

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7745 OF 2024

X.Y.Z.

.. Petitioner

Versus

1. The Dean of B.J. Government Medical College
And Sassoon Hospital, Pune – 411 001,
through the Professor and HOD,
Gynac & Maternity Department,
Sassoon General Hospital, Pune

2. Union of India
Through the Secretary,
Ministry of Law and Justice,
And
Ministry of Health and Family Welfare,
Through its Secretary, New Delhi;

3. State of Maharashtra,
Through the Principal Secretary,
Public Health Services,
Mantralaya, Mumbai – 23.

...Respondents

Mr. Tejesh Dande, Advocate for Petitioner.

Ms. Purnima Awasthi, Advocate for Respondent No.2-Union of India.

Ms. Kavita Solunke, AGP for Respondent No.3-State.

**CORAM : N.R. BORKAR &
SOMASEKHAR SUNDARESAN, JJ.**

Reserved on : May 29, 2024.

**Pronounced on : May 30, 2024.
(VACATION COURT)**

ORDER:

1. This Petition, filed on 27th May, 2024, seeks permission for the Petitioner to terminate a pregnancy of 25 weeks, with consequential directions.
2. We took up the Petition on the same, for final hearing and disposal, with the consent of the parties.
3. We noticed that the private medical report annexed to the Petition had indicated no abnormality with the foetus. However, that report had not considered the emotional and mental health of the Petitioner. We called upon the Medical Board of the B.J. Government Medical College and Sassoon General Hospital, Pune ("***Sassoon Hospital***"), to provide its assessment in compliance with the *Medical Termination of Pregnancy Act, 1971* (for short, "***MTP Act***") *vide* our order dated 27th May, 2024. The matter was posted for 29th May, 2024 so that we could have the Medical Board's assessment on various parameters to be able to adjudicate the Petition.

4. It is clear from the record that the pregnancy is not owing to any crime but is due to a consensual relationship. It is evident that apart from subjecting herself to investigation by the Sassoon General Hospital, the Nigdi Police Station, Pune was also informed by the hospital, which, made its inquiries. It is clear from the record that no sexual crime is involved.

5. The Petitioner is said to be from the lower income group and has stated that grave psychological effect of the pregnancy and social stigma are the primary reasons for which the Petitioner desires to terminate the pregnancy. It is evident from the pleadings that the Petitioner is also aware that should the medical termination procedure fail, leading to an infant being born, the Petitioner intends to give the child in adoption through government agencies in accordance with law. Besides, it was pleaded that since that the Petitioner is just above 19 years of age, the continuation of pregnancy may run the risk of maternal mortality.

6. This morning, we were provided with the report dated 28th May, 2024 of the Medical Board of Sassoon Hospital. We took note of the Members of the Medical Board who reviewed the case (seven medical professionals with expertise in Gynaecology, Radiology, General Medicine, Pediatrics and Psychiatry).

7. The Medical Board's report deals with all facets stipulated for consideration for a decision under the MTP Act, including the facet of the mental health of the Petitioner. Upon review of the report, it is clear that the Petitioner is carrying a single live intrauterine foetus, aged at 25 weeks and 6 days. The Medical Board examined the Petitioner, counseled her and has returned an explicit finding that "considering the woman's current psychological status, sociocultural and economic conditions, continuation of pregnancy can lead to grave psychological injury".

8. The report of the Medical Board also returns a finding that the Petitioner is physically fit for undertaking medical termination of pregnancy. The Medical Board has returned a recommendation that termination of pregnancy is indeed recommended "by medical methods and if required surgical".

9. The Medical Board's report records the Petitioner's age at 19 years, 03 months and 10 days and the pregnancy at 26 weeks and 02 days. It is stated, based on an ultra-sonography report dated 28th May, 2024, that the foetus does not display any congenital abnormality.

10. Therefore, it is the psychological status of the Petitioner that lies at the heart of the matter. The Medical Board's report also indicates that a

child be born despite a termination procedure, would run a high possibility of immediate and a long term physical and mental disability, which would seriously jeopardize the quality of life of the child.

11. We have given our anxious consideration to the submissions of the Learned Counsel for the Petitioner as also, of the Learned Counsel representing the Union of India and the State of Maharashtra. The findings returned in the Medical Board's report are essentially that the Petitioner would suffer grave psychological injury if the pregnancy is continued.

12. Against this backdrop, it is noteworthy that Section 3(2)(b)(i) of the MTP Act contains the *indicia* that the pregnancy may be terminated by a registered medical practitioner where the continuance of the pregnancy would involve grave injury to the woman's physical or mental health. *Explanation-2* to Section 3(2) provides for a statutory presumption of grave injury to the mental health of the pregnant woman if the pregnancy has been caused by rape. However, such a provision would not mean that sexual assault would be the only ground on which a professional diagnostic medical conclusion can be drawn that continuation of pregnancy would constitute grave injury to the mental health.

