IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5070 OF 2019

Snehal Pravin Desai } Petitioner
versus
Union of India and Ors. } Respondents

Ms.Bhavna Mhatre for the petitioner.

Ms.Purnima Awasthi for respondent nos. 1 and 3.

Ms.Kirti Kulkarni-AGP for respondent no.2.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

DATE :- APRIL 23, 2019

P.C. :-

1. Heard both sides.

2. Rule. Respondents waive service. By consent, Rule is made returnable forthwith.

3. By this petition, under Article 226 of the Constitution of India, the petitioner prays for the following reliefs:-

> (c) For a writ of mandamus or any other writ, order, or direction in the nature of mandamus directing the Respondents to-
>
> i constitute a Medical Committee for the examination of the Petitioner to assist this Hon'ble court in arriving at a decision on the plea of the Petitioner.
>
> ii allow the Petitioner to undergo Medical Termination of Pregnancy at a medical facility of her choice.
>
> (e) For an order directing Respondent No.1 to produce the report of MTP Committee which included the Health Secretary, Mr.Naresh Dayal, former Director-General of the Indian Council of Medical Research and Dr.N K

Ganguly as its members as stated in para 9 of the petition."

4. Pertinently, the larger issue covered by prayers (a) and (b) is not pressed.

5. The facts necessary for disposal of this petition are that the petitioner before this court is an Indian citizen. She resides in Pune District. She says that she is 23 weeks' pregnant. The authorities, who are party respondents to this petition are essentially concerned with public health services, health and family welfare and Ministry of Law and Justice.

6. The claim in the petition is that by virtue of the Act styled as the Medical Termination of Pregnancy Act, 1971 (for short "the MTP Act"), there is a prohibition for the termination of pregnancy beyond a specific period, namely, 12 weeks' pregnancy cannot be terminated unless the provisions of the MTP Act are complied with. The petitioner in the petition has set out various hurdles and difficulties faced by such women, but we are not concerned with that part of the pleadings for that is in relation to the larger relief claimed by the prayers which are expressly given up.

7. In the instant case, the petitioner says that after she was examined and following up the matter with the medical experts, she was informed by a private medical practitioner on 9th April,

2019 as under:-

> "**Obstetric ultrasound examination report**
>
> - 23 weeks 4 days ± 7 days maturity single live intrauterine fetus is seen.
>
> - Fetus shows cardiac defect in the form of Complete or dextro-transposition transposition of great arteries (D-TGA). Arota arises from RV receives systemic blood and returns it to the systemic system. The pulmonary artery receives pulmonary venous blood and returns it to the lungs.
>
> - In addition VSD is seen with overriding almost to the point of Double outlet right ventricle (DORV). Other visualised fetal appearances are normal at this stage.
>
> - There is adequate fetal growth.
>
> - Good amount of liquor is seen.
>
> - Doppler indices are normal.
>
> - Prognosis is poor. Fetus will need surgical intervention at birth.

8. After the follow up continued, it is her case that the advise is to terminate the pregnancy.

9. We have heard on such a petition Ms.Mhatre as also the advocates appearing for the Union of India and the State. Ms.Kulkarni appearing for the State was present as also Ms.Purnima Awasthi. On 16th April, 2019, the following order came to be passed:-

> 1. Let the petitioner appear before the Committee/Board of Medical Experts, which shall be set up by the Dean of Sasoon General Hospital and B.J.Medical College, Pune.

> The Committee to forward its report to this Court by Monday i.e. 22nd April, 2019.
>
> 2. We have clarified to the petitioner's advocate that in the event, the Committee opines that the ingredients of clause (b) of sub-clause (ii) of sub-section (2) of Section 3 of the Medical Termination of Pregnancy Act, 1971 are not satisfied, then, all consequences in law shall follow.
>
> 3. All concerned to act on an authenticated copy of this order.
>
> 4. Stand over to 22nd April, 2019. To be listed "First on Board".

