ISM

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6970 OF 2018

Smt. Poonam Arvind Varma .....Petitioner

V/s.

1. The Government of Maharashtra
2. Women and Child Development Divisional Government of Maharashtra
3. Ministry of Health and Family Welfare Government of Maharashtra .....Respondents
4. Ministry of Home Affairs Government of Maharashtra

Mr. Amit Mane for the petitioner
Mr. Sandeeb Babar AGP for the State.

CORAM : SHANTANU KEMKAR AND NITIN W. SAMBRE, JJ.

DATE : JULY 12, 2018.

P.C.

The petitioner Poonam is blessed with daughter Mahima Arvind Varma. At the behest of Mahima, daughter of petitioner, crime no. I-305 of 2018 came to be registered on 07/06/2018 with Mumbra Police Station, District: Thane for offence punishable under sections 376 of the Indian Penal Code and sections 4, 6, 8, 10 & 12

of the Protection of Children from Sexual Offences Act. It is alleged that accused Indrajeet who was studying with daughter of petitioner Mahima has committed the aforesaid offence during the period from 01/01/2018 to 26/01/2018. According to petitioner, on the date of the alleged offence so also on the date of registration of crime, the age of the victim Mahima was 17 years and 6 months.

2 Since the daughter of the petitioner is the victim of offence of rape and she having carrying 22 weeks of pregnancy as certified by the doctor upon examination, has approached this Court with a prayer for permission to terminate the pregnancy pursuant to the provisions of section 3 of the Medical Termination of Pregnancy Act, 1971 (Hereinafter referred to as “the Act” for the sake of brevity).

3 This Court, in view of cause cited before it on 02/07/2018 observed that the victim was admitted in Cama Hospital, thereafter shifted to Rajiv Gandhi Medical College at Kalwa, District Thane. Since she was carrying pregnancy, directions were issued to Dean, Sir J.J. Group of Hospitals, Mumbai to constitute a Committee of experts to examine the victim and submit a report of her physical

and mental condition and as to whether the pregnancy can be terminated. This Court directed the Dean to place the report by 05/07/2018 before this Court.

4 It appears that the victim did not remain present before the said Board as directed and accordingly, the Dean sent a report to that Court.

5 Thereafter, matter was adjourned, in view of request made by the learned counsel for the petitioner.

6 Pursuant to the orders of this Court passed on 02/07/2018, the Medical Board consisting of following department experts came to be constituted:

Obstetrics and Gynecology, Psychiatry, Radiology, Cardiology, Paediatrics and Paediatrics Surgery.

7 The Professor and Head, Dept of Radiology has observed that

on the date of examination, the age of the foetus was around 26 weeks and 5 days. The rest of the experts of the concerned department made following observations:

Opinion of Dr. Ashok anand (Prof and Head, Dept. of Obstetrics & Gyneocology)

Unwed with 6 months ammenorrhoea
P/A – uterus 26 weeks, relaxed, FHS+

Opinion of Dr. V. P. Kale (Prof & Head, Dept of Psychiatry)

No Psychopathology seen; She is of sound mind.

Opinion of Dr. Bela Verma (Prof & Head, Dept of Pediatrics)

Mahima verma wants MTP as she is unwilling to keep the baby/deliver it. The patient & her parents should be explained about the due risk of MTP

Opinion of Dr. N. O. Bansal (Prof & Head, Dept of Cardiology)

There is no cardiac anomaly in the foetus. Decision of MTP to be taken by committee.

Opinion of Dr. D. R. Kulkarni (Professor & Head, Dept. of Paediatrics surgery)

No congenital malformations in foetus. No paediatric surgical management needed.

Observations of Dr. Shilpa Domkundwar (Prof. & Head, Dept. of Radiology)

OBSTETRICS

FINDINGS

PRESENTATION	**CEPHALIC**	**UMBLICIAL CORD**	**3 VESSEL NO CORD AROUND NECK**
CARDIAC ACTIVITY	SEEN, 158/MIN	FETAL MOVEMENTS	PRESENT
PLACENTA	FUNDO-POSTERIOR	CERVICAL, LENGTH	ADEQUATE
PLACENTAL, THICKNESS	NORMAL, NO RETROPLACENTAL CLOTS	INTERNAL OS	CLOSED

Fetal Biometry: ***AFI: 10-11 cm***

BPD	70mm	28 weeks	2 days
HC	254mm	27 weeks	4 days
AC	215mm	26 weeks	0 days
FL	45mm	25 weeks	6 days
MGA		26 weeks	5 days
EFW			865+/- 126 gms
EDD			05/10/018

Impression: Single live intrauterine gestational sac of mean gestational age 26 weeks and 5 days.

COMMITTEE OPINION

After careful examination of the patient, opinion of Prof. Of Psychiatry, radiology, paediatrics, cardiology & Paediatric Surgery.

The Committee has come to the conclusion that as the pregnancy has already advanced to more than 26 weeks, baby weight being more than 865 Gm and will be alive if terminated requiring intensive neonatal care. Both mother and foetus seem to be in good condition, hence pregnancy should be allowed to continue till the foetus is relatively safe to survive outside the womb.

After the delivery, the baby can be given up for adoption. Mother, if required can be hospitalized in government hospital till term.

8 This Court made the learned counsel for the petitioner and the petitioner who was present in the Court aware about the Committee's opinion particularly the age of the foetus being more than 26 weeks, the weight of the baby being more than 865 Gms and in case if the pregnancy is terminated, the baby will be alive and require intensive neonatal care. It is also observed that there is no danger to the life of the petitioner and foetus as both are in good condition.

9 The learned counsel for the petitioner as such, sought time in the matter to take further instructions on the above issue and accordingly, matter was adjourned.

