

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.6340 OF 2023

XYZ

... PETITIONER

VERSUS

1] The State of Maharashtra
Through Secretary,
Health & Family Welfare Department,
Mantralaya, Mumbai-32

2] The Dean/Chief Medical Officer
Government Medical College and Hospital,
Jalgaon, Tal & Dist. Jalgaon

... RESPONDENTS

....

Ms Rutuja L. Jakhade, Advocate for Petitioner

Mr. S. B. Yawalkar, AGP for respondent Nos. 1 and 2

....

**CORAM : RAVINDRA V. GHUGE AND
Y. G. KHOBRAGADE, JJ.**

DATE : 20.06.2023

ORAL ORDER :-

1. By this petition, the biological mother of minor girl child aged 15 years, has preferred this petition and has put forth prayer clauses (B), (C) and (D) as under:-

(B) This Hon'ble Court may be pleased to issue appropriate writ, order or directions permitting the petitioner to terminate the pregnancy at the Government Medical College and Hospital, Jalgaon Dist. Jalgaon.

(C) This Hon'ble Court may be pleased to issue appropriate writ, order or directions to the respondent No.2 to examine the petitioner by the medical committee and to submit decision/report to this Hon'ble Court as early as possible.

(D) Pending hearing and final disposal of this writ petition, directions may be issued to the respondent No.2 to constitute medical committee and to examine the petitioner and to submit the report to this Hon'ble Court.

2. While referring the pregnant girl for a medical test with the Government Medical College and Hospital, Jalgaon, we had observed in our order dated 14.06.2023 in paragraph 5 as under.

“5. We permit the biological mother and the child to appear before the medical board of the Government Medical College and Hospital at Jalgaon for a medical examination at 11.00 a.m. tomorrow. The board shall examine the pregnant lady and express a clear opinion as to whether medical termination of the pregnancy is possible and as to whether in the process of doing so, a child with a beating heart is likely to be delivered. The medical board shall examine the pregnant lady at 11.00 a.m. onwards and a report of the medical examination expressing a clear opinion, shall be transmitted by e-mail on the address of the office of the Government Pleader which is gphcabd@gmail.com, by 5.00 p.m on 15.06.2023.”

3. On 16.06.2023, we had passed the following order:-

“1. Vide our order dated 14th June, 2023, we had directed the Medical Board, Government Medical College and Hospital at Jalgaon to examine the pregnant lady and submit it's medical report. It appears that the Medical Board sent a communication addressed to the learned AGP Mr. S. K. Tambe. What we had expected was, a report of the medical examination to be placed before us.

2. *We request the learned AGP to call for such report.*

3. *The communication received by Mr. Tambe dated 15.06.2023, which is in the form of an opinion of the Medical Board, is taken on record and marked as “X-1” for identification.*

4. *The said report indicates that considering the mental and physical status of the girl, who is a minor, it would be appropriate to grant permission to terminate the pregnancy. However, in the very next sentence, the Board submits that a live child will be born and if it is taken care of in NICU, there is every chance that the child would remain alive.*

5. *Considering the peculiar circumstances and the opinion of the Medical Board that a live child with a beating heart would be born and which can survive, the question is, whether to resort to termination of pregnancy when a live child will be born prematurely on account of induced labour or allow a full term baby to be born.*

6. *The learned Advocate for the petitioner seeks time till Monday, 19th June, 2023 to take instructions.*

7. *Stand over to 19th June, 2023 in the passing orders category.”*

4. The complete report in “Form-D” of the Medical Board for pregnancy termination, is placed before us. The five doctor’s board has set out/opined in the report (undated) that the baby is around 28 weeks as per the USG scan which was performed on 15.06.2023. It is also expressed that a live baby would be born and it would have to be admitted in NICU. Surgical intervention would be necessary. Blood

and blood products transfusion would be required and the lady will have to be admitted in the ICU. It is also expressed that there is a risk to the pregnant lady while performing the termination of pregnancy.

5. The learned Advocate for the biological mother submits on instructions that the girl was subjected to a physical crime and therefore, she would suffer from trauma, agony and physical hardships. Therefore, even if a live child is born, she insists that her daughter should be subjected to the said medical termination of pregnancy procedure.

6. We have perused the F.I.R. dated 23.03.2023 bearing No.0055/2023 registered with the Erandol Police Station, District Jalgaon, by the mother indicating that her daughter (the pregnant girl) went missing on 25.02.2023 around 12.00 noon. She suspected that somebody had enticed and taken her away. After the police investigated the matter, on 29.05.2023, the Sub-Inspector of the Erandol Police Station tendered his report dated 29.05.2023 to the learned Chief Judicial Magistrate stating therein that the girl was found in the company of one Raju Namdeo Dhumnar, who had promised to marry her and had taken her along with him to Jodhpur (Rajasthan) where they lived together. Since the concerned girl was

underage, the provisions of the Protection of Children from Sexual Offences (POCSO) Act, as well as the Indian Penal Code were invoked. It is in these circumstances, that the girl has conceived. The pregnancy is in the 28th week.