10. Thereafter, the report of the Medical Board has been made available to us and in the presence of the learned advocates, we have opened the sealed packet. We have ensured that copies of the report are made available to all the advocates and in their presence, we have perused it.

11. The Medical Board says that the petitioner woman is 26 years old. She is pregnant 24 weeks and sonography confirmed gestational age and the cardiac anomaly in the fetus. The woman was examined by the committee members, including cardiovascular surgeon and sonologist. As the gestational age is more than 20 weeks, the permission to terminate the pregnancy is sought.

12. The report contains remarks of Obstetrician, Radiologist, Paediatrician, Cardiovascular Surgeon, Physician and then the opinion of the committee. The committee examined the petitioner and carried out necessary investigations. The report is that the

pregnancy is 22 weeks and the baby has fatal cardiac anomaly. We reproduce the report as under:-

> "**Report of the Committee**
> The committee examined the woman, Snehal Desai [5070 of 2019] on 20/04/19 and necessary investigations were done. Clinical examination and investigation reveals that the pregnancy is 24 weeks and baby has fatal cardiac anomaly. [Transposition of great vessels]
>
> If this pregnancy is continued the baby will have high morbidity and mortality. The committee feels that the pregnancy should be terminated at this gestational age with kind permission of Hon Highcourt."

13. Thus, the committee feels that the pregnancy should be terminated at this gestational age with the permission of this court.

14. Before us, the provisions of the Act are relied upon and particularly section 3. That reads as under:-

> "**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 pregnant 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 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 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.

15. A bare perusal of this provision would indicate that subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is of opinion, formed in good faith, that 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 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.

16. This provision/clause is inapplicable in the facts of the present case. Here, the length of the pregnancy exceeds 12 weeks and clause (b) says that if the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, the termination is permissible. Here it has exceeded 20 weeks. However, the provisions of the law have been interpreted to mean that this court can be approached in writ jurisdiction and in writ jurisdiction, this court can, by referring the matter to a committee of experts or a Medical Board, which would be set up under the orders and directions of this court, issue appropriate orders in individual cases so that the pregnancies can be terminated.

17. In the instant case, the argument is that given the finding in the report, if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. However, sub-section (3) of section 3 of the MTP Act is a guiding provision and says that 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.

18. We have been noticing in matters after matters that though we set up expert committees or Boards and issue directions to the Deans and Superintendents of the public hospitals to do so, unmindful of the language of the Act and the consequences that would flow therefrom, the committee goes on forwarding reports. It feels that its assignment is only to opine whether there is a risk to the life of the pregnant woman or of grave injury to her physical or mental health and likewise to the child. In that as well, we find that the language of the provision is never perused, much less borne in mind while giving and forwarding a report. We are entrusting the responsibility and duty to give a proper finding and opinion to public hospitals advisedly. That is because these hospitals are set up under the auspices of the State Government. In the case of private practitioners, it may be that in some cases, the vested interests will take over and the opinion as sought by the patient may be given. The opinion may not necessarily agree with Medical Science and the developments in the scientific and medical fields. It may also not give a correct and honest conclusion. It is in these circumstances that the High Court is regularly directing the authorities manning and in control of public hospitals to set up a Board comprising of the

experts and forward the opinion of this Board to this court. It is to assist this court that such opinion is sought.

19. We find that in almost every case, the opinion is restricted and at times, guarded as well. In one of the cases, we find that the committee opined that the child may be born alive and in the event the pregnnacy is directed to be terminated on account of a risk to the life of the pregnant woman or a grave injury to her physical or mental health, still, while the pregnancy is being terminated or it is allowed to run its course, the risk to the life or of grave injury to her physical or mental health may remain and at times, she may succumb during the course of a surgical intervention, but the child were born alive. In that situation, distinct serious consequences would follow. Then, who should be visited with such consequences is the moot question. All these matters, therefore, should be taken into consideration by these persons who are styled as experts and whose opinion is sought by none other than the highest court in the State. They have greater responsibility and duty. That is not only to the public, but equally to this court. Eventually, the court acts and passes such orders to subserve larger public interest.

