

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

Writ Petition No. 14173 of 2017

District : Nandurbar

"X"

(Since minor through her mother)

.. Petitioner.

versus

The Union of India & others.

.. Respondents.

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Mrs. Sabahat T. Kazi, Advocate, for the petitioner.

Mr. Bhushan Kulkarni, Standing Counsel, for respondent No.1.

Mr. A. B. Girase, Government Pleader, for respondents No.2 to 4.

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**CORAM : R.M. BORDE &
SMT. VIBHA KANKANWADI, JJ.**

DATE : 12th DECEMBER, 2017.

JUDGMENT [Per Smt. Vibha Kankanwadi, J.] :

01. Rule. Rule made returnable forthwith.

02. Heard finally with the consent of learned counsels for the respective parties.

03. The guardian of an unfortunate deaf-dumb-mentally challenged 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 the victim.

04. The guardian-mother of the victim (petitioner) contends that her daughter is the victim in Crime No. 120/17 registered with Dhadgaon Police Station, Dhadgaon, District Nandurbar, which has been registered on 07.11.2017. After the medical examination of the victim was conducted on 02.11.2017 in a hospital at Akkalkuwa, it is found that she is pregnant and length of the pregnancy is 18 to 19 weeks. Thereafter, she was taken to Nandurbar Hospital on 05.11.2017 for further treatment. It was found that some unknown person had taken disadvantage of the physical situation of the victim, had committed rape on her. The victim is deaf-dumb and mentally retarded. Brother of the victim had lodged report against unknown person for the said crime. He had also filed application on 12.11.2017 for termination of pregnancy to respondent No. 4. However, respondent No. 4 told that since the victim is deaf-dumb-mentally challenged, he will not be able to perform the operation. In the mean time, victim was referred to Medical Superintendent, S. B. H. G. M. C. & Hospital, Dhule for her mental assessment. It was diagnosed with “Sever Mental Retardation”. An application was then preferred before Sessions Judge, Shahada for permission for termination of pregnancy. Final report was given on 28.11.2017. The said application was rejected on 04.12.2017. Hence, this petition.

05. Taking into consideration the contentions raised in the petition, by order dated 07.12.2017, we had directed and referred the victim for medical examination before the Board constituted at Government Medical College & Hospital, Aurangabad. The medical examination was directed in order to ascertain exact psychological and physical condition of the victim.

06. Petitioner was medically examined by five members Expert Committee constituting of —

1) Dr. Shrinivas Gadappa, (Chairman), HOD Dept. of OBGY,

- 2) Dr. S. K. Jain (Member), Prof. & HOD ENT.
- 3) Dr. Suhas Jewalikar (Member) HOD, Anaesthesia.
- 4) Dr. Varsha Rote, (Member) Prof & HOD, Radiology.
- 5) Dr. P. S. Patil, (Member) Prof & HOD Paediatrics.
- 6) Dr. Ghuge (Member) HOD, Psychiatry.

07. The Committee has recorded following findings in the report tendered to this Court :

1. From general examination she has no active medical complaints.
2. On Obstetrics examination her vital parameters are within normal limits With approximately 22 weeks of pregnancy.
3. Ultrasonographic examination suggestive of single live intrauterine foetus of approximate 22 weeks, Nuchal thickness 7mm, Unilateral pelvi ureteric Junction obstruction.
4. ENT examination, survivor is congenitally deaf and mute.
5. On psychiatric examination, survivor clinically seems to be of sever intellectual disability.
6. On Paediatrics examination, survivor has gross development delay with Down Syndrome.

08. The conclusions of the Committee are as follows :

1. Current pregnancy, on clinical and ultrasonographical examination is around 22 weeks by gestation. With Nuchal thickness 7mm, unilateral pelvi ureteric junction obstruction
2. Survivor clinically seems to be of severe intellectual disability.
3. Risk of termination of pregnancy is within normal acceptable limits.

09. 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.

10. 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. These are the situations in respect of termination of pregnancy of a woman who is not suffering from any physical abnormalities. 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.

11. 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. In the instant matter, when the victim was before the Medical Board, she had communicated (It appears that while indicating the psychiatric examination), that she has no other option than to commit suicide if she is forced to continue pregnancy. 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. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected.

12. 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.

13. The crucial question here is whether permission can be granted to terminate the pregnancy of 22 weeks in this case. The victim in this case is deaf, dumb and mentally retarded; therefore, she is unable to make a choice on her own whether to terminate the pregnancy or to continue with it. She has no such intellectual capacity, therefore, her guardian should be given that right to make choice. This case is also required to be considered from the physical point of view of the victim. Victim is deaf, dumb and mentally retarded. She is unable to take any decision. In fact, she is not even aware that she has been raped and she is pregnant. It has been stated by her guardian and brother that she is not even able to take care of herself. Question therefore arises under such circumstance as to how she would take care of child to be borne? It has been stated in the medical certificate that “ *On Paediatrics examination, survivor has gross development delay with Down Syndrome*”. If we consider “*Down Syndrome*”, it means “*is a genetic disorder caused by the presence of all or part of a third copy of chromosome*”. It is typically associated with physical growth delays, characteristic facial features and mild to moderate intellectual disability. The medical literature would show that there is no cure to the “down syndrome”. No doubt, a person with down syndrome may lead a normal life, but in the present case, when the victim is unable to take care of herself, there is every possibility

that she will not be able to take care of the foetus. Though the certificate states that the risk of termination of pregnancy is within normal acceptable limits; it would be hazardous to ask her to bear the pregnancy. It is not only dangerous to her, but dangerous to the unborn child also. 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. The pregnancy of the petitioner is definitely unwanted for her and it is violative of her personal liberty. Since she is unable to take decision due to intellectual disability, her guardian is taking the said decision, which is in the best interest of the victim and her survival. In the circumstances, we do not notice any impediment in permitting petitioner to terminate unwanted pregnancy.

14. Learned counsel for petitioner, states on instructions, that the petitioner would like to complete the procedure of termination of pregnancy of the victim 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 victim under supervision of the team of medical experts. Two members of the team shall be experts in Obstetrics and Gynecology.

15. Since according to petitioner, the pregnancy carried by the victim 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.

16. Rule is accordingly made absolute. No costs.

(Smt. Vibha Kankanwadi)
JUDGE

(R.M. Borde)
JUDGE

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