

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

AD HOC WP LD-VC NO84/2020

Punam Abhinav Shah .. Petitioner

vs.

State of Maharashtra .. Respondents

Ms.Ruchita Padwal for the petitioner
Ms.Jyoti Chavan, A.G.P. for the State

**CORAM: K.K.TATED, &
MILIND N. JADHAV, JJ.
DATED : JULY 03, 2020**

P.C.

. Heard.

2 Today the matter is placed on board for speaking to minutes of order dated June 30, 2020.

3 On page 13, in paragraph 22(iii),:

The following be deleted:

'In case if the child is born alive, it shall be the responsibility of the petitioner and her husband i.e. child's parents to assume full responsibility for such child.'

The following to be added:

"In case, if the child is born alive and if the Petitioner and her husband are not willing or are not in a position to

take responsibility of such a child then the State and its agencies will have to assume full responsibility for such a child.”

4 Rest of the order remains as it is.

5 The original order shall stand corrected accordingly which reads thus:

R.M. AMBERKAR
(Private Secretary)

**IN THE HIGH COURT OF JUDICATURE AT
BOMBAY
O.O.C.J.**

**LD-VC-84 OF 2020
WRIT PETITION NO. _____ OF 2020
(To be numbered subsequently)**

Punam Abhinav Shah .. Petitioner

Versus

The State of Maharashtra & Anr. .. Respondents

-
- Ms. Aditi Saxena for Petitioner.
 - Ms. Jyoti Chavan AGP for State.
-

**CORAM : K.K. TATED &
MILIND N. JADHAV, JJ.**

**DATE : JUNE 30, 2020.
(Through Video**

**Conferencing)
P.C.:**

Rule. Rule made returnable forthwith.

Heard by consent of the learned counsel for the parties.

This petition is filed for seeking permission to terminate the pregnancy. The petitioner is 28 weeks pregnant. The foetus has been detected with severe malformation. It is the claim of the petitioner that during an ultrasonography of gravid uterus conducted on 13th June 2020, it was revealed that the foetus suffered from Chiari II malformation (Exhibit "D"). The petitioner has annexed a copy of the ultrasonography of gravid uterus conducted by Dr. Manjusha Kulkarni of Yashashri Diagnostic Centre. The conclusion noted in the said report reads thus:-

"CONCLUSION:

A single live fetus is seen in changing lie.

LMP = 18/11/2019

LMP averaged gestational age = 29 weeks 5

days, E.D.D. by L.M.P. = 24/08/2020

USG averaged gestational age = 27 weeks 1 day.

Fetal congenital anomalies are seen-

Fetal spine shows multiple bifidae and open neural tube defect.

Small head, Lemon shaped skull seen with narrow posterior fossa, small cerebellum.

Mild ventriculomegaly.

This is suggestive of Chiari-II malformation."

Thereafter, the petitioner took a second opinion from Dr. Harish Shetty who recommended a second USG of gravid uterus. Dr. Bharat Sanghavi conducted the test at Arihant Diagnostic Centre on 19.6.2020 and the second Report confirmed the findings of multiple anomalies and noted as follows :

"The spinal canal in the lumbar and sacral region is open posteriorly. Lemon sign is noted, the skull is small, the cerebellum has herniated via the foramen magnum. (arnold chiari malformation)

Single live fetus in cephalic presentation of 28 weeks 1 days."

It is evident that the petitioner has made out a case as envisaged by sub-section (2) of Section 3 of the Medical Termination of Pregnancy Act, 1971.

6. By order dated 23.06.2020 this Court referred the case of the petitioner for seeking opinion of the Medical Board from J.J.Hospital, Mumbai, interalia, directing the board to examine the petitioner and submit the report to this Court as to whether it would be advisable to allow the petitioner to undergo medical termination of pregnancy after considering the danger to the life of the petitioner as well as the life of the foetus, if medical termination of pregnancy is not permitted.

7. The Medical Board submitted its report dated 27.06.2020 and gave the following opinion :

COMMITTEE OPINION

"AFTER CAREFUL EXAMINATION OF THE PATIENT AND STUDY OF THIS ULTRASONOGRAPHY. THE COMMITTEE CONFIRMS THAT THE FETUS HAS NUEROLOGICAL ABNORMALITIES IN THE FORM OF SPINA BIFIDA, OPEN NEURAL TUBE DEFECT, COLPOCEPHALY AND SMALL POSTERIOR FOSSA.

THE SAID CONDITION OF THE FETUS FULFILS THE CRITERIA OF "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.

