IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1212 OF 2021

X ..... Petitioner

Vs.

The State of Maharashtra ..... Respondent

Ms. Ruchita Padwal i/b Ms. Aditi Saxena, Advocate for Petitioner.
Mrs. Ashwini Purav, AGP for State/Respondent.

CORAM: K.K.TATED &
ABHAY AHUJA, JJ

DATED : MAY 11, 2021

(VACATION COURT THROUGH VC)

P.C.

1. Rule. With the consent of the counsel for the parties, Rule is made returnable forthwith.

2. The Petitioner has been named 'X' in order to protect her identity.

3. This Petition is filed by the Petitioner mainly for permission to undergo medical termination of pregnancy for the fetus diagnosed with complex cyanotic congenital heart disease at the medical facility of her choice.

4. It is the case of Petitioner that she is into 22nd / 23rd week of pregnancy. The Petitioner underwent the obstetrics

examination at the gestational age of 20 weeks on 24th April 2021, where it was found that the axis of the heart was abnormal and was placed more to left side, muscular VSD was noted, pulmonary artery was small in calibre, there was mild dilation of right atrium and detailed fetal echo cardiography was advised. Thereafter, on 26th April 2021 at the gestational age of 21 weeks, Petitioner underwent fetal doppler echocardiagraphy, where the following impression was indicated:-

"a) Cardiac axis is deviated to the left.
b) A large permembranous VSD.
c) Common Arterial Trunk (Type I) with dysplastic truncal valve.
d) Hypertrophied right ventricle.
The prognosis was guarded."

Thereafter, the Petitioner underwent complete obstetrics examination on 28th April 2021, where following was opined :-

"These findings could be sporadic or associated with genetic anomalies like 22q11 deletions. The prognosis of the heart defect is extremey guarded with baby requiring multiple surgeries and limited quality of life. Dr. Rahul Saraf shall counsel the couple regarding the same."

5. The Pediatric cardiologist's opinion dated 29th April 2021, refers to existence of complex congenital heart disease, where the common arterial trunk with atrial and ventricular septal defects have been noticed in the images. It has been advised that sometimes such lesions are associated with genetic abnormality like 22q11 deletion syndrome.

6. The Petitioner has stated in her Petition that she has desire to terminate the pregnancy in view of the aforesaid diagnoses. However, even though the amended Section 3(2) (b) (ii) of the Medical Termination of Pregnancy Act, 1971 (the "MTP Act"), permits the same upto a gestation period of 24 weeks, but as the effectiveness of the said amendments have not yet been notified, the Petitioner is left with no option other than to file the present petition.

7. Learned counsel for the Petitioner has relied on 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 under the MTP Act.

8. In view thereof and considering the ration laid down in these judgments, vide order dated 6th May 2021, this Court had directed the Petitioner to approach the Medical Board in Sasoon Hospital, Pune for her medical examination. The Medical Board was directed to conduct the examination and submit its report. Accordingly, the medical examination was conducted and the report dated 7th May 2021 of the Board was submitted to this Court. The concluding paragraph of the report reads thus :-

> *"**Key recommendations of the panel (if any) with justification:***
> *On clinical examination mother has 23 weeks and 6 days pregnancy and no medical and obstetric complication.*
> *In view of complex cranial and spinal abnormalities in the fetus on sonography such*

baby carries poor prognosis and if born alive will have significant morbidity and ortality. Thus medical termination of pregnancy is recommended with kind permission of Hon'ble High Court."

9. In the above backdrop, we have 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.

10. The MTP Act was enacted in the year 1971. Section 3 of the MTP 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 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 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 a 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 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."

11. Under Section 3 (2) (b) of MTP Act, the maximum period during which the pregnancy can be terminated is prescribed as 20 weeks. The circumstances under which the pregnancy can be terminated are set out in Section 3 of the MTP Act. One such circumstance, as mentioned in Section 3 (2) (b) (ii) is that 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.

12. 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."*

13. In the instant case, the Medical Board of the B. J. Government Medical College and Sasoon General Hospital, Pune, consisting of nine specialists including Gynecologist, Pediatrician as well as Radiologist, Microbiologist, Cardiologist, Medicines, CVTS, Psychiatrist, has opined that the fetal ultra-sonography shows complex cyanotic congenital heart disease, which will require multiple complex cardiac surgeries after birth and that there is increased risk of morbidity and mortality with each surgery, where prognosis remains poor, due to which there is risk of mental trauma to the mother. The medical termination of pregnancy is recommended subject to the permission of the Court.

14. In the circumstances, we are guided by the law as settled by a ***Division Bench of this Court (Coram: A.S. Oka & M.S. Sonak, JJ.) in Writ PetitionNos.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.

15. 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.

16. In paragraph-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.

17. 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.

18. 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, which direction appears to have found placed in the amendments of 2021, though yet to be notified.

19. 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 was offered best medical treatment available in the circumstances and in such cases if the parents of such child were not willing to or were 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.

20. 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 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.***

21. As mentioned earlier, the Medical Board has opined that if this Court permits, the medical termination of pregnancy is recommended. It was specifically reported that the fetal ultra-sonography shows complex cyanotic congenital heart disease, which will require multiple complex cardiac surgeries after birth and that there is increased risk of morbidity and mortality with each surgery, where prognosis remains poor.

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

ORDER

i. The Petitioner is permitted to undergo medical termination of pregnancy as per Medical Board's opinion dated 7th May 2021, at a medical facility of her choice at the earliest. 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. Writ Petition is disposed of accordingly.

vi. No order as to costs.

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

(ABHAY AHUJA, J.) **(K.K.TATED, J.)**