20. The object and purpose of the MTP Act is to provide for the termination of certain pregnancies by registered medical

practitioners and for matters connected therewith or incidental thereto. The Statement of Objects and Reasons to both, the main Act and the Amendment Act would denote that this Act is aimed at eliminating abortion by untrained persons and in unhygienic conditions, thus reducing maternal morbidity and mortality. When there is a concern about the health of the woman and there are situations and events in which unwanted pregnancies occur, then, the measure seeks to liberalise certain existing provisions relating to termination of pregnancy. The aim is that this is a health measure, which is also enabling the termination on humanitarian grounds such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman etc. and eugenic grounds where there is substantial risk that the child, if born, would suffer from deformities and diseases.

21. In the present case, we find that a medical expert, namely, Gynecologist, Obstetrician so also Sonologist has given an opinion, copy of which is at page 43 of the paper book, where he says that the fetus shows cardiac defect. His opinion is, the prognosis is poor. The fetus would need surgical intervention at birth. The report of the B.J.Government Medical College and Sassoon General Hospital, Pune is forwarded through its committee comprising of the Professor and Head, Obstetrics and Gynecology,

Associate Professor, Department of Cardio Vascular and Thoracic Surgery, Associate Professor and Head of Department of Paediatrics, Professor and Head of Department of Radiology and Associate Professor and Head of the Department of Medicine.

22. The Obstetrician says that the pregnancy is of 22 weeks with a fetus having fatal cardiac anomaly and the baby is unlikely to survive. The risks of termination of pregnancy at this gestation are bleeding, embolism, failure of induction and need for caesarean, sepsis etc. The Radiologist is not concerned with this part, but the Paediatrician says that the baby of 22 weeks is having fatal cardiac abnormalities. It is advisable not to continue the pregnancy in view of morbidity and mortality. However, the Cardiovascular Surgeon, after pointing out the fatal abnormalities, opines that the new born will require multiple surgeries in future. The surgeries carry high morbidity and mortality risks. The Physician opines that the baby is having transposition of great vessels, but the mother does not have any medical disease.

23. We are of the opinion that in such matters the medical experts should also record their finding and to the effect that the mother has been explained the risk of the surgical process being undertaken so as to terminate the pregnancy. There is a risk in

this process to her life. During this process, in the event the fetus is born alive, then, there would be further complications. It is, therefore, the legislature has inserted the provision which enables all the experts to form a opinion and conclude that the continuance of the pregnancy would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health. Pertinently, the pregnancy can be terminated if there is an opinion formed in good faith that 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 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.

24. In the instant case, there is no difficulty in accepting the unanimous opinion 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. However, there is no conclusive opinion with regard to the ultimate finding, save and except the remarks of the Obstetrician, who says that the risk of termination of the pregnancy has been explained to the patient and her relatives. Besides that the risk to her health when she undergoes the process has not been explained to her in such

details, that on occasions there would be a danger to her life or that she could be injured in some manner or the other. Her normal endeavors may, therefore, be adversely affected. That is not to be found in this opinion.

25. Ms.Mhatre says that all these risks are present to the mind of the petitioner and she has taken a conscious decision to come to this court with a request as noted above. It is her voluntary decision and there is no pressure or force of any kind exerted on her.

26. In the light of these statements made after speaking to the petitioner so also the petitioner being apprised of the findings and conclusions in the report, we pass the following order:-

(a) For the reasons aforerecorded, the writ petition is allowed. Rule is made absolute in terms of prayer clause c(ii).

(b) In the facts and circumstances of the case, there would be no order as to costs.

(B.P.COLABAWALLA, J.) **(S.C.DHARMADHIKARI, J.)**