IN VIEW OF THE FETAL NUEROLOGICAL ABNORMALITIES SHE IS ANGUISHED WITH THE CONDITION OF THE FETUS IN THE UTERO. HENCE COMMITTEE IS OF THE OPINION THAT IT IS ADVISABLE TO TERMINATE THE PREGNANCY IF COURT PERMITS.

SINCE THE PREGNANCY HAS ADVANCED TO 28 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 NATURAL LABOUR AT TERM.

AND IF THE COURT PERMITS THE PREGNANCY CAN BE TERMINATED AS DESIRED BY THE PREGNANT WOMAN WITH DUE RISK IN ANY TERTIARY CENTRE AS DESIRED BY THE PREGNANT WOMAN. BABY BORN MAY BE ALIVE AS IT IS 28 WEEKS PREGNANCY AND BABY WT IS APPROXIMATELY 1.3 kg. HENCE THE CARE OF BABY WILL BE RESPONSIBILITY OF THE PARENTS."

8. We have heard the learned counsels appearing for the petitioner and the respondent-state.

9. Considering the various decisions referred to and relied upon by the petitioner in the petition and the grounds enumerated therein and the report of the medical board which has been brought to the notice of

the petitioner, it is evident that the petitioner has made out a case as envisaged by sub-section (2) of Section 3 of the Medical Termination of Pregnancy Act, 1971.

10. In this background, we have considered various aspects of the matter in the light of the ratio of the various judgments of the Hon'ble Supreme Court and of this Court. It is necessary to consider some important aspects in this connection.

11. 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.”

12. 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 also set out under this Section. One such circumstance, as mentioned in Section 3(2)(b)(i) is that the termination of pregnancy is allowed if the continuance of the pregnancy involved a risk to the life of the pregnant woman or grave injury to her physical or mental health. Explanation 1 to this subsection provides that when the pregnancy was caused by rape, it was presumed to constitute a grave injury to the mental health of the pregnant woman. In the instant case, this particular circumstance is clearly existing and there is no doubt that continuance of this pregnancy is causing a grave injury to the mental health of the Petitioner. Apart from this, of course, considering her tender age of 17 years, there is an inherent risk to her life. The only difficulty in the present case is that the statutory period of 20 weeks

is over, more than four weeks ago. The Petitioner has entered into 25th week of her pregnancy and, therefore, the MTP Act does not permit medical termination of pregnancy in such cases.

13. 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.”

14. These issues are discussed and are 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 paragraphs-79 and 80, the Division Bench observed that in a situation where the continuance of pregnancy poses grave injury to the physical or mental health of the mother, if the pregnant mother is forced to continue with her pregnancy merely because the pregnancy had extended beyond the ceiling of 20 weeks, there would arise a serious affront to the fundamental right of such mother to privacy, to exercise reproductive choices, to bodily integrity and to her dignity. It was further observed that the principle of liberal or purposive construction would 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 the right to live with human dignity.

17. Considering all these facets, the Division Bench held, *inter alia*, 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.

18. 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.

19. 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 is offered best medical treatment available in the circumstances and in such cases if the

parents of such child were not willing to or are 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.

20. 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.

21. As mentioned earlier, the Medical Board has

opined that there is substantial risk of serious physical handicap with a very high morbidity and mortality to the condition of the foetus and knowing fully well the petitioner has expressed her desire to terminate the pregnancy to the committee and is well informed about the nature of the condition of the foetus and its outcome.

22. Considering the above discussion following order is passed :

(i) The petitioner is permitted to terminate the pregnancy as per Medical Board's opinion dated 27.06.2020 at a medical facility of her choice. However, such procedure shall be conducted at a hospital which has all the necessary permissions issued under the MTP Act and MTP Rules 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 the

child for saving its life.

(iii) In case, if the child is born alive and if the Petitioner and her husband are not willing or are not in a position to take responsibility of such a child then the State and its agencies will have to assume full responsibility for such a child.

(iv) Rule is made absolute in the aforesaid terms.

(v) All concerned parties to act on an authenticated copy of this order.

(vi) Writ Petition stands disposed of in the aforesaid terms.

23. Considering that the above matter has been heard via Video Conferencing due to the COVID -19 pandemic, it will not presently be possible to sign the copy of this order. In these circumstances, the order will be digitally signed by the Personal Assistant / Private Secretary of this Court. All concerned to act on production by fax or email of a digitally signed copy of this order.

[MILIND N. JADHAV, J.]

[K.K. TATED, J.]