

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP-10143-2020

DATE OF DECISION: JULY 22, 2020

NISHA AND ANOTHER

...PETITIONERS

VERSUS

U.T. CHANDIGARH AND OTHERS

...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE MANOJ BAJAJ.

PRESENT: MR. SUKHVINDER SINGH NARA, ADVOCATE
FOR THE PETITIONERS.

MR. SONIA SHARMA, ADDL. STANDING COUNSEL
FOR U.T., CHANDIGARH.

MR. SUKHDEEP SINGH PARMAR, DAG, HARYANA.

MR. AMIT JHANJI, ADVOCATE
FOR RESPONDENT NO.3.

MANOJ BAJAJ, J.(ORAL)

The petitioners are husband and wife who have invoked the extra ordinary writ jurisdiction of this Court under Article 226 Constitution of India, for seeking permission for medical termination of pregnancy of petitioner No.1 as the foetus has suffered complications.

The facts in brief leading to the petition are as under:-

- i. The petitioners after their marriage decided to grow the family and their first child after delivery could not survive beyond the period of 2 days because of certain complications. Later on, petitioner No.1 gave birth to a baby girl on 20.9.2015, who is presently 5 years old and is living a healthy life.
- ii. Now petitioner No.1 again conceived in 2020 and during her

check-up on 11.7.2020 at M.M. Institute of Medical Sciences & Research, Mullana, Ambala, certain complications were diagnosed in the foetus. The Obstetrics Ultrasonography report of petitioner No.1 is Annexure P-1. On the basis of the said report, the patient was referred to the Post Graduate Institute of Medical Sciences and Research, Chandigarh (for short 'PGIMER, Chandigarh') wherein her ultrasound was again conducted on 14.7.2020 and abnormalities were detected in the foetus.

It is the case of the petitioners that since the age of the foetus on 16.7.2020 was beyond 20 weeks, therefore, the medical termination of pregnancy was refused by the Paediatrics Surgery Consultant despite noticing the serious defects in the foetus.

On 17.7.2020, while issuing notice of motion in the case, this Court had passed the following order:-

“Petitioners have invoked the writ jurisdiction of this Court for medical termination of pregnancy, as the fetus (22 weeks old) conceived by petitioner No.1, has developed serious complications. Learned counsel for the petitioners has invited the attention of the Court to the observation of the doctor in this regard, which is as under:-

“-s/o spina bifida where associated neural deformities may arise over later gestation. Outcome in term of neuro developmental aspect is worse however survival may not be eventful. So parents wants MTP however cannot be offered as POG is more than 20 week.”

Notice of motion for 22.07.2020.

Ms.Sonia Sharma, learned Additional Standing

Counsel for U.T.Chandigarh appears on behalf of respondent No.1, whereas Mr.Amit Jhanji Advocate puts in appearance on behalf of respondent No.3 (PGIMER). Mr. Jhanji states that in case petitioner No.1 appears on 20.07.2020 before the Board of Directors constituted for the said purpose, she would be medically examined.

Let petitioner No.1 appear before the office of Medical Superintendent, PGIMER, Chandigarh on 20.07.2020 at 10.00 AM and after her medical examination, the report be sent to this Court on or before 22.07.2020.

Copy of this order be given dasti to the learned counsel for the petitioners under the signatures of the Bench Secretary.”

Learned counsel for respondent No.3 has submitted that in deference to the order dated 17.7.2020, the patient was examined by the Medical Board consisting of twelve Doctors on 20.7.2020 and filed the report bearing No.AP/MS/020/000910 dated 21.7.2020, which is taken on record. The said report reads as under:-

“1. As per USG done on 20/07/2020, the period of gestation (POG) is 22 wks + 5 days. She has a single live intrauterine fetus with thoracic meningocele (defect in spine and spinal cord) with expected poor neurodevelopmental outcome.

2. The patient has been examined and has been found to be clinically fit. However, she is under mental stress due to carrying a pregnancy in which the fetus is affected with meningocele.

3. As per the Royal College of Obstetricians &

Gynaecologists (RCOG) guidelines (Termination of pregnancy for fetal abnormality, 2010), if abortion is performed after 22 weeks of gestation, there is a possibility of live birth. Hence, in such cases, ultrasound guided injection of Potassium Chloride into the fetal heart is advised prior to abortion to prevent a live birth.

4. *Keeping in view the above, the Permanent Medical Board recommends that this patient may undergo medical termination of pregnancy at this stage due to severe congenital anomaly. However, medical termination of pregnancy at an advanced gestation of 23 weeks carries more than usual risks which have been explained to patient. She also has previous two caesarian sections due to which there is a possibility that she may need an abdominal operation to complete the process of abortion which has also been explained to the patient.*

5. *We also wish to bring to the knowledge of the Hon'ble High Court that doctors may perform the procedure of Potassium Chloride injection under ultrasound guidance into the fetus before termination of pregnancy, so as to prevent the fetus being born alive.”*

Learned counsel for the petitioner contends that since the Board after examination of petitioner No.1 has recommended the termination of the pregnancy by way of medical intervention and therefore, the writ petition be allowed. He submits that in case the child is allowed to be born, then it would certainly add agony and pain to the petitioners because of the likelihood of its being handicapped.

Learned counsel for respondents No.1 and 2 have not opposed

the prayer made by the petitioners in this writ petition, particularly when the experts have made recommendation in favour of petitioner No.1.

After hearing learned counsel for the parties, this Court finds that ordinarily, abortion is a crime which is punishable under Indian Penal Code, even if conducted voluntarily and with the consent of the pregnant woman, but the only exception is that such an act was done in a good faith. Further, the Government of India also promulgated Medical Termination of Pregnancy Act, 1971 which provides for termination of certain pregnancies by the registered medical practitioners. The relevant Section 3 of the Act 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 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 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 lunatic, 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”

A perusal of the above provision makes it clear that if there is a

substantial risk that in case the child is allowed to born, it would suffer from physical and mental abnormalities, the medical termination of pregnancy is permitted subject to a ceiling of twenty weeks on the length of the pregnancy. Admittedly, in the present case, the Doctors have noticed serious defects in the foetus that the child may suffer from neuro problems, but refused to terminate the pregnancy considering the age of the foetus which is twenty two weeks and five days as per the report dated 21.7.2020. It is clear that the foetus has defect in spine and spinal cord and is likely to result in neurodevelopmental outcome. It is evident that if child is allowed to be born, it may add to the agony and pain of the parents. Since the pregnancy period is slightly above the prescribed period, i.e. less than 3 weeks and therefore, considering the recommendation of the Medical Board, this Court is of the opinion that the petition deserves acceptance.

It will be useful to place reliance upon the decision rendered by the Hon'ble Supreme Court in (2009) 9 SCC 1 titled as *Suchita Srivastava and another vs. Chandigarh Administration*, wherein the abortion was permitted beyond the ceiling period of 20 weeks.

In view of the above, the writ petition is allowed and petitioner No.1 is granted permission for medical termination of her pregnancy. It is made clear that the procedure be performed without loss of time by the Doctors at PGIMER, Chandigarh-respondent No.3.

July 22, 2020
Gulati

(MANOJ BAJAJ)
JUDGE

Whether Reportable : Yes/No

Whether Speaking/Reasoned : Yes/No