

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No.12493 of 2019

‘X’	...Petitioner
<i>Versus</i>	
The State Of Maharashtra	...Respondent

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Mr. M. K. Kochrekar a/w. Kasturi Ghadshi, Vishal Kolekar, Pradnya Jogdand i/b. Randhir Kale, Advocate for the Petitioner.
Mr. Y. S. Kochare, AGP, for the Respondent Nos.2 & 3.

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**CORAM : K.K. TATED &
SARANG V. KOTWAL, JJ.**
DATE : 10th DECEMBER, 2019

PC. :

1. Rule. With consent of the parties, Rule is made returnable forthwith.
2. This petition is filed by the petitioner who is a minor girl aged 12 years, through her father, for permission to undergo medical termination of pregnancy at Sassoon Hospital.
3. It is mentioned in the petition that, the father of the victim has lodged an FIR at Wai Police station under sections 376 and 506 of the I.P.C. and under section 4, 6, 8 & 12 of the Protection of Children from Sexual Offences, Act, 2012. The victim was subjected to the offence of rape by the accused who was

relative of the victim and was residing nearby. As a result of sexual offence, the victim became pregnant. The petitioner's family consulted Doctors as the victim complained of nausea and pain in abdomen. Her medical examination revealed that, she was pregnant and pregnancy was of more than five and half months. The FIR was lodged on 21/11/2019. Since the pregnancy had exceeded the statutory period of 20 weeks prescribed under the Medical Termination of Pregnancy Act, 1971 (for short, 'MTP Act'), the petitioner is seeking permission from this court to terminate her pregnancy.

4. We have heard Mr. Kochrekar, the learned Counsel for the petitioner and Mr. Kochare, the learned AGP for the Respondent Nos.1 & 2.

5. The learned Counsel for the petitioner relied on a few judgments passed by the Hon'ble Supreme Court as well as different Division Benches of this Court dealing with the issue of granting permission for termination of pregnancy even after the statutory period of twenty weeks provided under the MTP Act was over. He submitted that the mental trauma that the victim

petitioner is undergoing because of the pregnancy caused due to the offence of rape was causing serious injury to her mental health. Besides this, there was inherent risk to her life because of pregnancy at such a tender age.

6. Considering the various directions issued by the Hon'ble Supreme Court, as well as, by different Division Benches of this Court, we had directed the Medical Board at Sassoon Hospital to submit a report regarding victim's health and possible risk involved in the entire procedure.

7. Today, the report of the Committee is tendered before us in sealed envelope. The envelope is opened in the court. The report of the Committee reads thus:

“The committee examined the girl [Petition No. 12493 of 2019] on 06/12/2019 and necessary investigations were done. Clinical examination and investigations reveals that the pregnancy is 23 weeks and 4 days on sonography of 6/12/2019. If this pregnancy is continued it might cause mental and physical trauma to the patient. The committee feels that the pregnancy may be terminated with kind permission of Hon'ble High Court.

However there is substantial risk in termination of pregnancy at this gestation like failure of termination and need of unnecessary caesarean section, and bleeding and all those risks are explained to the woman and her family and they are willing to accept the risk.”

8. The opinion of the Obstetrician Dr. Wankhede mentions that the pregnancy is of 23 weeks and 04 days with no fetal anomaly. The members of the Board have opined that the pregnancy can be terminated with permission of this Court.

9. In this background, we considered various aspects of the matter in the light of the law laid down in this behalf by the Hon’ble Supreme Court and this Court in the past. Since this is an important and unusual case, in addition to being an unfortunate case, it is necessary to consider some important aspects in this connection.

10. The MTP Act was enacted in the year 1971. Section 3 of the MTP Act reads 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 1.--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 pregnant woman.

Explanation 2.-- 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 pregnant 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 to the pregnant woman's actual or reasonably 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.”

11. Under Section 3(2)(b) of the MTP Act, the maximum period of pregnancy is prescribed as twenty weeks. The circumstances under which the pregnancy can be terminated are also set out under this Section. One such circumstance, as mentioned in Section 3(2)(b)(i) is that the termination of pregnancy is allowed if the continuance of the pregnancy involved a risk to the life of the pregnant woman or grave injury to her physical or mental health. Explanation 1 to this sub-section provides that when the pregnancy was caused by rape, it was presumed to constitute a grave injury to the mental health of the pregnant woman. In the instant case, this particular circumstance is clearly existing and there is no doubt that continuance of this

pregnancy is causing a grave injury to the mental health of the petitioner. Apart from this, of course, considering her tender age of 12 years, there is an inherent risk to her life. The only difficulty in the present case is that the statutory period of 20 weeks is over, more than seven weeks ago. The petitioner has entered into 28th week of her pregnancy and, therefore, the MTP Act does not permit medical termination of pregnancy in such cases.

12. However, Sub-Section (1) of Section 5 of the MTP Act carves out an exception, which reads thus :

“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.”

