

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO.3855 OF 2024

ABC

Petitioner

versus

1. State of Maharashtra
2. State of Maharashtra through
Principal Secretary, Public Health Department,
Mumbai.
3. Vithal Syana General Hospital,
through Medical Board, Tembhi Naka,
Tembhi Naka, Dhobi Ali, Charai,
Thane (West).

Respondents

Mr.Ashley Cusher i/by Ms.Priyanka S. Tiwari, Advocate for Petitioner.
Mrs.M.P.Thakur, AGP, for State.

CORAM : PRAKASH D. NAIK AND
N.R.BORKAR, JJ.

DATE : 22nd March 2024

PC :

1. Petitioner seeks following reliefs :

(a) This Hon'ble Court be pleased to issue Writ in the nature of Mandamus under Article 226 of the Constitution of India and be pleased to allow to terminate the fetus of the petitioner/victim 'ABC';

(b) This Hon'ble Court be pleased to issue a direction to the Respondents directing them to terminate the pregnancy of the victim 'ABC' or in the alternative reliefs (considering the welfare of the victim 'ABC') as the Court deems fit for or;

(c) Pending the hearing and final disposal of this

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petition the Hon'ble Court may be pleased to direct the Respondents to provide free medical facilities during the termination of pregnancy of the victim 'ABC';

(d) This Hon'ble Court be pleased to issue direction to the respondents for counselling of the victim 'ABC' through an agency who are specialized in pre and post pregnancy counselling especially for the minor victims of rape and sexual assault;

(e) This Hon'ble Court be pleased to issue a direction to the Respondents directing them to compensate the victim under Manodhairya Scheme and to compensate and give benefits of new rules laid in Protection of Children from Sexual Offences Rules, 2020 and to appoint para legal volunteer for assisting the victim 'ABC'”

2. Thus, Petitioner seeks to abort her fetus of 25 weeks. Petitioner is victim of sexual assault. She is aged about 19 years. The FIR was lodged by Petitioner with Shrinagar Police Station, Thane on 27th March 2024 for offences under Sections 376, 376(2)(n), 452, 506, 507 of Indian Penal Code. It was alleged that accused had subjected the Petitioner to sexual assault in October-2023. She was threatened. Subsequently on two other occasions when the family members were not in the house, Petitioner was subjected to sexual assault. When she complained about pain in abdomen she was taken to doctor and it was diagnosed that she was pregnant.

3. This petition was filed on 14th March 2024 and on mentioning it was immediately listed for hearing on 15th March 2024. Vide order dated 15th March 2024 we directed the Medical Board constituted under MTP Act for District Thane to examine Petitioner immediately and submit the report to this Court. Petitioner was examined by Board on 18th March 2024 and report was submitted to this Court.

The report was received by this Court on 20th March 2024. The copies of report were made available to learned counsel for Petitioner and learned AGP for perusal and at the request of advocate for Petitioner the petition was listed on 21st March 2024.

4. We have heard both sides.

5. Learned advocate for Petitioner submitted that Petitioner is a victim of sexual assault. She seeks to abort her fetus of 25 weeks. To ensure the mental and physical well being of Petitioner, she seeks to terminate her fetus/pregnancy under the provisions of Section 5 of MTP (Amendment) Act. Petitioner wants to live a normal life without any complications or medical problems.

6. Learned advocate for Petitioner has relied upon the decision of Hon'ble Supreme Court in the case of **XYZ Vs.State of Gujarat and others (2023-Live Law (SC)-680)** and another decision of this Court in the case of **A (Mother of X) Vs. State of Maharashtra and others** passed in Writ Petition (L) No.48 of 2022, decided on 3rd January 2024.

7. Learned AGP submitted that report submitted by Medical Board does not approve termination of pregnancy and the opinion given by Medical Officers indicate that there is denial of approval for termination of pregnancy. It is submitted that opinion of Pediatric Department and Department of Neurology which is incorporated in the medical report dated 19th March 2024 indicate that if pregnancy is terminated at this gestational age, possibility of live birth with extreme prematurity and baby may require NICU care. The chances

of perinatal complications in the new born, may require special neonatal intensive care leading to possibility of long term neurological complications in the new born. It is further submitted that opinion expressed in the report also refers to the fact that after termination of pregnancy the baby may be delivered alive and baby may require NICU care and this baby's care must be taken by relatives. Hence in the light of opinion expressed by Medical Board, the reliefs sought by Petitioner may be rejected.

