

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

**WRIT PETITION NO. 372 OF 2019
AYESHA KHATOON W/O SHAIKH UMAR FAROOQUE
VERSUS
THE UNION OF INDIA AND ORS.**

Mr.Aditya N. Sikchi, Advocate for the petitioner.
Mr.Amol Patale, Advocate for respondent No.1/Union
Mr.S.S. Dande, AGP for respondent/State.

**CORAM : PRASANNA B. VARALE &
S.M.GAVHANE, JJ.
DATED : 15.01.2019**

P.C. :-

1. Heard learned Counsel for the petitioner. Considering the urgency claimed by the petitioner, by order dated 10.01.2019, we have permitted to the petitioner to undergo the exercise of medical examination of the Medical Board. Learned AGP with the assistance of respondent No.3 and in presence of one of the Doctors of the Committee Dr.Kalyankar submitted a report of the Committee before us. The Committee constitutes of eight Doctors under the Chairmanship of Dr. Zine, Medical Superintendent, Government Medical College and Hospital,

Aurangabad. Other members of the Committee are Dr. Vijay Kalyankar, Dr. Prashant Titare, Dr. Anil Joshi, Dr. Pradip Deshmukh, Dr. Trupti Joshi, Dr. Junaid Shaikh and Dr. Rashmi Bengali. The report report is duly signed by the members of the Committee which states that the patient was examined thoroughly and the Committee also had gone through obst sonography of the patient and recorded finding as below:-

(1) Length of pregnancy has Average Gestational age of 19 weeks 4 days by LMP and obst Sonography both,

(2) On obstetric ultrasonography dated 11.01.2019, findings noted are – Foetal Micromelia with ? Ventricular Septal defect and main Pulmonary artery hypoplasia with prominent bilateral lateral ventricles and echogenic both kidneys.

2. Learned Counsel appearing for the petitioner by inviting our attention to the documents placed on record, namely, the report issued by a private diagnostic center, provisions of the Act, as well the judgments of the Apex Court and Division Bench of this Court, drew support for his contentions. Learned Counsel for the petitioner was

justified in inviting our attention to the judicial pronouncement and we are certainly guided by this authoritative pronouncement by the Hon'ble Apex Court in the matter of "X" and others Vs. Union of India, MANU/SC/0149/2017 and order passed by Division Bench of this Court in the matter of "X" Vs. State of Maharashtra and others in Writ Petition No.12408 of 2017. There is some difference in the facts, namely, in Writ Petition No.12408 of 2017, the petitioner was unfortunate victim who had suffered physical abuse and mental torture and had approached this Court, whereas here it is the petitioner who is household lady faced with unforeseen and unfortunate situation approaching this Court. The Division Bench of this Court in the order dated 13th October, 2017 referred to report received by the Court, the constitution of Board, the conclusion drawn by the Committee in the report. The Division Bench further referred to provisions and the Medical Termination of Pregnancy Act, 1971 and more particularly sections 3,4 and 5 of Act. It would be useful for our purpose to

refer to observations of the Division and the same reads as under :-

"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 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. "

3. The Division Bench also referred to judgment of the Apex Court in the case of Suchita Srivastava Vs. Chandigarh Administration, 2009(9) SCC 1 and it states 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. It refers to the observations made by Division Bench of this Court in Sou Moto Public Interest Litigation No.1/2016 in the matter of High Court on its own motion Vs. The State of Maharashtra, LEX(BOM) 2016 9 page 114, in para 13 and these observations 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."

4. The Division Bench then refers the judgment of the Apex Court in the matter of Appellant "X" Vs. Union of India & Ors, AIR 2016 SC 3525 and observed that the Hon'ble 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 (Emphasis supplied).

5. The Hon'ble Apex Court in the matter of Appellant "X" Vs. Union of India and others, 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. It may not be necessary for us to refer to further observations and on the facts in the matter of Writ Petition 12408 of 2017, wherein the petitioner was subjected to physical and mental trauma in the exploitation suffered by her.

