

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2229 OF 2020

“X”

...Petitioner

Versus

State Of Maharashtra

...Respondent

....

Mr. V.V. Purwant a/w. Rushikesh Kale i/b. Divya V. Parab, Advocate
Advocate for the Petitioner.

Smt. S.S. Bhende, AGP, for the Respondent – State.

Mr. Nilesh C. Ojha a/w. Abhishek Mishra i/b. Mangesh Dongre, Advocate
for the Applicant/intervenor in IA/1/2020.

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

**DATE : 11th MARCH, 2020
[In Chambers at 5:15 p.m.]**

PC. :

1. This Petition involves a very delicate issue as to whether the Petitioner can be granted permission for medical termination of pregnancy as the statutory limit of 20 weeks provided under the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as, ‘MTP Act’) is over long back and the Petitioner is in 30th week of her pregnancy. The facts involved in the Petition give rise to complex issues which are required to be decided.

2. As mentioned earlier, the Petitioner has approached this Court by way of this Petition mainly with a prayer for permission to terminate her pregnancy. The Petitioner is more than 18 years of age. It is the Petitioner's case that she is a victim of an offence of rape. She has lodged her FIR vide C.R. No.0008/2020 on 18.1.2020 at Wai Police Station, District-Satara for the offence punishable under Sections 376-D, 323, 504, 506 read with Section 34 of I.P.C.. The FIR mentions her date of birth as 7.5.2001. It is not necessary to reproduce entire allegations of her FIR. However, her specific case is that, the main accused and his friend committed rape on her on 24.7.2019. Since the FIR is being investigated, we are not referring to any other allegations in the FIR. However, some other aspects mentioned in the FIR are relevant for the purposes of this Petition. The FIR mentions that in August, 2019, she felt dizziness and she had missed her menstrual cycle. Therefore, she used a medical kit to confirm her suspicion about her pregnancy. Her own tests confirmed that she was pregnant. Thus, she became aware of her pregnancy in the month of August, 2019. This fact is also averred in the Petition. The FIR further mentions that the Petitioner

contacted the main accused, who suggested that he could help her in abortion. On 2.1.2020, he threatened her that she should terminate her pregnancy otherwise he would commit her murder. After that she approached the police station and lodged her FIR on 18.1.2020.

3. It is her case in the Petition that she is saddled with unwanted pregnancy which is causing her great mental and physical agonies. It is her contention that there would be psychological harassment to the child as the child would not be accepted in the society. According to the Petitioner, she tried to get her pregnancy terminated but the Doctors informed her that it could not be done without permission of the Court. Even the police officers of Wai Police Station advised her for the same. Therefore, she approached this Court with this Petition.

4. In the Petition, the Petitioner has referred to a few judgments wherein permission was granted to such victims to terminate their pregnancy.

5. During pendency of this Petition, the main accused filed Interim Application No.1/2020 in this Petition opposing such relief.

6. We have heard Shri V.V. Purwant, learned Counsel for the Petitioner, Smt. S.S. Bhende, learned AGP for the Respondent – State and Shri Nilesh C. Ojha, learned Counsel for the Applicant/intervenor in IA/1/2020.

7. Shri Purwant, learned Counsel for the Petitioner referred to the provisions of the MTP Act and submitted that in view of Sections 3 and 5, this Court can exercise its jurisdiction under Article 226 of the Constitution of India and grant relief to the Petitioner, as prayed for.

8. We have considered the submissions made by Shri.Purwant. Sections 3 & 5 of the MTP Act, as referred to by Shri. Purwant read 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.

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.”

9. A Division Bench of this Court (Coram: A.S. Oka & M.S. Sonak, JJ.) had an occasion to deal with the issue of granting permission for medical termination of pregnancy under certain circumstances. This order was passed 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.

10. The Division Bench 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.

11. 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.

