2016 9 page 114**, in paragraph no. 13 of the judgment are relevant for consideration which read thus :

13. A woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. To be pregnant is a natural phenomenon for which woman and man both are responsible. Wanted pregnancy is shared equally, however, when it is an accident or unwanted, then the man may not be there to share the burden but it may only be the woman on whom the burden falls.

Under such circumstances, a question arises why only a woman should suffer. There are social, financial and other aspects immediately attached to the pregnancy of the woman and if pregnancy is unwanted, it can have serious repercussions. it undoubtedly affects her mental health. The law makers have taken care of helpless plight of a woman and have enacted Section 3(2)(b)(i) by incorporating the words "grave injury to her mental health". It is mandatory on the registered medical practitioner while forming opinion of necessity of termination of pregnancy to take into account whether it is injurious to her physical or mental health. While doing so, the woman's actual or reasonable foreseeable environment may be taken into account.

11. In the matter of **Appellant "X" Vs. Union of India and others** reported in **AIR 2016 SC 3525**, the Honourable Apex Court considering the provisions of section 5 of the Act of 1971, permitted termination of pregnancy of duration of 23 to 24 weeks. It is observed in the judgment that section 3 leaves no room for doubt that it is not permissible to terminate pregnancy after 20 weeks however, section 5 of the Act lays down exception to section 3. It is further observed that termination of pregnancy which is necessary to save life of a pregnant woman is permissible. The Honourable Apex Court in the matter of **Appellant X Vs. union of India and others** reported in **AIR 2017 SC 1055**, granted permission for termination of pregnancy of duration of 24 weeks since it was noticed that the foetus could not survive. In the instant matter, apart from danger to the life of the petitioner, this Court has to take note of the psychological trauma the petitioner is undergoing as a result of carrying unwanted pregnancy. As has been stated

above, the freedom of petitioner to make choice to terminate unwanted pregnancy which is result of physical abuse needs to be respected and such freedom of choice shall have to be construed as integral part of her personal liberty. In the instant matter, the medical board has reported that risk involved in terminating pregnancy is within normal range. Physical health of petitioner is normal and she is above 18 years of age. In the circumstances, we do not notice any impediment in permitting petitioner to terminate unwanted pregnancy.

12. Learned counsel for petitioner, states on instructions, that the petitioner would like to complete the procedure of termination of pregnancy at Government Medical College & Hospital, Aurangabad. The Dean of Government Medical College & Hospital, Aurangabad is thus directed to forthwith complete the procedure of termination of pregnancy of petitioner under supervision of the team of medical experts. Two members of the team shall be experts in Obstetrics and Gynecology.

13. Since according to petitioner, the pregnancy carried by her is as a result of offence of rape, complaint has already been lodged and the matter is under investigation, the Dean, Government Medical College & Hospital, Aurangabad is directed to preserve tissue sample and blood sample of the foetus for carrying out necessary medical tests including DNA, finger printing/mapping. The Investigating Officer conducting investigation in the matter shall ensure that the samples of tissues and blood etc. shall be forwarded to the Regional Forensic Laboratory, Aurangabad, for DNA, Finger printing/mapping and for carrying necessary tests

and the samples and report shall be preserved for the purpose of trial of the offence.

14. Rule is accordingly made absolute. No costs.

(S.M. GAVHANE)
JUDGE

(R.M.BORDE)
JUDGE

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