

ssp

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10711 OF 2018

XYZ ...Petitioner
vs.
The State of Maharashtra
and others ...Respondents

Ms Bhavana Mhatre a/w Ms Meenaz Kakalia I/b
Mr.Kranti L.C. for the Petitioner
Mr.P.G.Sawant, AGP for the respondent No.2
Ms Purnima Awasthi for respondednt No.1

CORAM : A.S.OKA, &
M.S.SONAK, JJ.
DATE : SEPTEMBER 26, 2018

P.C.:

1 Perused the order dated 21st September 2018. The petitioner has tendered additional affidavit to which a photo copy of her Aadhar Card is annexed. Affidavit is taken on record and marked 'A-1' for identification.

2 In terms of the order dated 21st September 2018, a medical board constituted by the Dean of Sir J.J.Group of Hospitals has submitted a report. The medical board consisted of seven Doctors attached to Grant Medical College, Mumbai. The Board consisted of 1) Professor and Head of Department of Obstetrics and Gynecology of Grant Medical College and Sir J.J.Group of Hospitals, 2) Professor and Head of the Department of Psychiatry, Sir J.J.Group of

Hospitals, 3) Professor and Head of Department of Radiology, Sir J.J.Group of Hospitals, 4) Professor and Head of Department of Paediatrics, Sir J.J.Group of Hospitals, 5) Professor and Head of the Department of Cardiology, Sir J.J.Group of Hospitals, 6) Professor and Head of the Department of Pediatrics Surgery, Sir J.J.Group of Hospitals, 7) Professor and Head of the Department of C.V.T.S., Sir J.J.Group of Hospitals and 8) Professor and Head of the Department of Neurosurgery, Sir J.J.Group of Hospitals. The report is taken on record and marked 'R-1' for identification. In the report, opinion of the Board is recorded. The opinion reads thus:

COMMITTEE OPINION

UPON EXAMINATION AND AFTER CAREFUL STUDY OF MULTIPLE SONOGRAPHY REPORTS, IT IS CONFIRMED THAT THE FETUS SUFFERS FROM SERIOUS NEUROLOGICAL ABNORMALITY IN THE FORM OF UNILATERAL DILATATION OF LEFT LATERAL VENTRICLE MEASURING 24 MM, BRAIN PARENCHYMA IS THINNED OUT 7 CLEFT LIP. THIS CONDITION IS LIKELY TO WORSEN WITH INCREASING GESTATIONAL AGE.

THE CONDITION OF THE FETUS FULFILLS THE CRITERIA OF "SUBSTANTIAL RISK OF SERIOUS PHYSICAL HANDICAP".

THE WOMAN HAS BEEN EXPLAINED ABOUT THE OUTCOME IN HER LANGUAGE SHE UNDERSTANDS.

THE PREGNANT WOMAN HAS VOLUNTARILY EXPRESSED HER DESIRE TO TERMINATE THE PREGNANCY AND IS WELL INFORMED ABOUT THE NATURE OF THE CONDITION OF FETUS AND ITS OUTCOME. SHE IS ANGUISHED WITH THE CONDITION OF THE FETUS IN UTERO. HENCE IT IS ADVISABLE TO TERMINATE THE PREGNANCY.

THE PREGNANCY WAS WITHIN PERMISSIBLE LIMITS FOR MTP, WHEN SHE CAME FOR MTP. HENCE TERMINATION OF PREGNANCY CAN BE ALLOWED WITH DUE RISK I/V/O FETAL ANOMALIES."

3 We have heard the learned counsel for the petitioner. The learned AGP for the second respondent and the learned counsel for the first and third respondents.

4 Our attention is invited to the decision of the Division Bench of this Court dated 9th January 2018 in Writ Petition St.No.36727 of 2017 in the case of Shaikh Ayesha Khatoon vs. Union of India and others. The Division Bench was dealing with the similar case where the petitioner lady was in the 27th weeks of pregnancy. In the present case, the petitioner is in 26th week of pregnancy. The Division Bench considered sections 3 and 5 of the Medical Termination of Pregnancy Act, 1971 (for short 'the said Act').