8. Learned AGP has relied upon the decision of Hon'ble Supreme Court in the case of **R Vs. Union of India** (Special Leave Petition [Civil] No.4527 of 2024, dated 31st January 2024) and the decision of this Court in the case of **X Vs. State of Maharashtra, through Secretary, Health Department and Others** (2023-SCC OnLine-Bom-1544).

9. Pursuant to the directions of this Court Petitioner was examined by the members of District Medical Board constituted under Medical Termination of Pregnancy Act, 1971 under chairmanship of District Civil Surgeon, Civil Hospital, Thane. The Board consisted of two Gynecologist, one Pediatrician, one Radiologist, one Psychiatrist from Civil Hospital, Thane, one Cardiologist and one Neurologist from Thane.

10. We have perused the report. The age of Petitioner is around 18 years 10 months. The report of Gynecology Department indicate that patient is conscious, oriented febrile. Obst USG on 16th March 2024 suggestive of single living intrauterine pregnancy with breech presentation, 25 weeks 2 days with foetal weight 874 grams.

The opinion on the findings reads as follows :

“Patient is unmarried 18 years 10 months old with clinically 26 to 28 weeks live pregnancy with breech presentation with mild anemia. After termination of pregnancy baby may delivered alive and baby may require NICU care. And this baby’s care must be taken by relatives.

As Ultrasound suggestive of single living intrauterine pregnancy with breech presentation, 25 weeks 2 days with foetal weight 874 gms. If the baby not delivered vaginally may require surgery. This risk explained to her relatives.”

11. Radiology Department opined that “Ultrasonography of gravid uterus shows a single viable fetus with breech presentation with Gestational age of 25 weeks 2 days clinical corelation”. Psychiatric Department has indicated that “patient is not suffering from any major mental illness at present. Patient is fit to undergo the procedure of medical termination of pregnancy from psychiatry point of view”. The Pediatric Department has opined that “if pregnancy is terminated at this gestational age, possibility of live birth with extreme prematurity and baby may require NICU care”. Cardiology Department opined that “patient is fit from Cardiology and need to counsel for procedure with due risk with written informed consent”. Neurology Department has opined that “patient is neurologically fit. Chances of perinatal complications in the new born, may require special neonatal intensive care; leading to possibility of long term neurological complications in the new born”. The report further mentions that opinion by Medical Board for termination of pregnancy “Denied”. Clause-7 of the report refers to the ‘physical fitness of the woman for the termination of pregnancy’ and the opinion is ‘No’.

12. The concluding part of report provides justification for the decision which reads as follows :-

“After taking history, careful examination by Gynecologist, Pediatrician, Radiologist, Cardiologist, Respiratory Specialist, Neurologist and Psychiatrist District Medical Board, Thane has come to the opinion that at present no abnormality is detected in the fetus and the pregnant (victim) mother. She is above 18 years old and pregnancy is caused by sexual assault. Pregnant mother and her parents do not want to continue pregnancy and she is anguished with the pregnancy.

Continuation of pregnancy may lead to pregnancy related complications like Anemia, pregnancy induced Hypertension, as well as complication during labour.

Pregnant mother and her parents have expressed desire to terminate the pregnancy and are made aware of the dangers of continuation of pregnancy as well as termination of pregnancy.

In the Medical Termination Process, there may be possibility of child being born alive. In the guidelines of GOI, Ministry of Family Welfare, it is mentioned that sexual assault survivor is an indication for termination beyond 24 weeks. As per this guidelines it will be advisable to stop the fetal heart sounds before inducing abortion by a procedure of fetal reduction. Kindly noted that, the fetal reduction service is not available in Civil Hospital, Thane.

Since the pregnancy has advanced up to 25 weeks and 2 day (by USG Report), well beyond legal limits of termination of pregnancy i.e. 24 weeks”.

13. Thus, the report submitted by Medical Board constituted under MTP Act does not support termination of pregnancy. It is pertinent to note that opinion of Neurology Department and Pediatric Department refers to possibility of live birth with extreme prematurity and baby may require NICU care. Neurology Department opined that chances of perinatal complications in the

new born may require special neonatal intensive care leading to possibility of long term neurological complications in the new born. Report also states that patient is not fit for termination of pregnancy.

