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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 2967/2020 & CM APPL. 10300/2020

JYOTSNA SHINGWANI ..... Petitioner

Through: Mr. Vikas Walia, Advocate with petitioner and her husband in person.

versus

UNION OF INDIA & ORS ..... Respondents

Through: Mr. Rajesh Gogna, Advocate for R-1/UOI.
Ms. Mrinalini Sen, Advocate for R-2/GNCTD.
Mr. Anand Verma and Mr. Shwetank Singh, Advocates for R-3/AIIMS with Dr. Vatsla Dadhwal in person.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

O R D E R

% 20.04.2020

1. The matter has been heard through Video Conferencing.

2. The petitioner, who is currently in the 23rd week of pregnancy, has approached this Court, for an appropriate writ, directing the respondents to allow her to undergo medical termination of her pregnancy. Besides the above relief, the petitioner has also challenged the *vires* of Sections 3(2)(b) and 5(1) of the Medical Termination of Pregnancy Act, 1971 (in short, **'MTP Act'**). However, we do not propose to go into the aspect of the legality of the aforesaid provisions as on the date of admission of the present petition, learned counsel for the

petitioner had submitted that he did not wish to press the challenge the *vires* of the said provisions.

3. Facts in brief leading to filing of this writ petition are as under:

(a) The petitioner, who is 29 years old, is currently in the 23rd week of her pregnancy. She had got pregnant in the month of November 2019.

(b) On 25.01.2020 and again on 07.02.2020, the petitioner was advised to undergo a Level-II scan, as part of the general process, to check upon the foetus.

(c) As advised, she underwent a Level-II scan in her 21st week of pregnancy, ie., on 03.04.2010.

(d) The report, dated 04.04.2010, reads as under:

> *"Mrs.Jyotsna Shingwani had her first antenatal visit with us on 4th April' 2020 with Level 2 dated 3rd April suggestive of a large intra abdominal cyst with multiple internal septae (21 weeks +).*
>
> *Repeat ultrasounds were done, which confirmed the above findings and also echogenic bowel and hepatic calcification. Amniocentesis was done on 8th April and sent for FISH, oncoarray and TORCH PCR. Reports of these are awaited.*
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> *The differentials for the above findings include duodenal atresia/meconeum peritonitis or intra uterine infections.*
>
> *The prognosis of these cannot be judged now. Pediatric surgeon opinion advised. However, the baby may require*

post natal evaluation and/or surgery which may be of major/prolonged nature. However, the exact nature/etiology of cyst can be known after birth."

4. On receiving report, the petitioner has approached this Court with the instant petition, pleading *inter alia* that the condition of the foetus that she is carrying, is not compatible with life as per the diagnosis received. She seeks permission to abort the foetus and terminate the pregnancy that has crossed the gestation period of 20 weeks.

5. Vide order dated 15.04.2020, this Court had constituted a Medical Board. Relevant portion of the said order reads as under:-

"15. We have heard learned counsels for the parties. At the outset, we must pen down that the response of all the respondents has been very heartening. Despite the pressure and the burden on the hospitals in the present day time, each of the respondent has graciously offered to examine the petitioner on account of the problems being faced by her. However, a consensus was finally reached between the counsels that the requisite exercise would be undertaken at AIIMS.

16. Accordingly, in the facts and circumstances of the present matter, we deem it fit to direct AIIMS to constitute a Medical Board and examine the petitioner and the fetus, to determine the medical condition of the fetus as well as the petitioner. The entire exercise, as undertaken by the learned counsel for AIIMS, would be completed within a period of three days from today.

17. The Medical Board, besides examining the medical condition of the petitioner and the fetus, would also examine the following issues :

1. Whether continuance of the pregnancy would involve a risk to the petitioner or would in any manner lead to deterioration of her physical or mental health?

2. Whether there is any risk if the medical termination of pregnancy is performed at this stage?

18. The Medical Board will give its report, which will include the analysis of the medical abnormality of the fetus, along with its opinion, keeping in view the detailed guidelines mentioned in the Memorandum issued by the Central Government, as aforementioned. Learned Counsel for AIIMS is at liberty to carry the report in a sealed cover to the Court, in the event that he is unable to file the same before the next date of hearing, on account of paucity of time."

