

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION (STAMP) NO. 29605 OF 2019

Jasmine Anwar Kezhakekekara

..Petitioner.

Versus

State of Maharashtra

..Respondent.

Ms. Aditi Saxena for Petitioner.

Mr. Y. S. Khochare, A.G.P. for Respondent No.1.

**CORAM : K. K. TATED &
SARANG V. KOTWAL, JJ.
DATED : 05th DECEMBER, 2019.**

PC :

1. Rule. With consent of the parties, Rule is made returnable forthwith.
2. This petition is filed by the petitioner mainly for permission to undergo medical termination of pregnancy at the medical facility of her choice.
3. It is her case in the petition that, during her pregnancy, on 11/11/2019, an Ultrasound Obstetrics Examination was conducted and it was found that the foetus

was having gestational age of 26 weeks and it suffered from serious cardiac anomalies. Further Fetal Cardiac examination was conducted on 18/11/2019 and the existence of such serious multiple anomalies were confirmed. A specialist's opinion was sought and it was observed by the specialist that, there was a significant cardiomegaly with heart occupying more than 70% of thoracic cavity. The foetus thus had serious cardiac condition. However, since the pregnancy had extended beyond statutory period of 20 weeks prescribed under the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as 'MTP Act'), the petitioner had to approach this court for permission to undergo procedure for medical termination of pregnancy. It is her case that, continuation of the pregnancy and enforcement of the MTP Act, has led the petitioner to undergo severe psychological, physical, mental and emotional trauma.

4. We have heard Ms. Aditi Saxena, learned counsel for the petitioner and Mr. Y. S. Khochare, learned A.G.P for the Respondents.

5. Learned counsel for the petitioner relied on a few Judgments passed by the Hon'ble Supreme Court, as well as, passed by different Division Benches of this Court dealing with the issue of granting permission for termination of pregnancy even after a statutory period of 20 weeks, provided under the MTP Act was over.

6. Considering the ratio laid down in these judgments, we had directed the petitioner to approach the medical board in Sassoon Hospital, Pune for examination. The Medical Board was directed to conduct the examination and submit its report. One of the members of the Board was directed to remain present in the court. Accordingly, the Medical examination was conducted and the report of the Board was submitted to this court. The concluding paragraph of the report reads thus:-

“The Committee examined the woman [W P 29605 of 2019] on 28/11/19 and necessary investigations were done. Clinical examination and investigations reveals that the pregnancy is 26 weeks and baby has complex cardiac anomaly. There is no risk to

the mother if the pregnancy is continued.

If this pregnancy is continued the baby will have high morbidity and may require multiple cardiac surgeries with a bad prognosis. The committee feels that the pregnancy may be terminated with kind permission of Hon'ble High Court.

However there is a 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.”

7. In this background, we considered various aspects of the matter in the light of ratio of the various Judgments of the Hon'ble Supreme Court and this Court.

8. 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.”

9. Under Section 3(2)(b) of the MTP Act, the maximum period of pregnancy which can be terminated is prescribed as twenty weeks. The circumstances under which the pregnancy can be terminated are set out under this Section. One such circumstance, as mentioned in Section 3(2)(b)(ii) is that, the termination of pregnancy can be allowed if there was a substantial risk that, if the child were born, it would suffer from such physical or mental abnormality as to be seriously handicapped.

10. 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.”

11. In the instant case, however, the Board has not opined that the termination of the pregnancy was immediately necessary to save the petitioner's life. The petitioner is more than 20 weeks into her pregnancy.

12. 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.

13. 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.

14. In para 79, the Division Bench observed that, in a situation where there was substantial risk that if the child

were born, would suffer from deformities and diseases, and if the pregnant mother is forced to continue with her pregnancy, merely because the pregnancy has extended beyond the ceiling of 20 weeks, there would arise a serious affront to the fundamental right of such mother to privacy, to exercise a reproductive choices, to bodily integrity, to her dignity. It was further observed that the principle of liberal or purposive construction will 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 right to live with human dignity. The Division Bench ultimately held that, 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.

15. 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.

16. 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.

17. 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.

18. As mentioned earlier, the Medical Board has opined that the pregnancy can be terminated with permission of this Court. It was specifically reported that, if the pregnancy was continued the baby would have high morbidity and would require multiple cardiac surgeries with a bad prognosis.

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

- i. The petitioner is permitted to undergo medical termination of pregnancy as per Medical Board's opinion, 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. 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 its life.
- iii. In case, if the child is born alive and if the petitioner is not willing to take responsibility of such a child then the State and its agencies will have to assume full responsibility for such child.
- iv. Rule is made absolute in the aforesaid terms.

- v. All concerned parties to act on the authenticated copy of this order.

(SARANG V. KOTWAL, J.)

(K.K.TATED, J.)