12. In view of these observations, we had referred the Petitioner to the Medical Board established at Sir J.J. Group of Hospitals, Mumbai for this very purpose. After her examination, we received a report of the Medical Board dated 6.3.2020. It was signed by (i) Dr. Ashok Anand, Professor & Head, Department of OBGY, GGMC, Mumbai, (ii) Dr. Maithili Umate, Asso. Professor, Department of Psychiatry, GGMC, Mumbai, (iii) Dr. Nita Sutay, Professor & Head, Department of Pediatrics, GGMC, Mumbai, and (iv) Dr. Shilpa Domkundwar, Professor & Head, Department of Radiology, GGMC, Mumbai. The Committee's opinion reads thus :

“COMMITTEE OPINION

AFTER HISTORY EXAMINATION, ULTRASONOGRAPHY REPORTS & 2D ECHO AT SIR J. J. GROUP OF HOSPITALS, MUMBAI IT IS CONFIRMED THAT **FETUS SUFFERS FROM SERIOUS CARDIAC ANOMALY WITH LARGE ASD WITH LARGE VSD WITH ? HYPOPLASTIC LEFT HEART SYNDROME POSSIBILITY OF HIGH NEONATAL MORBIDITY AND MORTALITY AFTER BIRTH.**

THE PREGNANCY IS ALSO AS A RESULT OF RAPE AND THE MOTHER DOES NOT WANT TO CONTINUE THE PREGNANCY WITH CONGENITAL HEART DISEASE MOTHER HAS EXPRESSED DESIRE TO TERMINATE PREGNANCY.

SINCE THE PREGNANCY HAS ADVANCED TO 28 WEEKS, WELL BEYOND LEGAL LIMIT OF TERMINATION OF PREGNANCY. THE PREGNANCY CAN ONLY BE TERMINATED WITH Hon'ble HIGH COURT PERMISSION. TERMINATION OF PREGNANCY CAN BE ALLOWED CONSIDERING. COMPLEX HEART DISEASE IN FETUS AT A CENTRE OF HER CHOICE. AT 28 WEEKS OF GESTATION TERMINATION OF PREGNANCY CARRIES RISK TO THE PREGNANT WOMAN, WHICH IS NOT LIKELY TO BE MORE THAN NORMAL LABOUR. **BABY WILL BE BORN ALIVE.”**

13. In the same report, Dr. Domkundwar, Professor & Head, Department of Radiology, had suggested that “Fetal echocardiography correlation from cardiologist for further evaluation is recommended”.

14. Considering this suggestion, we had called for the report of a Cardiologist in that behalf by passing orders dated 6.3.2020 and 9.3.2020. Today, i.e. 11.3.2020, we received the report signed by Dr. N.O. Bansal, Professor & Head, Department of Cardiology, Grant Medical College & Sir J.J. Group of Hospitals, Mumbai. The report reads thus :

“Seen by Professor Dr N O Bansal (HOD Cardiology).
The case under consideration has a single fetus which is approximately 28-29 week gestation whose fetal echo was reviewed today, findings of which are given below

- 1] 2 ventricles identified (RV and LV)
- 2] Small Ventricular Septal defect Noted
- 3] Very Large ASD (atrial septal defect) almost amounting to single atrium
- 4] Both AV Valves noted
- 5] Bifurcating pulmonary artery noted
- 6] Markedly small(hypoplastic) aorta noted

The above finding show that there is a severe hypoplastic aortic arch with a common atrium. With such a malformed heart survivorship of fetus is itself at a stake in utero and if permitted to be born survivorship is virtually impossible beyond a few days of life. Hence it is advisable to carry out termination of pregnancy on medical ground.”

15. In this background, we have given our anxious consideration to the issue as to whether we should grant permission to the petitioner to terminate her pregnancy. As discussed earlier, undoubtedly this Court can exercise its jurisdiction under Article 226 of the Constitution and grant permission for medical termination of pregnancy even if the pregnancy has crossed the statutory limit of 20 weeks. But, this power can be exercised only in exceptional cases and in conformity with the basic requirements of the MTP Act. The Court will have to take into consideration whether the Petitioner’s case was within any of the circumstances mentioned in Sections 3 & 5 of the MTP Act. Though the outer limit of 20 weeks provided under the Act can be extended in a given case, this period cannot be stretched to an unreasonable period and even for such extension, the attending

circumstances and background of the case cannot be ignored.

16. Though, the Division Bench in the case referred to hereinabove, has directed formation of the Medical Boards to give their opinion in such cases, ultimately the Court will have to decide whether the permission has to be granted and it is not binding on the Courts to accept the recommendation of the Medical Board. The Court has to apply its mind to the facts and circumstances of the case.

17. In this context, an order dated 27.3.2017 passed by the Hon'ble Supreme Court in Writ Petition (Civil) No.174/2017 is important. In that case the Petitioner before the Hon'ble Supreme Court was into her 27th weeks' of pregnancy. The report of the Medical Board in that case was as follows :

“(1) The diagnosis of Arnold Chairi malformation Type 2 with meningo myelocele with tethered cord has been made on the basis of ultrasonography.