6. Pursuant to the above order, a Multi-Disciplinary Medical Board was constituted by the respondent No.3/AIIMS and a Status Report has been filed by AIIMS enclosing therewith, a copy of the Report. Relevant portion of the Status Report is as under:-

"5. It is submitted that pursuant to this Hon'ble Court's order dated 15.04.2020, the Medical Board constituted as per the provisions of the Act held a meeting on 17.04.2020 at 10:30 A.M. The Board consisted of the following members:

i) Dr. Vatsla Dadhwal, Professor, Dept. of Obstetrics & Gynaecology

ii) Dr. Garima Kachhawa, Addl. Professor, Dept. of Obstetrics & Gynaecology

iii) Dr. Shilpa Sharma, Addl. Professor, Dept. of Paediatric Surgery

iv) Dr. Ramandeep, Addl. Professor, Dept. Of Psychiatry

v) Dr. Smita Manchanda, Associate Professor, Dept of Paediatrics

vi) Dr. Jeeva Shankar, Associate Professor, Dept. Of Paediatrics

vii) Dr. Kulbhushan Prasad, Associate Professor, Dept of Forensic Medicine & Toxicology

viii) Dr. Puneeth T, Department of Hospital Administration

ix) Dr. Paavan Gopathoti, Department of Hospital Administration

6. The Petitioner was duly examined by the Medical Board on 17.04.2020. The Board also perused her medical records and conducted another ultrasound at AIIMS to form their opinion. On the basis of the examination, the Medical Board has formed the following opinion:

a) The Petitioner is at 23 weeks and 1 day of pregnancy by LMP, which corresponds to Ultrasound Report.

b) The Board members reviewed the ultrasound reports available with the patient and ultrasound scan was done at AIIMS i.e. 17.04.2020. The ultrasound indicates possibilities of meconium pseudo cyst with encysted fluid around echogenic bowel or duplication cyst. There is no other gross congenital anomaly detected.

c) The Board counseled about the prognosis to the couple that the baby would require surgery at birth and the chances of baby survival is 60-70% without significant morbidity. However, 30% chance of neonatal mortality is there due to surgery or disease.

d) The decision rest with the parents in regards to termination of pregnancy.

e) There is no risk to the Petitioner's physical or mental health on continuation of pregnancy.

f) There is no risk if the medical termination of pregnancy performed at this stage.

A true and correct copy of the report of the Medical Report dated 17.04.2020 (along with the covering letter) is annexed herewith and marked as Annexure A-1."

7. Today, the case has again been taken up through video-conferencing. Mr. Vikas Walia, learned counsel for the petitioner, Mr. Rajesh Gogna, learned counsel appearing for the respondent No.1/Union of India and Mr. Anand Verma, learned counsel for the respondent No.3/AIIMS have addressed arguments.

8. Learned counsel for the petitioner submits that the Report suggests that immediately after its birth, the baby would have to undergo a major surgery and that there are 30% chances of it not surviving the surgery. He also submits that the mother (the petitioner herein) is highly stressed and not in a mental frame of mind to carry on with the pregnancy.

9. We requested learned counsel for the petitioner to link the petitioner and her husband in the video conferencing for us to interact with them. On coming on board, the petitioner has in no uncertain terms, stated that the foetus is not normal and the serious medical problems that the baby shall face immediately on birth, that are life threatening, is causing her severe mental trauma. Her husband, Mr. Dipesh Sachdeva,

who is also present, submits that he has been informed by the Doctors that chances of the baby developing complications even after the major surgery is conducted, are not ruled out.

10. Given the stand of the petitioner and so as satisfy ourselves with regard to the exact condition of the foetus, we next asked Mr. Anand Verma, learned counsel for respondent No.3/AIIMS to request the Chairman of the Multi-Disciplinary Medical Board, Dr.Vatsla Dadhwal, to join the hearing through video conferencing. Dr.Vatsla Dadhwal was kind enough to join the hearing through video conferencing at a short notice. She has clarified that the baby will have to undergo a major surgery immediately after the birth and that there are 60% chances of the baby surviving the operation but 30% chance is that the surgery could be unsuccessful, in the event of extensive bowel involvement and in that eventuality, the baby may die within a short span of a month or so, post surgery. On a query posed by us, she has informed that the presence or absence of any other associated factors and other chromosomal or genetic abnormality, will only be clear, after birth and during the course of the surgery and further, in the post operative period.