5 In paragraph 10, the Division Bench quoted sections 3 and 5 of the said Act. Paragraph 10 reads thus:

"10 Section 3(2)(b)(i) and (ii) as well as section 5 (1) of the Act of 1971 read thus:

"3. When pregnancies may be terminated by registered medical practitioners -

(1) xxxx

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

(a) xxxx

(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."

"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 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."

In paragraph 13, the Division Bench held thus:

"13 It is further observed that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a 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 [as per section 3(2)(b)(i) of the Act of 1971] or when there is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped [as per Section 3(2)(b)(ii) of the Act of 1971]. It is true that Clauses (I) and (ii) of sub-section 2 (b) of Section 3 are attracted in the case where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks. However, as has been recorded

above, Section 5 permits termination of pregnancy by a registered medical practitioner in 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. It shall also have to be construed that Section 5 brings within its ambit the provisions of Section 4 and so much of the provisions of sub-section (2) of Section 3 of the Act of 1971 except the limitation in respect of length of the pregnancy of 20 weeks as provided in sub-section (2)(b) of Section 3 of the Act of 1971. It would thus be logical to conclude that the contingencies referred in Clauses (i) & (ii) of sub-section (2)(b) of Section 3 will have to be read in Section 5 of the Act of 1971 and it would be relevant to consider the threat perception and substantial risk involved if the child were to born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. The contingencies laid down in Clauses (i) & (ii) of sub-section (2) (b) of Section 3 shall therefore equally apply to the request of a pregnant woman seeking permission to terminate the pregnancy beyond 20 weeks and accordingly Section 5(1) will have to be construed, to meet the object and purpose of enactment and to promote cause of justice."

6 Even in paragraph 22, the Division Bench reiterated that if the conditions laid down in clauses (i) and (ii) of sub-section 2(b) of section 3 of the said Act are satisfied, it would provide a good ground for exercising jurisdiction under section 5 of the said Act. In the present case, going by the opinion of the Medical Board, the contingencies provided in clauses (i) and (ii) of sub-section 2(b) of section 3 of the said Act exist. The Medical Board has opined that there is a substantial risk of child being born with serious physical handicap. There is no reason to discard the opinion of the Medical Board.

7 The opinion of the Medical Board records that the petitioner is well informed about the nature and condition of the fetus and its outcome and she has voluntarily expressed her desire to terminate the pregnancy.

8 The averments made in the petition show that the petitioner wants to undergo medical termination of pregnancy in Nowrosjee Wadia Maternity Hospital, Parel, Mumbai which is admittedly, a hospital run by Brihanmumbai Mahanagar Palika.

9 This is a case where the petitioner is willing to undergo medical termination of pregnancy. The petitioner is aware about the risks involved and the petitioner has agreed to bear the expenses. As

observed in the case case of Shaikh Ayesha Khatoon (supra), it is obvious that the Doctors who are a part of Medical Board and the Doctors who supervise the procedure of medical termination of pregnancy will enjoy immunity from any legal action arising out of this litigation.

10 Accordingly, we pass the following order:

(i) We permit the petitioner to undergo medical termination of her pregnancy in Nowrosjee Wadia Maternity Hospital, Parel, Mumbai. It will be open for the petitioner to report to the office of the Head of the Department of Gynecology of the said hospital on Friday i.e. 28th September 2018 at 11.00 a.m. The petitioner will produce a copy of this writ petition along with annexures and documents of identity which shall be verified by the concerned officers of the said hospital;

(ii) We direct the authorities of Nowrosjee Wadia Maternity Hospital to admit the petitioner immediately on her reporting on Friday 28th September 2018 and ensure that the procedure for medical termination of pregnancy will be undertaken;

(iii) Needless to add that the medical termination of pregnancy will be at the

risk of the petitioner and the doctors who are the members of the Medical Board and the doctors who will perform the procedure will enjoy immunity from any legal action arising out of this litigation;

(iv) The petition is disposed of on the above terms;

(vi) Hospital Authorities to act on an authenticated copy of this order.

(M.S.SONAK,J.)

(A.S.OKA,J.)