6. Learned Counsel for the petitioner was justified in placing reliance on the judgment of this Court in the matter of Ayesha Khatoon Vs. Union of India and Ors. MANU/MH/0028/2018. It would be relevant for our purposes to refer the observations of the Division Bench

from the judgment.

20. Generally speaking, Statutes are classified in fourfold manner. Firstly, the statutes are remedial, secondly they are declaratory, thirdly they are procedural and lastly they are penal or disentitling. One has to find out the character of the statute as to whether it is penal or not, so as to apply principles of strict construction. In the instant matter it cannot be said that the provisions of the enactment which are relevant for consideration are penal in character. In a way, the provision is remedial and procedural. The provision, therefore, cannot be applied the standards as regards interpretation of a Statute which is penal in character.

21. On analysis of the judgments and the narrations, as recorded above, one must while interpreting the provisions of law, bear in mind that the provision as to be interpreted by reading all of its parts together and it is not permissible to omit any part thereof. The golden rule of interpretation is that the provisions of law have to be read as it is without adding or subtracting anything therefrom. In an appropriate case, the Court can only iron out the creases but while doing so, it must not alter the fabric, of which an Act is woven.

22. In the instant matter, on reading of Section 5 of the Act of 1971, it does transpire that the contingencies and the parameters laid down in clauses (i) & (ii) of subsection (2)(b) of Section 3 shall have to be read in Section 5 except the bar of limitation as provided in

Section 3(2)(b) of the Act of 1971. It would not be appropriate to over look the contingencies laid down in clauses (i) & (ii) of subsection (2) (b) of Section 3 while considering the request of a pregnant woman for termination of the pregnancy if the conditions laid down in clauses (i) & (ii) of subsection (2)(b) of Section 3 are satisfied it would provide a good ground for exercise of jurisdiction under Section 5 of the Act of 1971.

23. The Ministry of Health and Family Welfare, Government of Maharashtra has prepared the MTP (Amendment) Bill and the notification in that regard was published on 29.10.2014. The State Government has proposed amendment to Section 3 of the Act of 1973 and clause (C) is proposed to be added which reads thus :

“(C) the provisions of subsection (2) of section 3 as relate to the length of the pregnancy shall not apply to the termination of a pregnancy by a registered health care provider where the termination of such pregnancy is necessitated by the diagnosis of any of the substantial foetal abnormalities as may be prescribed.”

x x x x x

27. The Counsel appearing for the petitioner states, on instructions, that the petitioner will bear the medical expenses of the procedure of medical termination of pregnancy at a medical facility of her choice.

28. It is clarified at this stage that the petitioner has been sensitized by the

Committee/Medical Board about the risk factors involved and it would be open for the petitioner to undergo the procedure of medical termination of pregnancy at her own risk and consequences. It is further made clear that the Doctors who have put their opinions on record shall have the immunity in the event of occurrence of any litigation arising out of the instant Petition.

29. Rule is accordingly made absolute. There shall be no order as to costs. The operative part of this judgment shall be uploaded today and all concerned parties, including concerned approved Medical Center, to act upon the authenticated copy of the operative order.

7. In the present matter, the petitioner has also been sensitized by the Committee/Medical Board about risk factors involved and learned Counsel for the petitioner reiterated and assures this fact that the petitioner has been sensitized about the risk factors involved. Learned Counsel for the petitioner, on instructions, submits before us that that petitioner is ready to go before the Medical authorities of respondent No.3 i.e. the Government Medical College and Hospital, Aurangabad for the exercise of termination of pregnancy by following due

procedure of the Government Medical College and Hospital, Aurangabad and by bearing expenses as required.

8. In view of these facts, the writ petition is allowed in terms of prayer clauses (B) and (C).

9. Parties to act upon authenticated copy of this order.

[S.M.GAVHANE, J.]

[PRASANNA B. VARALE, J.]