

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition (Stamp) No. 2446 OF 2020

"X" since minor
through father and natural Legal Guardian ...Petitioner
Versus
The State Of Maharashtra
and another ...Respondents

....

Mr. Niranjan Deshpande i/b. Afreen Khan, Advocate for the Petitioner.
Dr. Kirti Kulkarni, AGP, for the Respondent – State.

....

**CORAM : K.K. TATED &
SARANG V. KOTWAL, JJ.**
DATE : 12th FEBRUARY, 2020
[In Chambers at 2:45 p.m.]

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 15 years, through her father, mainly for permission to undergo medical termination of pregnancy at a medical facility of her choice.
3. It is the case of the Petitioner in the Petition that she felt some movements in her stomach and, therefore, she took pregnancy test on 30.12.2019, which turned out to be positive. As

she was scared to tell this fact to her parents, she did not inform them immediately. On 31.1.2020, she had severe pain in her stomach and, therefore, the Petitioner's father took her to a Medical Practitioner on 1.2.2020. At that time, after examination the Doctor told the Petitioner and her father about her pregnancy. The Doctor also informed the police and thereafter the FIR came to be lodged.

4. It is her case in the Petition that she is the victim of offence of rape for which FIR vide C.R. No. 60 of 2020 is registered at Samata Nagar Police Station, Mumbai on 01.02.2020 under Sections 376(2)(n), 417 of the Indian Penal Code and under Sections 6, 10 and 12 of the Protection of Children from Sexual Offences Act, 2012.

5. The Petitioner's case is that after registration of FIR, medical examination was conducted, which revealed that she was pregnant and at the time of filing the petition, she was 23 weeks pregnant and has been barred from seeking the termination of pregnancy without orders from this Court as she has crossed 20 weeks of pregnancy as provided under the Medical Termination of

Pregnancy Act, 1971 (for short, 'MTP Act'). The petition also mentions that she is in custody of Child Welfare Committee Centre in Andheri.

6. The Petitioner's case is that, her mental and physical health were put in serious risk because of the pregnancy. And, therefore, permission of this Court is necessary to enable the Petitioner to undergo the procedure for medical termination of pregnancy.

7. We have heard Mr. Niranjan Deshpande, learned Counsel for the Petitioner and Dr. Kirti Kulkarni, learned AGP for the Respondent – State.

8. 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.

9. 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.

10. Considering the ratio laid down in these judgments, vide order dated 10.2.2020, we had directed Respondent No.2 to produce the Petitioner before the Medical Board in Sir J.J. Hospital, Mumbai. The Medical Board was directed to conduct the examination and submit its report. Accordingly, the medical examination of the Petitioner was conducted and the report of the Medical Board was submitted to this Court. The concluding paragraph of the report reads thus:

“ **COMMITTEE OPINION**

AFTER TAKING HISTORY, CAREFUL EXAMINATION, ULTRASONOGRAPHY EXAMINATION AND PSYCHIATRIC EVALUATION THE COMMITTEE HAS COME TO THE OPINION THAT AT PRESENT NO ABNORMALITY IS DETECTED IN THE FETUS AND THE PREGNANT MINOR MOTHER. PREGNANT MINOR MOTHER DOES NOT WANT TO CONTINUE PREGNANCY AND SHE IS ANGUISHED WITH THE PREGNANCY. SHE IS MINOR 15 YEARS OLD AND PREGNANCY IS CAUSED BY RAPE.

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 FATHER HAVE EXPRESSED DESIRE TO TERMINATE THE PREGNANCY AND ARE MADE AWARE OF THE DANGERS OF CONTINUATION OF PREGNANCY, AS WELL AS TERMINATION OF PREGNANCY.

SINCE THE PREGNANCY HAS ADVANCED TO 24 WEEKS, WELL BEYOND LEGAL LIMIT OF TERMINATION OF PREGNANCY i.e. 20 WEEKS, THE TERMINATION CAN ONLY BE DONE WITH Hon'ble HIGH COURT PERMISSION.

AT 24 WEEKS OF GESTATION ,TERMINATION OF PREGNANCY CARRIES RISK TO PREGNANT MINOR. ALSO CONTINUATION OF PREGNANCY WILL HAVE PHYSICAL & MENTAL STRESS TO MINOR MOTHER. HENCE IT IS ADVISABLE TO TERMINATE THE PREGNANCY.”

11. 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 of this Court. It is necessary to consider some important aspects in this connection.

12. 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.”

13. 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 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 15 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 four weeks ago. The Petitioner has entered into 24th week of her pregnancy and, therefore, the MTP Act does not permit medical termination of pregnancy in such cases.

14. 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.”

15. These issues are discussed and are 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. In paragraphs-79 and 80, the Division Bench observed that in a situation 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. 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. In forming our opinion, we are also relying on the judgments passed by the Hon'ble Supreme Court in the case of **X and others Vs. Union of India and others**, reported in (2017) 3 SCC 458 and in the case of **Meera Santosh Pal and others Vs. Union of India and others** in Writ Petition (Civil) No.17/2017 decided on 16.1.2017.

22. As mentioned earlier, the Medical Board has opined that 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 father 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 informed regarding the dangers of continuation of pregnancy as well as termination of pregnancy. The Petitioner and her father had expressed desire before the Board to terminate the pregnancy. Considering this specific opinion of the Medical Board, we are inclined to permit the Petitioner to undergo medical termination of pregnancy.

24. Another important aspect is considered in 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. Similar directions are required 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 Medical Board's opinion dated 12.2.2020, 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.** Respondent No.2 is directed to take all the necessary steps to comply with this order in producing the Petitioner before the Medical Center of her choice, referred to in clause (i) above.
- vi.** Respondent No.2 also shall take care of the Petitioner and provide all necessary medical facilities and medicines after such procedure is performed.
- vii.** Rule is made absolute in the aforesaid terms.

viii. 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.

ix. Writ Petition stands disposed of in the aforesaid terms.

(SARANG V. KOTWAL, J.)

(K.K. TATED, J.)

Deshmane (PS)