11. We have enquired from Dr.Vatsla Dadhwal, as to whether the report of the amino centesis test and FISH test, which was conducted on the petitioner on 8th April, 2020, could throw any light on the health of the foetus. To this, the petitioner's husband has stated that the test was conducted but the results are collated and processed only in Bombay and

due to the existing countrywide lockdown situation in view of Covid-19 pandemic, the said report has still not been couriered to them.

12. On the other hand, Mr. Anand Verma, learned counsel for the respondent No.3/AIIMS has cited several decisions of the Supreme Court to contend that termination of the pregnancy can be permitted only when there is a danger to the life of the mother in proceeding with her pregnancy or in circumstances where the baby suffers from such a medical abnormality that will prevent it from leading a normal and healthy life. He submits that in the absence of any such factor, as in the present case, it would not be advisable to terminate the pregnancy.

13. Mr. Rajesh Gogna, learned counsel appearing for the respondent No.1/Union of India, has relied on two articles, one is, *"Right to be born"* by Mr.D.A.Davey and another one by Mr. Ravi Kanojia, on *"Rights of an unborn baby versus the social and legal constraints of parents: Birth of a new debate"*, to contend that unborn babies have also rights and unless there is a life threatening medical abnormality suffered by the mother, even if she is diagnosed to have a baby with multiple defects, incompatible to life after birth, she shall have to continue with the pregnancy upon crossing the gestation period of 20 weeks, which is the outer limit under the Statute.

14. Let us first examine the legal position relating to termination of pregnancy as contemplated in the Medical Termination of Pregnancy Act, 1971, that provides for termination of pregnancy by a registered

medical practitioner in specified circumstances. Sections 3 and 5 of the Act, which are relevant for this case, 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.*
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> ***(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 baby were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.***
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> *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 babyren, 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 C1.(a), no pregnancy shall be terminated except with the consent of the pregnant woman.

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5. Sections 3 and 4 when not to apply.-

(1) The provisions of Sec.4 and so much of the provisions of sub-section (2 of Sec. 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practioner, shall not apply to the termination of a pregnancy by the registered medical practitioner in 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.

(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of a pregnancy by a person who is not a registered medical practitioner shall be

an offence punishable under that Code, and that Code shall, to this extent, stand modified." (emphasis added)

15. It is to be noted that the Legislature has decided to amend the MTP Act and the Medical Termination of Pregnancy Bill, 2020 has been introduced wherein, the period of 20 weeks as stipulated in Section 3(2)(b), has been extended to 24 weeks. The said Bill has been passed by the Lok Sabha and is to be tabled before the Rajya Sabha.

16. In Suchita Srivastava v. Chandigarh Admn.**,** reported as **(2009) 9 SCC 1,** while dealing with the case of termination of pregnancy of a rape victim, the Supreme Court has observed as under:

"***Termination of pregnancy cannot be permitted without the consent of the victim in this case:***

18. *Even though the expert body's findings were in favour of continuation of the pregnancy, the High Court decided to direct the termination of the same in its order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009] . We disagree with this conclusion since the victim had clearly expressed her willingness to bear a baby.*

19. The victim's reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter. *We have adopted this position since the applicable statute clearly contemplates that even a woman who is found to be "mentally retarded" should give her consent for the termination of a pregnancy.*

21. *When the MTP Act was first enacted in 1971 it was largely modelled on the Abortion Act of 1967 which had*

been passed in the United Kingdom. The legislative intent was to provide a qualified "right to abortion" and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers.

22. There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. *Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling State interest" in protecting the life of the prospective baby. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.*

23. *A perusal of the abovementioned provision makes it clear that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a "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"[as per Section 3(2)(i)] or when "there is a substantial risk that if the baby were born, it would suffer from such physical or mental abnormalities as to be*

seriously handicapped" [as per Section 3(2)(ii)]. While the satisfaction of one medical practitioner is required for terminating a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period.

24. *The Explanations to Section 3 have also contemplated the termination of pregnancy when the same is the result of a rape or a failure of birth control methods since both of these eventualities have been equated with a "grave injury to the mental health" of a woman."* (emphasis added)

17. The view expressed in **Suchita Srivastava (supra)** that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as contemplated in Article 21 of the Constitution of India, has been reiterated by the Supreme Court in a recent decision in the case of **Mrs. X and Ors. Vs. Union of India and Ors.** reported as **2017 (3) SCC 458**, where termination of the pregnancy of the petitioner after 24 weeks of gestation was allowed on account of the fact that the foetus was diagnosed as suffering from serious medical condition of *bilateral renal agenesis and anhydramnios*. In Sarmishtha Chakrabortty vs. Union of India reported as **2018 (13) SCC 339**, where the pregnancy had reached 25 weeks, based on the report of the Medical Board which recorded that even if the child would be born, it would have to undergo complex cardiac surgery stage by stage and there was high morbidity, the petitioner's prayer for medical termination of her pregnancy was allowed.