7. Earlier, the Government Medical College and Hospital, Jalgaon, Department of Radiology, examined the girl on 30.05.2023 and noticed that she was pregnant with 25 weeks 3 days. No congenital anomalies were detected after conducting ultrasonography on the patient. The department head took the care of not conducting an examination for detecting the gender of the foetus. Thereafter, this petition has been filed.

8. The fact is that a child would be born some day, whether by forcible medical intervention or by a natural delivery. The medical report clearly indicates that a live baby would be born and by keeping the baby in NICU, the baby would survive. The question, therefore, is that, if a live baby is to be born even today after a forcible delivery of the child is to be performed, considering the request of the probable mother for terminating the pregnancy, an under developed live child would be born. There are chances of certain deformities being developed due to such forcible delivery.

9. The further issue would be that if in any case the child is going to be born and the natural delivery is just 12 weeks away, in the backdrop of the girl having accompanied the male and having lived with him away from her mother for a couple of weeks until they were apprehended, we are of the view that the future of the health of the child and its physical and mental development needs to be considered at this stage. When a live child is going to be born even today, we might as well let the child be born after 12 weeks and under medical advise, if the petitioner desires to give away the child to an orphanage, she shall have the liberty of doing so.

10. The disadvantage of permitting forcible delivery of the child today is that a child which would have naturally developed into a well grown baby in the 40th week will have to be brought into this world at a premature stage and that too forcibly.

11. The learned Advocate for the biological mother, submits that in the peculiar facts as above, the girl be placed in the Government Hospital until her delivery, so as to be looked after properly.

12. The learned AGP has expressed his apprehension as regards keeping the girl in the hospital for 12 weeks. The biological mother has instructed the learned Advocate to make a statement that after the child is born, it would be handed over to an orphanage for adoption. Naturally, if the baby is well developed and delivered naturally or as a full term baby, there would be no deformity and the chances of adoption would be brightened.

13. The learned AGP submits that there are certain social organizations which take care of such 'would be' mothers like "Shaskiya Vatsalya Mahila Vastigruh" (Mother Home), near Ashok Stambh, Gangapur Road, Nashik, or the Government's Savitribai Mahila Rajyagruha at Aurangabad, where the girl can be lodged. We permit the Petitioner (biological mother) and the pregnant lady (would be mother) to opt for either of these shelter homes. If that happens with the consent of the biological mother and the would be mother, we direct the concerned authorities at the relevant place to ensure that a female Psychologist is provided to take care of the would be mother.

14. We also direct the said organization to ensure that proper medical assistance is provided to the would be mother and she shall

be given every assistance to be admitted in the hospital at the right time when the delivery is to occur. Subject to following the medical protocol, if the would be mother desires to hand over the child in adoption, she would be at liberty by following due procedure laid down in law. We leave option open to the Petitioner to choose a shelter home, either at Nashik or the Government's Savitribai Mahila Rajyagruha at Aurangabad.

15. The District Officer, Women and Child Development Department at Nashik or at Aurangabad, as the case may be, would assist the "Would Be Mother" and shall have interaction with her on routine basis in order to monitor her condition.

16. Besides medical assistance, all other facilities as are normally made available to the inmates of the Mother Home and especially to the pregnant women, would be extended to her. So also, the assistance of a counsellor/psychiatrist/ motivator, would also be extended to her in order to ensure that she is at peace and is in a stable physical and mental condition.

17. Pursuant to the above, in the event, the petitioner needs any assistance beyond is being provided under this order or if she is

in any difficulty and requires legal or medical assistance, she is at liberty to make such request directly to the concerned authorities or through a civil application in this Court.

18. After the child is delivered and the time is ripe for the petitioner to leave the Mother Home, she is at liberty to take a decision as to whether, she desires to keep the child or seek assistance of the Child Welfare Committee. In these circumstances, paragraphs 132, 133 and 134 of the judgment in **XYZ vs. Union of India and others, 2019 (3) Bom. CR 400**, would be applicable and if she does not desire to keep the child with her, the Child Welfare Committee, AURANGABAD or NASIK, would follow the prescribed procedure for declaring the child to be legally “free for adoption” and adopt appropriate steps to place the child in an appropriate agency or orphanage as is prescribed in law. Paragraphs 124 to 134 of the judgment in XYZ read as under:-

“124] In all such cases, where permission is granted to medically terminate pregnancies the provisions in the MTP Rules, 2003 and the MTP Regulations, 2003, will have to be complied with by the registered medical practitioners, hospitals/clinics and the approved places in terms of section 4(b) of the MTP Act. Therefore, the directions which we have issued, are in addition to and certainly not in derogation of any of the requirements prescribed

under the MTP Act, the rules and regulations made there under.