(2) The mother's physical condition is normal and there is no physical risk to the mother, due to continuation or termination of pregnancy. But she is anxious about outcome of pregnancy.

(3) The fetus has severe physical anomalies which will compromise post natal quality of life and the child will have severe physical and mental morbidity on survival.

(4) If the pregnancy is terminated at 27 weeks, the baby may be born alive and may survive for variable period of time.”

18. The Apex Court noted that it had not been possible to the Medical Board to determine the period of time for which the baby was likely to survive, though it was mentioned that the baby was not likely to survive like a normal baby. The Apex Court went on to add that having regard to the fact that there was no danger to the mother’s life and the likelihood that the baby may be born alive and may survive for variable period of time, the Apex Court did not consider it appropriate in the interest of justice to direct the Respondents to allow the Petitioner to undergo medical termination of her pregnancy. In that case even the Medical Board had stated that it did not advise medical termination of pregnancy on medical grounds.

19. In the present case before us, the Petitioner was major as

she was more than 18 years of age. She became aware of her pregnancy in August, 2019 itself. She did not take any steps for medical termination of pregnancy. Even if it is accepted that for various reasons, she did not want to disclose this fact in the initial period; according to her own case, she was contacting the main accused, who was telling her to go for abortion. The Petitioner did not take any steps. Finally, she lodged her FIR on 18.1.2020. Even thereafter she did not approach this Court immediately for permission to undergo medical termination of pregnancy. The Petition was filed only on 28.2.2020. Thus, after lodging of FIR also the Petitioner waited for inordinate period to approach this Court. This allowed the fetus to grow to 28th week of gestation period.

20. The Petitioner had approached this Court with the contention that she being a rape victim, her case was covered under Section 3(2)(b)(i) read with Explanation-1. In short, her case was that she was suffering from mental trauma amounting to grave injury to her physical and mental health. After we called for the report from the Medical Board, it was discovered that the child was suffering from serious anomaly. Therefore, now the case is

also covered under Section 3(2)(b)(ii). The Petitioner was unaware of the child's medical condition. The facts show that though she was aware of her pregnancy in August, 2019 she did not undergo any medical examination to see the medical condition of the child. The medical condition of the fetus was revealed only after this Court had sought opinion of the Medical Board. This situation could have been easily avoided if the Petitioner had taken steps for examination of her fetus immediately after becoming aware of her pregnancy. Even taking into account the reluctance of a rape victim to seek help from anybody, the delay on her part in this case is quite unreasonable.

21. In another case, a Division Bench of this Court (Coram: A.S. Oka & M.S. Sonak, JJ.) in Writ Petition No.9862/2018 had similarly declined the permission for termination of pregnancy which had crossed 26 weeks in case of a minor, who was a victim of rape. In that case, the Medical Committee had opined that the baby would have high morbidity and mortality but the pregnancy should not be terminated as it would be high risk pregnancy termination and there would be multiple risks to the mother. In

that situation though she was a rape victim, the permission was refused by a Division Bench of this Court for medical termination of pregnancy.

22. Considering all the above aspects, we are of the considered view that even in this case the permission cannot be granted to the Petitioner to undergo medical termination of pregnancy. However, we are also taking into consideration the opinion of the Cardiologist that survivorship of fetus is itself at a stake in utero and if permitted to born survivorship is virtually impossible beyond a few days of life. Hence, there is necessity to provide necessary medical facility to the Petitioner. This being an exceptional case, on humanitarian ground only and in accordance with various benevolent schemes brought in force by the Government in this behalf, the State Government will have to bear the expenses for her medical treatment and also will have to look after the child. Hence, the following order :

- i. The permission is refused to the petitioner to undergo medical termination of pregnancy.
- ii. The Petitioner can get herself admitted to any Government

Hospital immediately for constant monitoring of her health and pregnancy.

- iii. The Government Hospital, where she gets admitted, will provide all the necessary medical facilities and medicines to her and all steps shall be taken to save her life in case of emergency.
- iv. In case, if the child is born alive, the Government Hospital shall provide all medical facilities to such child.
- v. If the Petitioner is not willing to take responsibility of the child, the State Government shall assume full responsibility of such child.
- vi. All medical expenses, for the purposes referred to in above clauses, shall be borne by the State Government.
- vii. Writ Petition is dispose of in the aforesaid terms.

(SARANG V. KOTWAL, J.)

(K.K. TATED, J.)

Deshmane (PS)