18. In a case where the petitioner approached the court in the 25th week of her pregnancy seeking abortion of the foetus on the ground of physical abnormality, a Co-ordinate Bench of this Court in Priyanka Shukla v. Union of India reported as **2019 SCC ONLINE DEL 9098,** observed as under:-

> *"15. Apart from the fact that the issue is covered by the decisions cited hereinabove, we are also of the opinion, that in holding as we do, we are not really infracting Section 3 or Section 5 of the MTP Act (supra). Section 3(2)(b) permits termination of pregnancy, inter alia, where there is substantial risk of serious physical or mental abnormalities, were the baby to be allowed to be born. Seen in isolation, it thus places a gap of 20 weeks gestation for this to be permissible. At the same time, Section 5 relaxes the rigour of Section 3(2) in a case where the termination of the pregnancy is immediately necessary to save the life of the pregnant woman. We are of the opinion that these provisions have be to construed as part of one cumulative dispensation and not isolated from each other. Seen thus, we are convinced that, even in a case where the condition of the foetus is, as in the present case, incompatible with life, the rigour of Section 3(2) deserves to be relaxed, and the right to terminate the pregnancy cannot be denied merely because gestation has continued beyond 20 weeks."*

19. In the instant case, it is very clear from the Status Report filed by the respondent No.3/AIIMS that the baby has a cyst in the abdomen, most likely a *meconium pseudocyst*, for which it would have to undergo a major surgery immediately after birth. There is a 30% chance that the surgery may not be successful if there is an extensive bowel involvement. Dr. Vatsala Dhadwal has informed us in clear terms that

even post surgery, there are chances that the infant may die within a span of a month or so. In the absence of the report of the tests stated to have been undergone by the petitioner, the full extent of the pathology and whether there are any more associated factors and other chromosomal or genetic abnormality, will only be clear after birth and during the surgery and the post operative period. The surgery *per se* is a major surgery to be performed on a newborn and may involve the intestinal re-section if intestinal obstruction is noticed. *Meconium pseudocyst*, commonly associated with *meconium peritonitis* is potentially a fatal condition that occurs secondary to a number of cases of bowel pathology including perforation, obstruction and atresia. Because of the potential serious consequences of *meconium peritonitis* and frequent association with cystic fibrosis, which is another potentially lethal genetic defect, the baby will have to undergo the trauma of a major surgical correction of any bowel involvement and any other associated diseases found present.

20. We have been informed that this is the first pregnancy of the couple. Though the petitioner/mother, has categorically stated that she is not in a mental frame of mind to proceed ahead with the pregnancy and the very thought of the baby, having to undergo a major operation, immediately on birth, is causing her immense and unbearable mental trauma, the Status Report mentions that there is no risk to her mental or physical health on continuation of the pregnancy. Therefore, it cannot be said that continuation of the pregnancy will result in putting the mental health of the petitioner to risk. What is significant is that there is a substantial risk that if the child is born, it would suffer from a physical

abnormality that would be seriously detrimental to its healthy and normal life. As stated earlier, the child would be required to undergo a major operation, immediately after birth. The child will be exposed to numerous intra operative and post operative complications and if any such problems arise, it would affect the quality of its life. The lack of compatibility of the foetus with a healthy and normal life is therefore looming large.

21. In view of the above, we are of the opinion that given the medical condition of the foetus, the rigours imposed by Section 3(2) of the Act ought to be relaxed and the request of the petitioner for termination of her pregnancy beyond the gestation period of 20 weeks ought to be acceded to. This is all the more so when the report of the Multi-Disciplinary Medical Board has stated that there is no risk involved to the petitioner if the foetus is aborted and the medical termination of the pregnancy is performed at this stage. We however make it clear that this judgment has been rendered in the peculiar facts of the present case and after speaking to the petitioner as also upon interacting with the Chairman of the Medical Board and obtaining her valuable input.

22. The petition is disposed of alongwith the pending application.

HIMA KOHLI, J

SUBRAMONIUM PRASAD, J

APRIL 20, 2020
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