13. We have also given our active consideration to Section 3(4)(b) of the MTP Act which provides that no pregnancy shall be terminated except with the consent of the pregnant woman. To satisfy ourselves, we convened a meeting with the Petitioner today, in Chambers, over this Court's electronic platform, ensuring access control and privacy of the Petitioner.

14. The protocols and procedure for termination of pregnancy is set out in the *Guidance Note for Medical Boards for Termination of Pregnancy Beyond 20 Weeks of Gestation (In cases referred by the Courts)* (for short, "**Guidance Note**"). The Guidance Note had been communicated by the Ministry of Health and Family Welfare, Government of India in 2017 to all Medical Boards for being followed in cases of late term termination. The procedure for termination in respect of a foetus where heartbeat is detected, is spelt out in Paragraph V.c of the Guidance Note under the head "Stopping Foetal heart beat".

15. We asked the Petitioner if the said procedure had been explained to her, and received a confirmation in the affirmative. The Guidance Note too requires the Medical Board to counsel the pregnant person seeking termination of pregnancy, and to explain the procedure involved. It is apparent that the Petitioner was given an explanation of the procedure by

the Medical Board as indeed the Learned Counsel representing her. We too explained the process to the Petitioner, and sought her views on whether she was making a conscious choice to opt for termination of pregnancy. Upon a careful consideration of the record and our interaction with the Petitioner, we are of the opinion that the Petitioner is indeed fully aware of the foetus having a heartbeat, and is also firmly desirous of terminating the pregnancy, after being made well aware of the procedure to be adopted.

16. Consequently, taking into account the explicit finding of grave psychological injury from the continuation of pregnancy, and the fact that the Petitioner is physically fit for termination, it appears to us that the Petitioner's sovereign entitlement to make an autonomous choice about her body and to exercise it in the form of opting for medical termination, lends itself to acceptance.

17. In a very recent judgement in the case of *A (Mother of X) Vs. State of Maharashtra and Anr.*¹, the Hon'ble Supreme Court has articulated in a fair degree of detail, the need for the Medical Board's report to reflect the effect of the pregnancy on the pregnant person's physical and mental health. The Hon'ble Supreme Court has also stated that primacy has to be

¹ (2024 SCC OnLine SC 835)

accorded to the pregnant person's consent. The following extract is noteworthy:

“21The purpose of the opinion of the RMP borrows from the legislative intent of the MTP Act which is to protect the health of a pregnant person and facilitate safe, hygienic, and legal abortion. The right to abortion is a concomitant right of dignity, autonomy and reproductive choice. This right is guaranteed under Article 21 of the Constitution. The decision to terminate pregnancy is deeply personal for any person. The choice exercised by a pregnant person is not merely about their reproductive freedom but also about their agency as recognised by this court in X v. State (NCT of Delhi). It is therefore imperative that the fundamental right of a pregnant person is not compromised for reasons other than to protect the physical and mental health of the pregnant person.”

[Emphasis Supplied]

18. In the facts of that case, the Hon'ble Supreme Court noted that the test of substantial foetal abnormalities (*indicia* referred to in Section 3(2B) of the MTP Act), which makes the length of the pregnancy irrelevant, would not be a test to be blindly applied. The Court returned a finding that a clarificatory report of the Medical Board (in the facts of that case) had fallen into error by denying termination on the ground that there were no congenital abnormalities in the foetus. The Court ruled that if the ingredients of Section 3(2B) of the MTP Act had been attracted, there would, in fact, be no need for permission from Courts. Consequently, it is clear that the law declared by the Hon'ble Supreme

Court is that congenital abnormalities in the foetus is not a pivotal determinative factor for a decision in such cases where the pregnancy is beyond 24 weeks. For felicity, we consider it necessary to extract and cite the following from the aforesaid judgment:

25.two clear postulates emerge as to the legislative intent of the MTP Act. Firstly, the health of the woman is paramount. This includes the risk avoided from the woman not availing unsafe and illegal methods or abortion. Secondly, disallowing terminations does not stop abortions, it only stops safe and accessible abortions. The opinion of the RMP and the medical board must balance the legislative mandate of the MTP Act and the fundamental right of the pregnant person seeking a termination of the pregnancy. However, as noticed above and by this Court in *X vs. State (NCT of Delhi)* the fear of prosecution among RMPs acts as a barrier for pregnant people in accessing safe abortion. Further, since the MTP Act only allows abortion beyond twenty four weeks if the fetus is diagnosed with substantial abnormalities, the medical board opines against the termination of pregnancy merely by stating that the threshold under Section 3(2-B) of the MTP Act is not satisfied. The clarificatory report dated 3 April 2024 fell into this error by denying a termination on the ground that the gestational age of the fetus is above twenty four weeks and there are no congenital abnormalities in the fetus.

