

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No.12054 of 2019

‘X’

...Petitioner

Versus

The State Of Maharashtra

...Respondent

....

Ms. Meenaz Kakalia, Advocate for the Petitioner.

Ms. Sushama S. Bhende, AGP, for the Respondent – State.

....

**CORAM : K.K. TATED &
SARANG V. KOTWAL, JJ.**

DATE : 29th NOVEMBER, 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 mother, mainly for permission to undergo medical termination of pregnancy at a medical facility of her choice.

3. It is her case in the petition that, the petitioner and her parents came to know about her pregnancy only on 17.11.2019. The petitioner complained of pain in her abdomen on 16.11.2019. On the next day, she was taken to a local doctor by her mother for

medical examination. On the advice of the doctor, ultrasound examination was conducted on 17.11.2019; which revealed that, the petitioner was six months pregnant. The petitioner along with her parents came to Mumbai to consult doctors and to seek medical advice. It appears that the Medical Practitioner, who was consulted by the petitioner in Mumbai, told the petitioner and her parents that the matter should be reported to the police. Accordingly, the Police Officers of Sakinaka Police Station, Mumbai were informed and an FIR vide C.R. No.00/2019 was registered at Sakinaka Police Station, Mumbai on 18.11.2019 under Section 376 of Indian Penal Code, 1860 (for short, 'IPC') and under Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act'). The FIR mentions that an unknown person had forcefully committed rape on the petitioner causing pregnancy. Since it was a medico-legal case, the petitioner was referred to Rajawadi Hospital at Ghatkopar. Further tests and ultrasonography confirmed that the petitioner was more than 28 weeks into her pregnancy.

4. The petitioner's case is that, her mental and physical

health were put in serious risk because of the pregnancy. The statutory limit of twenty weeks provided under the Medical Termination of Pregnancy Act, 1971 (for short, 'MTP Act') was already over and, therefore, permission of this Court is necessary to enable the petitioner to undergo the procedure for medical termination of pregnancy.

5. We have heard Ms. Meenaz Kakalia, the learned Counsel for the petitioner and Ms. Sushama S. Bhende, the learned AGP for the Respondent – State.

6. 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. She 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.

7. Considering the various directions issued by the Hon'ble Supreme Court as well as this Court in the past, vide order dated 25.11.2019, we had directed the Medical Committee constituted at Sir J.J. Hospital, Mumbai (for short, 'Committee') to deal with such cases; to examine the victim petitioner. The examination was conducted by the Committee on 26.11.2019 and the report was submitted before this Court on 27.11.2019. The Committee has recorded its opinion as under :

“ **COMMITTEE OPINION**

AFTER TAKING HISTORY, CAREFUL EXAMINATION, ULTRASONOGRAPHY EXAMINATION AND PSYCHIATRIC EVALUATION, THE COMMITTEE HAS COME TO THE OPINION THAT ALTHOUGH THERE IS NO ABNORMALITY DETECTED AT PRESENT IN THE FETUS AND THE PREGNANT MINOR. BUT PREGNANT MINOR DOES NOT WANT TO CONTINUE PREGNANCY AND SHE IS ANGUISHED WITH THE PREGNANCY. SHE IS MINOR 12 YEAR OLD.

CONTINUATION OF PREGNANCY IN MINOR MAY LEAD TO PREGNANCY RELATED COMPLICATIONS LIKE ANAEMIA, PREGNANCY INDUCED HYPERTENSION AS WELL AS COMPLICATIONS DURING LABOUR. IT IS ALSO GOING TO HAVE PSYCHOLOGICAL IMPACT ON PREGNANT MINOR WITH UNCERTAIN FUTURE.

PREGNANT MINOR AND HER PARENT HAVE EXPRESSED DESIRE TO TERMINATE THE PREGNANCY AND ARE MADE AWARE OF THE DANGERS OF CONTINUATION OF PREGNANCY, AS WELL AS TERMINATION OF

PREGNANCY.