13. This very issue is discussed and is dealt with by a Division Bench of this Court (Coram: A.S. Oka & M.S. Sonak, JJ.) in Writ Petition Nos.10835/2018, 9748/2018 & OS Writ Petition

(L) No.3172/2018, decided on 3.4.2019. The Division Bench considered various judgments passed by the Hon'ble Supreme Court and discussed many issues. First and foremost, the Division Bench referred to the order of the Hon'ble Supreme Court passed in Writ Petition (Civil) No.928/2017, wherein it was observed that such cases could be filed in the respective High Courts having territorial jurisdiction. In paragraph-116, the Division Bench has observed that in such cases Writ Petition under Article 226 of the Constitution of India will have to be instituted in this Court if the petitioner resides within the territorial jurisdiction of this Court or if the cause of action arises within the territorial jurisdiction of this Court to seek permission for termination of her pregnancy if such termination is not immediately necessary to save her life, but, where she alleges that the circumstances set out in clauses (i) & (ii) of Section 3(2)(b) of the MTP Act exist.

14. The Division Bench also considered whether expression 'life' in Section 5 of the MTP Act was to be construed narrowly as antithesis to death or physical survival or whether it had to be liberally interpreted adopting the principles of purposive

interpretation.

15. It was observed in paragraphs-79 and 80 that where the continuance of pregnancy poses grave injury to the physical or mental health of the mother, if the pregnant mother is forced to continue with her pregnancy merely because the pregnancy had extended beyond the ceiling of 20 weeks, there would arise a serious affront to the fundamental right of such mother to privacy, to exercise reproductive choices, to bodily integrity and to her dignity. It was further observed that the principle of liberal or purposive construction would harmonize the provision in Section 5 of the MTP Act with the constitutional provisions. Based on some Supreme Court judgments, the Division Bench went on to observe that the right to life enshrined in Article 21 included the right to live with human dignity.

16. Considering all these facets, the Division Bench held, *inter alia*, where a pregnant woman, the length of whose pregnancy has exceeded 20 weeks, seeks to terminate such pregnancy on the ground that its continuance would involve grave injury to her physical or mental health or where 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, such pregnant woman will have to seek permission from the High Court and unless such permission is granted, no registered Medical Practitioner can terminate such pregnancy.

17. It was further held that, this Court, in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India, can permit medical termination of pregnancy the length of which exceeds 20 weeks, in contingencies set out in clauses (i) and (ii) of Section 3(2)(b) of the MTP Act. The Division Bench had directed the State to constitute Medical Boards for this purpose.

18. The Division Bench had further held that if medical termination of pregnancy was permitted and inspite of that if the child was born alive, then the registered Medical Practitioner and the hospital concerned was required to assume full responsibility to ensure that such child is offered best medical treatment available in the circumstances and in such cases if the parents of such child were not willing to or are not in a position to assume the responsibility for such child, then, the State and its agencies

will have to assume full responsibility for such child in the best interests of such child and in accordance with the statutory provisions of the Juvenile Justice Act.

19. In view of the observations made in the aforesaid judgment of the Division Bench in W.P Nos.10835/2018, 9748/2018 & OS W.P. (L) No.3172/2018, applying the ratio, guidelines and directions of this judgment to the facts of the case, we are of the considered view that the petitioner will have to be permitted to undergo medical termination of pregnancy.

20. The report of the committee also mentions that, there was substantial risk in termination of pregnancy like failure of termination and need of unnecessary caesarean section and bleeding. All these risks were explained to the victim and her family and they were willing to accept the risk.

21. Another Division Bench of this Court (Coram: R.M. Borde & N.J. Jamadar, JJ.) in Writ Petition No.6613/2019 on 13.6.2019 has dealt with another important issue. It was observed in that judgment that since the pregnancy in that case was a result of physical abuse and since the FIR was lodged, directions were

issued for preservation of the tissue sample, blood sample of the fetus for carrying out necessary medical tests including DNA, finger printing/mapping and the Investigating Officer was directed to forward the same to the Regional Forensic Laboratory. The learned Counsel for the petitioner submitted that similar directions needed to be issued in the instant case as well.

22. Considering the above discussion, following order is passed :

- i.** The petitioner is permitted to undergo medical termination of pregnancy as per Committee's report dated 06/12/2019, at Sassoon Hospital, Pune.
- ii.** The Dean of the Sassoon Hospital shall ensure that the procedure is performed at a place which satisfies all the requirements of the MTP Rules 2003 and the procedure shall be conducted by the Medical Practitioner who satisfies the conditions laid down under those rules.
- iii.** The blood sample and tissue sample of the fetus shall be preserved for the purpose of carrying out necessary medical tests including DNA and other tests. The Investigating Officer

conducting investigation shall ensure that the samples are forwarded to Forensic Science Laboratory and the samples shall be preserved for the purpose of trial of the offence.

- iv. In case, if the child is born alive, the Medical Practitioner who conducts the procedure will ensure that all necessary medical facilities are made available to such child for saving it's life.
- v. In case, if the child is born alive and if the petitioner and her parents are not willing or are not in a position to take responsibility of such a child then the State and its agencies will have to assume full responsibility for such child.
- vi. Rule is made absolute in the aforesaid terms.
- vii. All concerned parties to act on the authenticated copy of this order. Learned A.G.P. is directed to send an authenticated copy of this order to the Investigating Officer who is conducting investigation in the present case.

(SARANG V. KOTWAL, J.)

(K.K. TATED, J.)

VB.GOKHALE