

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2210 OF 2020

Nidhi Nilesh Jadhav

...Petitioner

Versus

State Of Maharashtra

...Respondent

....

Ms.Afreen Khan a/w. Rachita A. Padwal, Advocate for the Petitioner.
Smt. P.J. Gavhane, AGP, for the Respondent – State.

....

CORAM : K. K. TATED &
SARANG V. KOTWAL, JJ.

DATED : 03rd MARCH, 2020

[IN CHAMBERS AT 2:45 P.M.]

PC :

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

2. This petition is filed by the petitioner mainly for permission to undergo medical termination of pregnancy at the medical facility of her choice.

3. It is the case of the petitioner that she is into 26th week of pregnancy. The medical examination conducted on 27.1.2020 showed that the fetus is suffering from hydrocephalus with bilateral feet and anomaly. On 11.2.2020, Ulro Sonography was performed by Dr. Ashwini at KEM

Hospital. Following observations were mentioned in the Report:

“Dilated Lt. Lateral ventricle, cerebral atrophy, & genu valgum.”

4. The petitioner has stated in her petition that she desired to terminate the pregnancy, but, she was barred from doing so because the pregnancy had exceeded the statutory period of 20 weeks provided under the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as ‘MTP Act’).

5. We have heard Ms.Afreen Khan, learned Counsel for the Petitioner and Smt. P.J. Gavhane, learned A.G.P for the Respondent – State.

6. Learned counsel for the petitioner relied on a few 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 of 20 weeks, provided under the MTP Act was over.

7. The learned Counsel for the Petitioner had submitted that the Petitioner was from Ratnagiri District, but was staying at Panvel at the time of filing of this Petition.

Learned Counsel submitted that the Petitioner was ready and willing to attend Sir J.J. Group of Hospitals, Mumbai for her medical examination.

8. In view thereof and considering the ratio laid down in these judgments, vide order dated 28.2.2020, we had directed the petitioner to approach the Medical Board in Sir J. J. Group of Hospitals, Mumbai 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 of the Board was submitted to this court. The concluding paragraph of the report reads thus:-

“ **COMMITTEE OPINION**

AFTER CAREFUL EXAMINATION OF THE PATIENT AND STUDY OF THE ULTRASONOGRAPHY REPORT. THE COMMITTEE CONFORMS THAT THE FETUS SUFFER FROM ASYMMETRICAL HYDROCEPHALUS, SMALL POSTERIOR FOSSA, NON ALLGNMENT OF BILATERAL FOOT ? CONGENITAL TALIPES EQUINES VARUS, DEFORMITY OF THE BOTH HANDS ? SYNDACTYLY.

THE SAID CONDITION OF THE FETUS CAN HAVE

**"SUBSTANTIAL RISK OF SERIOUS PHYSICAL HANDICAP
WITH A VERY HIGH MORBIDITY AND MORTALITY,"**

THE WOMAN HAS EXPRESSED HER DESIRE TO
TERMINATE THE PREGNANCY AND IS WELL
INFORMED ABOUT THE NATURE OF THE CONDITION
OF THE FETUS AND ITS OUTCOME.

SHE IS ANGUISHED WITH THE CONDITION OF
THE FETUS IN THE UTERO.

SINCE THE PREGNANCY HAS ADVANCED TO 25
WEEKS AND IS BEYOND 20 WEEKS CUT OF THE
MEDICAL TERMINATION OF PREGNANCY ACT. SHE
HAS APPROACHED HONOURABLE COURT FOR
TERMINATION OF PREGNANCY.

AT THIS STAGE OF PREGNANCY, THE RISK OF
TERMINATION REMAINS THE SAME AS THAT OF
DELIVERY AT TERM.

AND IF THE COURT PERMITS THE PREGNANCY
CAN BE TERMINATED WITH DUE RISK IN ANY
TERTIARY CENTRE AS DESIRED BY THE PREGNANT
WOMAN.

THE HONOURABLE COURT IS HEREBY
REQUESTED TO INSTRUCT THE PARENTS
TO TAKE THE RESPONSIBILITY OF THE CHILD IF BORN
ALIVE."

9. In this background, we 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 thus :

“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 1.--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 2.-- 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 to 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 the MTP Act, the maximum period of pregnancy which can be terminated is prescribed as twenty weeks. The circumstances under which the pregnancy can be terminated are set out under this Section. One such circumstance, as mentioned in Section 3(2)(b)(ii) is that, the 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, however, the Board has not opined that the termination of the pregnancy was immediately necessary to save the petitioner’s life. The petitioner is more than 20 weeks into her pregnancy.

14. This very issue is discussed and is dealt with by a Division Bench of this Court (Coram: A.S. Oka & M.S. Sonak, JJ.) in Writ Petition Nos.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. 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.

17. 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.

18. 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.

19. 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 the 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.

20. As mentioned earlier, the Medical Board has opined that if the Court permits the pregnancy can be terminated with due risk in any tertiary centre as desired by the pregnant woman. It was specifically reported that the condition of the fetus fulfills the criteria of substantial risk of serious physical handicap with a very high morbidity and mortality.

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

i. The petitioner is permitted to undergo medical termination of pregnancy as per Medical Board's opinion dated 2.3.2020, 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. All concerned parties to act on the authenticated copy of this order.

(SARANG V. KOTWAL, J.)

(K.K.TATED, J.)

Deshmane (PS)