14. In the case of XYZ Vs. State of Gujarat and others (2023-LiveLaw [SC]-680) (supra), the Supreme Court has considered the request of victim for termination of pregnancy. The medical report was positive for termination of pregnancy. The High Court had declined the prayer for issuing direction for termination of pregnancy. In the facts of the case it was observed that there was no impediment in granting termination of pregnancy. The Apex Court considered various decisions on the issue of termination of pregnancy wherein it was observed that a woman can become pregnant by choice irrespective of her marital status. In case pregnancy is warranted, it is equally shared by both the partners. However, in case of an unwanted or incidental pregnancy, the burden invariably falls on the pregnant woman affecting her mental and physical health. Article 21 of the Constitution recognizes and protects the right of a woman to undergo termination of pregnancy if her mental or physical health is at stake. Importantly, it is the woman alone who has the right over her body and is the ultimate decision maker on the question of whether she wants to undergo an abortion. In the context of abortion, the right of dignity entails recognizing the competence and authority of every woman to take reproductive decisions, including the decision to terminate the pregnancy. At the same time Apex Court in the same decision has observed that whole object of preferring a Writ Petition under Article 226 of Constitution of India is to engage with the extraordinary discretionary jurisdiction of the High Court in exercise of its

constitutional power. Such a power is vested with the constitutional courts and discretion has to be exercised judiciously and having regard to the facts of the case and by taking into consideration the relevant facts while leaving out irrelevant considerations and not vice versa.

15. In the case of A (Mother of X) Vs. State of Maharashtra and others (supra), this Court has dealt with similar situation. Opinion of doctor was, however, unanimous that the pregnancy must be terminated and continuation may lead to complications. The continuation of pregnancy in the opinion of Board was bound to have a grave impact on the pregnant minor's psychological mental health. It was observed that risk associated with the continuing the pregnancy is far greater than termination. The board therefore unanimously recommended the termination of pregnancy.

16. In both the above decisions Medical Board had supported the request for termination of pregnancy.

17. In the case of R Vs. The Union of India and others (supra), the Apex Court has declined termination of pregnancy. However, we find that the period of gestation in the said decision of 30 weeks plus 6 days.

18. The Division Bench of this Court in the case of X Vs. State of Maharashtra, through Secretary, Health Department and others (supra), had relied upon report of Medical Board and after analysing the provisions of MTP Act had denied the relief of termination of pregnancy. It was observed that question is to if a live baby will be born even after a forcible delivery of the child, considering the

request of probable mother for terminating the pregnancy, it would lead to an under developed live child being born. There are chances of certain deformities being developed due to such forcible delivery. 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 in to this world at a premature stage and that too forcibly. The Medical Board's report indicate that live baby would be born and the baby may survive. Therefore, if the foetus of 24 weeks and 3 days (now 25 weeks) is permitted to be aborted, which is going to be a forced delivery, there may be chances of abnormalities in the child, which would handicap the child permanently. In any case the child is going to be born alive and the natural delivery is just 15 weeks away from today. Therefore the Court was not inclined to permit for termination of pregnancy.

19. As stated hereinabove, report of Medical Board mentions that after termination of pregnancy baby will be delivered live and that if pregnancy is terminated at this gestational age, possibility of live birth with extreme prematurity and baby may require NICU care. The report also indicate that there are chances of perinatal complications in the new born, may require special neonatal intensive care leading to possibility of long term neurological complications in the new born. The Report also mentions that patient is not physically fit for termination of pregnancy. Hence we are not inclined to direct the Respondents to terminate pregnancy of Petitioner.

20. All the required medical facilities to take care of the Petitioner before and after delivery be provided to the Petitioner by State. The compensation under any schemes for which Petitioner is entitled for, be provided to her. Concerned authorities shall take utmost care of

Petitioner before and after the delivery.

21. In the light of opinion given by Medical Board as stated above and factual matrix of this case, we are not inclined to issue directions for termination of pregnancy of Petitioner.

ORDER

- (i) Civil Writ Petition No.3855 of 2024 is dismissed;
- (ii) The Respondent-State is directed to provide all requisite medical facilities to the Petitioner in hospital till delivery.

(N.R.BORKAR, J.)

(PRAKASH D. NAIK, J.)

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