IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.9647 OF 2023

"A'
Age- 17 years, Occ: Education,
Through the Guardian & Mother
"B" … PETITIONER

VERSUS

1] The State of Maharashtra
Through the Secretary,
Health Department,
Mantralaya, Mumbai-32

2] The Dean,
Dr. Shankarrao Chavan Govt. Medical
College and S.G.G.S.M. Hospital,
Nanded.

3] The Officer Incharge,
Police Station Hatta,
Dist. Hingoli. … RESPONDENTS

....
Mr. Shekade Shashikant E., Advocate for Petitioner
Mr. V.M. Kagne, AGP for Respondent-State
...

CORAM : RAVINDRA V. GHUGE &
Y.G. KHOBRAGADE, JJ.
DATE : 7th August, 2023

ORDER :-

1. On 04.08.2023, we had passed the following order:

"1. The identity of the Petitioner is kept a secret. She is more than 17 years of age. On account of incest, she is rendered pregnant. It is stated that the age of the foetus is around 25 to 27 weeks.

2. We are referring the victim to Respondent No.2 Government Medical College and Hospital for carrying out the medical examination under the provisions of the Medical Termination of Pregnancy Act, 1971. We request the learned AGP to immediately communicate this order to the Dean of the concerned Medical College.

3. The victim would be presenting herself at 10.00 a.m. on 05.08.2023 for medical examination. Let the Medical Board submit it's report to the Office of the learned Government Pleader by e-mail or through a hand delivery so as to be placed before us on 07.08.2023.

4. We make it clear that the Medical Board would apprise us as to whether the growth of the foetus is normal? Whether pregnancy of the Petitioner could be medically terminated, and whether a live child is likely to be born if the termination of pregnancy is carried out.

5. Stand over to 07.08.2023 in the "passing orders category".

2. The learned AGP has tendered the report of the Seven Member Medical Board dated 05.08.2023. The board comprises of subject experts, like a Professor and HOD Radiology, Professor and HOD Pediatrics and Assistant Professor, HOD, Department of Psychiatry, a Professor/HOD and another

Assistant Professor belonging to the Department of OBGY, are also members of the said board. The report is marked as 'X' for identification. It is observed in the report as under:

> *"1. Mole on right cheek*
> *2. mole on left side of neck*
> *The examinee is conscious, oriented, afebrile with pulse rate 88 beats/minute, blood pressure 120/80mmhg*
> *CVS-5152+, No murmur*
> *RS-AEEBS,B/L CHEST CLEAR*
> *PA-Ut 30-32 weeks, longitudinal lie, breech presentation, liquor adequate FHR 1366/m regular, uterus relaxed*
>
> *Her investigations are as follows*
> *Random blood sugar 103 mg/dl Haemoglobin 9.7gm%*
> *Liver function test SGOT 25, SGPT 10, T BILI 0.5*
> *Kidney function test 5r UREA 15, Sr CREAT 0.7*
> *ECG WNL*
>
> *USG (05/08/2023): Single live intrauterine pregnancy of 29 to 30 weeks of GA FHR +nt Liquor adequate, placenta Anterior, Breech presentation EFW 1497grams,no evidence of any congenital malformation noted.*
>
> *Opinion of expert committee regarding MTP*
> *The examinee XXXXXXXXXXXXXXX* (we are not disclosing the name) *is under guardianship of XXXXXXXXXXXXX* (we are not disclosing the name) *and another is physically and mentally fit to undergo Medical Termination of Pregnancy. She has been examined thoroughly by expert committee and opine that the patient is fit for termination of pregnancy on the humanitarian grounds. Termination: might be by Vaginal route or by cesarean section. As she has completed 30-weeks, there are chances of live birth of baby, so its better to*

continue the pregnancy ivo live birth of baby is possible and watch for spontaneous on set of labor.

Dr.S.R. Wakode Professor and HOD Dept of OBGY	Dr.Dnyaneshwar Jadhav Assistant Professor Dept of OBGY	Dr. Ubaid Khan Professor and HOD Dept of Medicine
Dr.Vaishnavi Kulkarni Professor and HOD Dept of Anesthesia	Dr. Umesh Atram Assistant Professor (for HOD)	Dr. Kishor Rathod Professor and HOD Dept of Pediatrics
Dr. Ameet Panchmahalkar Professor and HOD Dept of Radiology		

3. It is, therefore, clear from the opinion expressed by the committee that the concerned lady has completed 30 weeks of her pregnancy and would deliver a live baby with chances of survival. The opinion is that it would be appropriate to continue with the pregnancy and let a normal baby be born after completing the full term of pregnancy.

4. The learned Advocate for the mother submits on instructions that this court may pass an appropriate order.

5. We have perused the F.I.R. dated 13.07.2023 bearing No.0285/2023 registered with the Hatta Police Station, District Hingoli, alleging that on 12.02.2023 the victim went to stay at her maternal aunt's home where she got in touch with her cousin brother and further developed physical relations with him. The accused, against the will of the victim,

committed rape on her w.e.f. 12.02.2023 to 21.02.2023, which resulted in a pregnancy. The victim lodged the complaint under Section 376(2)(J), 376(2)(N) of the I.P.C. Since the victim was underage, the provisions of the Protection of Children from Sexual Offences (POCSO) Act were also invoked. The pregnancy is in the 30-32nd week.

6. The fact is that a live child would be born some day, whether by forcible medical intervention today or by a natural delivery, after 40 weeks. The medical report clearly indicates that a live baby would be born. The question, therefore, is that, if a live baby is to be born even today after a forcible delivery of the child in order to terminate the pregnancy, an under developed live child would be born. There are chances of certain deformities being developed due to such forcible delivery. This would hamper the chances of adoption, if the mother does not want to keep the child.

7. The further issue would be that if in any case the child is going to be born and the natural delivery is just 8 weeks away, 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 8 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.

8. 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. 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.

9. The learned AGP submits that there are certain social organizations which take care of such 'would be' mothers like Mata Anusaya Shaskiya Mahila Rajyagruha, Shivaji Nagar, Nanded - 431 602 or the Government's Savitribai Mahila Rajyagruha at Aurangabad, where the girl can be lodged. We permit the Petitioner (Mother) and the pregnant lady (would be mother) to opt for either of these shelter homes. If that happens with the consent of 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.

10. 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 Nanded or the Government's Savitribai Mahila Rajyagruha at Aurangabad.

11. The District Officer, Women and Child Development Department at Nanded 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.

12. 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.

13. 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.

14. 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 NANDED, 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 (supra), 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 becomplied 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. Vagyani 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."

15. The **Writ Petition is, accordingly, disposed off.**

[Y.G. KHOBRAGADE, J.] **[RAVINDRA V. GHUGE, J.]**

mub