27. The powers vested under the Constitution in the High Court and this Court allow them to enforce fundamental rights guaranteed under Part III of the Constitution. When a person approaches the court for permission to terminate a pregnancy, the courts apply their mind to the case and make a decision to protect the physical and mental health of the pregnant person. In doing so the court relies on the opinion of the medical board constituted under the MTP Act for their medical expertise. The court would thereafter apply their judicial mind to the opinion of the medical board. Therefore, the medical board cannot merely state that the grounds under Section 3(2-B) of the MTP Act are not met. The

exercise of the jurisdiction of the courts would be affected if they did not have the advantage of the medical opinion of the board as to the risk involved to the physical and mental health of the pregnant person. Therefore, a medical board must examine the pregnant person and opine on the aspect of the risk to their physical and mental health.”

[Emphasis Supplied]

19. We have also considered the submissions made by the Learned Counsel for the State suggesting that the partner in causation of the pregnancy would have a stake in the decision, particularly since the case at hand involves a consensual relationship, and not a sexual assault. We are satisfied that the law declared by the Hon’ble Supreme Court renders the partner as not being a stakeholder in the choice of exercise of reproductive right by the pregnant person i.e. the choice of whether to terminate or continue with the pregnancy. Towards this end, the following extracts from the same judgment of the Hon’ble Supreme Court are instructive:

32. *As noted above, the order of this court allowing ‘X’ to terminate her pregnancy is recalled. This decision is made in light of the decisional and bodily autonomy of the pregnant person and her parents. The MTP Act does not allow any interference with the personal choice of a pregnant person in terms of proceeding with the termination. The Act or indeed the jurisprudence around abortion developed by the courts leave no scope for interference by the family or the partner of a pregnant person in matters of reproductive choice.*

33. As stated above, the role of the RMPs and the medical board must be in a manner which allows the pregnant person to freely exercise their choice. In the present case, the guardians of 'X', namely her parents, have also consented for taking the pregnancy to term. This is permissible as 'X' is a minor and the consent of the guardian is prescribed under Section 3(4)(a) of the MTP Act.

34. In *Suchita Srivastava v. Chandigarh Admn.*, a three-judge Bench of this Court has held that the right to make reproductive choices is a facet of Article 21 of the Constitution. Further, the consent of the pregnant person in matters of reproductive choices and abortion is paramount. The purport of this Court's decision in *Suchita Srivastava (supra)* was to protect the right to abortion on a firm footing as an intrinsic element of the fundamental rights to privacy, dignity and bodily integrity as well as to reaffirm that matters of sexual and reproductive choices belong to the individual alone. In rejecting the State's jurisdiction as the *parens patriae* of the pregnant person, this Court held that no entity, even if it is the State, can speak on behalf of a pregnant person and usurp her consent. The choice to continue pregnancy to term, regardless of the court having allowed termination of the pregnancy, belongs to the individual alone.

[Emphasis Supplied]

20. Applying the aforesaid principles to the issues at hand, we have been persuaded to permit medical termination of the Petitioner's pregnancy. Consequently, we issue the following directions:-

- (a) The Petitioner shall be entitled to call upon the B.J. Government Medical College and Sassoon General Hospital, Pune to carry out the procedures stipulated for termination of her pregnancy, whether by medical methods or (if required)

surgically, in terms the Medical Board's report dated 28th May, 2024;

(b) The Petitioner having been found to be exposed to the risk of grave psychological injury should the termination not be effected, and having been found physically fit for termination of pregnancy, is hereby given permission for undergoing the stipulated procedures in accordance with the applicable protocols for effecting such termination;

(c) Considering that the Petitioner is an adult (aged over 19 years) and is entitled to her own sovereign decision for reproductive autonomy, the views of her parents or of her partner are not relevant, in terms of the law declared by the Hon'ble Supreme Court in the judgement referred to above;

(d) At this stage, we are not entering upon the pleading by the Petitioner in connection with surrendering an infant that may be born despite the termination procedure, in adoption. If a child were to be born despite performing the procedures permitted by us above, the Petitioner would be at liberty to take an appropriate sovereign choice of her own volition at

that stage, should such contingency at all arise. The Petitioner shall be at liberty to pursue all avenues legitimately available to her in such event.

21. Consequently, we permit the Petitioner to undergo the termination procedure at the Sassoon Hospital, Pune pursuant to this order at the earliest, and if possible, immediately today, i.e., 30th May, 2024. The Petitioner shall be entitled to present herself to the Sassoon Hospital for undergoing the procedures for termination of the pregnancy. Considering the grave danger to the Petitioner's mental health posed by the continuation of pregnancy, as diagnosed by the Medical Board, we are sure the Sassoon Hospital and its Medical Board would take care to ensure sensitive treatment and handling of the Petitioner in connection with all procedures, whether medical or administrative, keeping her emotional and mental health at the forefront.

22. Before parting with the matter, we wish to express our deep appreciation to the Learned Counsels for the Petitioner, the Union of India and the State of Maharashtra for the objective and professional assistance rendered to the Court, enabling us to arrive at the decision rendered in this order, in an objective manner based on empirical evidence, and the law declared by the Hon'ble Supreme Court.

23. The Writ Petition stands disposed of accordingly. No order as to costs.

24. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[SOMASEKHAR SUNDARESAN, J.]

[N.R. BORKAR, J.]