- 125] *In some cases, including, in one of the cases in this batch of Petitions, the medical board suggested that the pregnant mother and/or her family members give an undertaking that if, despite attempts at medical termination of pregnancy, the child is born alive, then the pregnant mother and/or her family members take full responsibility for such child.*
- 126] *At the outset, we make it extremely clear that if despite attempts at medical termination of pregnancy, the child is born alive, then, first and foremost the registered medical practitioner and the hospital/ clinic concerned will have to assume the full responsibility to ensure that such child is offered the best medical treatment available in the circumstances, in order that it develops into a healthy child. Though there is debate as to whether the fetus (child in the womb) is a person, entitled to rights, there is no debate on the issue that a child, born alive, is a person, in whom, the right to life and personal liberty inheres. Therefore, taking into consideration the provisions of Part III and Part IV of the Constitution, we make it clear, that under no circumstances, such a child must be neglected or left to perish, particularly where the pregnant or her family members may not be in a position to or may not be willing to assume responsibility in such matters.*
- 127] *In the aforesaid regard, we refer to the decision of the Supreme Court in Parmanand Katara vs. Union of India (1989) 4 SCC 286 where it was held that there can be no second opinion that preservation of human life is of paramount importance. That is so on account of the fact that once life is lost, the status quo ante cannot be restored as resurrection is beyond the capacity of man. Article 21 of the Constitution casts the obligation on the*

State to preserve life. The provision as explained by this Court in scores of decisions has emphasised and reiterated with gradually increasing emphasis, that position.

- 128] *The Supreme Court has further observed that a Doctor at the government hospital positioned to meet this State obligation is, therefore, duty bound to extend medical assistance for preserving life. Every doctor whether at a government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way. So far as this duty of medical profession is concerned, it is a duty coupled with human instinct and therefore, it needs neither any decision nor any code for compliance. In any case, Code of Medical Ethics framed by the Medical Council of India Item 13 specifically provides for it.*
- 129] *In M. Nagraj (supra), the Constitution Bench in the context of certain fundamental rights, including the right to life and human dignity, has held that the values impose a positive duty on the State to ensure their attainment as far as practicable. The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it. It is the duty of the State to not only to protect the human dignity but to facilitate it by taking positive steps in that direction.*
- 130] *Therefore, if the child, despite attempts at medical termination of pregnancy, is born alive, then the parents as well as the Doctors owe a duty of care to such child. The best interest of the child must be the*

central consideration in determining how to treat the child. The extreme vulnerability of such child is itself reason enough to ensure that everything which is reasonably possible and feasible, in the circumstances, will have to be offered to such child, so that it develops into a healthy child.

- 131] *In such matters, the instinct of the parents, will no doubt take over when it comes to the love and care to be offered to such child. However, in the unfortunate situation, where for several myriad factors, the parents of such child are unwilling to or genuinely not in a position to care for such child, then, the “parens patriae” doctrine, will oblige the State to assume parental responsibility in relation to such child.*
- 132] *Even apart from the “parens patriae” doctrine, the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, will apply to such an unfortunate situation. There are detailed provisions under the Juvenile Justice Act to deal with cases of “abandoned child” as defined under section 2(1) or “child in need of care and protection” as defined in section 2(14) of the Juvenile Justice Act. The hospital/clinic authorities, must take necessary measures as prescribed under the Juvenile Justice Act to deal with such unfortunate situations. The best interest of the child, must be the primary consideration in all such matters.*
- 133] *According to us, both the parens patriae doctrine as well as provisions of Juvenile Justice Act obliged the State to assume parental responsibility in relation to such children. Therefore, the State, consistent with the provisions of the Juvenile Justice Act will have to protect and take care of such children, should, such need arise. Mr. Vagyan and Ms.Kantharia, the learned Government Pleaders, on the basis of instructions, have assured this Court, that consistent with the provisions of section 27 of the Juvenile*

Justice Act, the State Government, where it has not already done so, will by notification in the Government Gazette constitute for every District, one or more Child Welfare Committees (CWC) for exercising the powers and discharging the duties conferred upon such Committees in relation to children in need of care and protection under the Juvenile Justice Act.

134] *The learned Government Pleaders, on the basis of instructions, have assured this Court that the State and its agencies like CWC etc. will, after compliance prescribed procedures, declare such children legally “free for adoption”, in case the enquiries establish that such children have no one to care for or are abandoned or surrendered. In any case, we direct the State and its agencies to take all steps in this regard, keeping in mind the principle of the best interests of such children.”*

19. The Writ Petition is, accordingly, disposed off.

[Y. G. KHOBRAGADE, J.]

[RAVINDRA V. GHUGE, J.]

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