10 Since the petitioner has not agreed to opinion of the Medical Board, the matter was argued by the learned counsel for the petitioner on merit. By inviting attention of this Court to provisions of section 3, 4 & 5 of the Acct and the observations made by the Apex Court in the matter of **Suchita Srivastava V/s. Chandigarh Administration**[1] and **Shaikh Ayesha Khatoon vs. Union of India**[2] submits that it is a settled position of law that since the petitioner is a victim of rape, she needs to be granted permission to terminate the pregnancy. He would specifically invite attention of this Court to Explanation I to section 3 of the Act so as to claim that there is a grave injury to the mental health of daughter of the petitioner, she being the victim of rape.

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1 **[2009 (9) SCC 1]**
2 **[2018 (3) Mh.L.J. 486]**

11 This Court, in the aforesaid background has also suggested the petitioner that the child born can be given in adoption, considering her status as unmarried mother.

12 To the above, the learned counsel for the petitioner insisted that the petitioner be granted permission to terminate the pregnancy.

13 Considered rival submissions.

14 The Apex Court in the matter of **Suchita Srivastava** [cited supra] was dealing with an issue as regards the termination of pregnancy of a mentally retarded person.

15 The Apex Court while interpreting the provisions of section 3 (2) (b) 3 (4) (b) has observed in paragraphs 45, 46, 47 and 48 as under:

> ***45.*** *Even if it were to be assumed that the victim's willingness to bear a child was questionable since it may have been the product of suggestive questioning or because the victim may change her mind in the future, there is*

another important concern that should have been weighed by the High Court. At the time of the order dated 17.7.2009, the victim had already been pregnant for almost 19 weeks. By the time the matter was heard by this Court on an urgent basis on 21.7.2009, the statutory limit for terminating a pregnancy, i.e. 20 weeks, was fast approaching. There is of course a cogent rationale for the provision of this upper limit of 20 weeks (of the gestation period) within which the termination of a pregnancy is allowed. This is so because there is a clear medical consensus that ***an abortion performed during the later stages of a pregnancy is very likely to cause harm to the physical health of the woman who undergoes the same.***

46. *This rationale was also noted in a prominent decision of the United States Supreme Court in Roe v. Wade 410 US 113 (1973), which recognised that the right of a woman to seek an abortion during the early-stages of pregnancy came within the constitutionally protected 'right to privacy'. Even though this decision had struck down a statutory provision in the State of Texas which had criminalized the act of undergoing or performing an abortion, (except in cases where the pregnancy posed a grave risk to the health of the mother) it had also recognised a 'compelling state interest' in protecting the life of the prospective child as well as the health of the pregnant woman after a certain point in the gestation period.*

47. *This reasoning was explained in the majority opinion delivered by Blackmun, J.,*
US at pp. 162-63:

> *"In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does*

> *have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling'."*

> ***48.*** *In light of the above-mentioned observations, it is our considered opinion that the direction given by the High Court (in its order dated 17.7.2009) to terminate the victim's pregnancy was not in pursuance of her 'best interests'. Performing an abortion at such a late-stage could have endangered the victims' physical health and the same could have also caused further mental anguish to the victim since she had not consented to such a procedure."*

15 Apart from above, in the matter of **Shaikh Ayesha Khatoon** [cited supra] though permits the termination of pregnancy beyond 20 weeks of age of foetus, still the fact remains that the termination is permissible by reading down the provisions as could be inferred from the observations made in para 11 which reads thus:

> *11. Section 3 of the Act of 1971 thus prescribes the outer limit of 20 weeks in the matter of termination of pregnancy in certain circumstances enumerated in Clauses (i) & (ii) of sub-section 2(b) of Section 3. Section 5 carves out an*

exception to Sections 3 & 4. It is provided that 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. It is contended relying on the provisions of sub-section (1) of Section 5 by the petitioner that the bar contained in sub-section (2) of Section 3 laying down the conditions for according permission to terminate the pregnancy is not absolute bar and in appropriate cases such permission can be accorded. Section 5 of the Act of 1971 carves out an exception in relation to the outer limit provided under sub-section (2) of Section 3 of the Act of 1971 i.e. 20 weeks in case where the termination of such pregnancy is immediately necessary to save the life of the pregnant woman. It is the contention of the petitioner that firstly the trauma that the petitioner is likely to suffer is life threatening and it shall be construed that exercise of a choice in the event there are foetal abnormalities found and the chances of survives of the baby, if allowed to take birth, are minimum, is a matter to be considered within the parameters of Section 5 of the Act of 1971. Apart from this, the petitioner contends that the provisions of sub-section (2) including clauses (i) & (ii) of sub-section (2)(b) of Section 3 are required to be read in Section 5 except the outer limit of twenty weeks that has been provided in sub-section (2)(b) of Section 3 of the Act of 1971."

16 In the aforesaid background of the factual matrix and the legal position, what to be noticed is whether the victim i.e. daughter of the petitioner is capable for consenting for sexual activity which has

resulted into her pregnancy or not will be addressed in the criminal proceedings. However, the fact remains that this Court cannot substitute its opinion to the opinion expressed by the Medical Experts Committee wherein they have opined not to permit the termination of pregnancy. Such opinion of the Committee is based on justifiable and appealing reason viz. if the pregnancy will be terminated, which is at advanced stage, particularly when the weight of the baby as noticed, the same will be born alive and will require intensive neonatal care. If the abortion is permitted to be performed at this advanced stage of pregnancy, same may also cause harm to the physical health of daughter of the petitioner.

17 That being so, we hardly notice any case which prompts this Court to exercise its extraordinary jurisdiction in granting prayer of the petitioner.

18 As such, in our opinion, there is no substance in the petition. Petition as such fails, dismissed.

[NITIN W. SAMBRE, J.] **[SHANTANU KEMKAR, J.]**