GESTATIONAL AGE IS 27 WEEKS AND BABY WEIGHT IS 1.1 kg ON ULTRASONOGRAPHY. SO IF TERMINATION OF PREGNANCY ALLOWED IT IS GOING TO RESULT IN LIVE SALVAGEABLE BABY. HENCE INTRA UTERINE FOETICIDE CAN BE CONSIDERED IN SPECIALISED CENTRES ALONG WITH TERMINATION OF PREGNANCY.”

8. On 27.11.2019, we heard the parties as well as Dr. Ashok Anand, who was heading the Committee. On that day, by further order, we directed the Committee to hold counselling sessions with the victim petitioner and her mother to make them aware about the possible procedure for termination of pregnancy as was reflected in the report tendered before this Court on 27.11.2019.

9. Accordingly the Committee held counselling sessions with the petitioner and her mother and further opinion was tendered before us, which reads thus:

“ COMMITTEE OPINION

AS PER HIGH COURT ORDER PETITION NO.12054/2019, DATE:-27/11/2019 MEETING OF THE MEDICAL COMMITTEE WAS HELD ON 28/11/2019 AT 10:00 AM IN OFFICE OF THE PROFESSOR & HEAD, OBSTETRICS AND GYNECOLOGY DEPARTMENT, GGMC, MUMBAI. THE MINOR PETITIONER AND HER MOTHER WERE PRESENT FOR THE MEETING.

1. THE MOTHER AND PETITIONER, A MINOR WERE COUNSELLED IN THEIR OWN LANGUAGE, REGARDING

MODE OF DELIVERY BY CAESERIAN SECTION.

2. THE MOTHER AND THE MINOR WERE COUNSELLED BY MEDICAL COMMITTEE INDIVIDUALLY AND TOGETHER REGARDING MODE OF DELIVERY AND REGARDING THE INJECTION TO STOP FETAL HEART IN UTERO.

3. MOTHER AND THE MINOR SHARED WILLINGNESS IN WRITING TO THE MEDICAL COMMITTEE TO UNDERGO OPERATIVE DELIVERY BY CAESERIAN SECTION FOR THE TERMINATION OF PREGNANCY. BOTH MOTHER AND PETITIONER (MINOR) WANTED INJECTION TO STOP FETAL HEART BEFORE DELIVERY IN THE CENTER OF HER CHOICE.”

10. 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.

11. 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 form 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.”

12. 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.

13. 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.”

14. In the instant case, however, the Committee’s opinion does not specifically say that termination of such pregnancy is immediately necessary to save the petitioner’s life. Thus, though the MTP Act permits medical termination of pregnancy in case of a women who was pregnant for more than 20 weeks only when

termination of such pregnancy is immediately necessary to save the life of the pregnant woman, Section 5 of MTP Act is not attracted at present.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. We respectfully agree with 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.

22. The Committee, established for this purpose, in its report has clearly opined that the continuation of pregnancy may lead to pregnancy related complications like anemia, pregnancy induced hypertension as well as complications during labour. It was

specifically observed that it was also going to have psychological impact on pregnant minor with uncertain future.

23. The petitioner and her parents were made aware of the dangers of continuation of pregnancy as well as termination of pregnancy and they had expressed desire to terminate pregnancy. They were specifically counselled regarding the mode of procedure. The petitioner and her mother had shared willingness in writing with the Committee to undergo operative delivery by caesarian section for termination of pregnancy. The petitioner and her mother wanted injection to stop fetal heart before delivery in the center of their choice. Considering this specific opinion of the Committee, we are inclined to permit the petitioner to undergo medical termination of pregnancy.

24. The learned Counsel for the petitioner invited our attention to the order passed by another Division Bench of this Court (Coram: R.M. Borde & N.J. Jamadar, JJ.) in Writ Petition No.6613/2019 on 13.6.2019. 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.

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

- i. The petitioner is permitted to undergo medical termination of pregnancy as per Committee's opinion dated 27.11.2019, at a medical facility of her choice. However such procedure shall be conducted at the Medical Center which has all the necessary permissions issued under the Maharashtra Termination of Pregnancy Rules, 2003 and the procedure shall be conducted by a Medical Practitioner who satisfies the conditions laid down under those Rules.
- ii. 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.

- iii. 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.
- iv. 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.
- v. Rule is made absolute in the aforesaid terms.
- vi. 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.)

Deshmane (PS)