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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6430 OF 2018

Neelam Choudhary .....Petitioner

V/s.

1.Union of India
2. State of Maharashtra
3. Ministry of Health and Family Welfare, through its Secretary .....Respondents

Ms. Gayatri Singh Senior Advocate a/w Ms. Neha Philip a/w. Mr. Kranti L. C. for the petitioner
Mr. S. L. Babar AGP for the State

CORAM : SHANTANU KEMKAR AND NITIN W. SAMBRE, JJ.

DATE : JUNE 19, 2018.

ORAL ORDER: [PER: NITIN W. SAMBRE, J.]

Heard the learned senior counsel Ms. Gayatri Sing and the learned AGP for the respondent.

2 By way of present petition, the petitioner has sought following

reliefs:

"a. For a writ of declaration or any other appropriate writ, order or direction in the nature of declaration, declaring section 3 (2) (b) of The Medical Termination of Pregnancy Act, 1971 to the limited extent that it stipulates a ceiling of 20 weeks for an abortion to be done under Section 3, as ultra vires Article 14 and 21 of the Constitution of India;

b. For a writ of declaration or any other appropriate writ, order or direction in the nature of declaration, declaring that the case of the Petitioner is a fit case for exercising jurisdiction under Section 5 of the Medical Termination of Pregnancy Act, 1971.

c. For a writ of mandamus or any other writ, order, or direction in the nature of mandamus directing the Respondents to-

i. Constitute a Medical Committee for the examination of the Petitioner to assist this Hon'ble court in arriving at a decision on the plea of the Petitioner;

ii. allow the Petitioner to undergo Medical Termination of Pregnancy at a medical facility of her choice.

d. For a writ of mandamus or any other writ, order, or direction in the nature of mandamus directing the Respondents to set up appropriate Medical Committees in each district in the State of Maharashtra to assess the pregnancy and offer MTP to the Petitioner and other women in need of the procedure beyond the prescribed 20 weeks limit.

e. For an order directing Respondent No. 1 to produce the report of MTP Committee which included the Health Secretary, Mr. Naresh Dayal, former Director-General of the Indian Council of Medical Research and Dr. N K Ganguly as its members as stated in para 9 of the petition."

3 It is urged by the learned counsel for the petitioner that section 3 of the Medical Termination of Pregnancy Act, 1971 (Hereinafter shall be referred to as 'the Act' for the sake of brevity) provides for the circumstances in which pregnancy may be terminated by

registered medical practitioner. According to her, the petitioner got married in 2012 and initially she was not staying with her husband. It is further claimed that petitioner was pursuing her studies and thrice attempted unsuccessfully to clear 12th standard examination. From 2016 onwards, the petitioner started residing with her husband and in laws, however, certain differences cropped up resulting into petitioner coming back and resided with her parents. In 2016, it is claimed by the petitioner that in view of the cruelty and violence practiced by her husband, an NC complaint for offence under section 323, 504 of the Indian Penal Code came to be registered.

4 It is the case of the petitioner that since the husband of the petitioner promised her of well being, she restored her relationship with her husband. According to her, the physical and mental harassment by her husband and in-laws continued even

thereafter. According to her, she is a patient of epilepsy and is under constant medication from K.E.M. Hospital, Bombay.

5 While conceiving her marriage, the petitioner was time and again instructed her husband to have protective sex *qua* birth of a child. However, the husband of the petitioner does not pay any heed to the same. On the other hand, it is claimed that the petitioner being a patient of epilepsy is unable to consume oral contraceptives on account of potential reaction with the drugs that she has administered for treating her epilepsy.

6 In view of constant mental and physical cruelty, the petitioner came back to her parental house after having diagnosed of carrying pregnancy of about more than 20 weeks.

7 In the aforesaid factual background, the learned counsel for the petitioner submits that the petitioner does not intend to continue with the pregnancy as she intend to pursue her studies and apply for divorce. According to her, taking into account her health problem of epilepsy, it will not be advisable to continue with the

pregnancy and also pursue her studies. A further submission is made that in the aforesaid background, the respondent be directed to constitute a Medical Board so as to ensure termination of pregnancy.

8 *Per contra* the learned AGP would oppose the claim and would urge that the petition is not maintainable as there is no medical advice to the petitioner to terminate her pregnancy of more than 20 weeks. According to him, there is no substance in the petition and the petition is liable to be dismissed.

9 A foremost question that is required to be addressed in factual background raised in the petition is whether the petitioner's prayer for constitution of Medical Board for considering her claim for termination of pregnancy is required to be ordered and if no, whether this Court is required to go into examining the validity/virus of the provisions of the Act in question, particularly section 3 (2) (b) of the Act.

10 From the record, it is *ex-facie* clear that it is the case of the petitioner that she is carrying as on date pregnancy of about 23 weeks. The petitioner was got married in 2012 and started residing with her husband and in-laws in 2016. The fact remains

that she is educated up to 11th standard and pursuing further studies. It is also apparent that in 2016, an NC came to be registered for an offence under section 323, 504 of the Indian Penal Code in view of the complaint lodged by the petitioner against her husband and in-laws. It is apparently clear that the said NC complaint was not further prosecuted by the petitioner. Rather, in categorical terms she has admitted that, she has started residing with her husband. Out of the said relationship, she conceived a child and presently carrying pregnancy of 23 weeks.

11 In the aforesaid factual background, if the claim of the petitioner is examined *qua* her prayer for issuance of directions for permission to terminate pregnancy, it is required to be noted that the none of the medical papers which are placed on record certifies that there is imminent danger to life of the petitioner nor the condition of the foetus is in compatible with the extra uterine life. It is even not the case of the petitioner that the foetus would not be able to survive. The petitioner has also not demonstrated that continuation of pregnancy can gravely endanger the physical and mental health of the petitioner.

12 Apart from above, it is required to be noted that the petitioner is seeking termination of pregnancy based on the cause viz. her matrimonial discord with her husband, her intention to initiate divorce proceedings and to pursue her career and improve her education qualification. If the aforesaid cause as cited by the petitioner are examined in the light of the provisions of the Medical Termination of Pregnancy Act, 1971, same not at all recognized to form basis for accepting the prayer of the petitioner to terminate the pregnancy. If the scheme of the Act is appreciated, the medical practitioner is permitted to terminate the pregnancy where the length of the pregnancy does not exceed 12 weeks. In case it exceeds 12 weeks but does not exceeds 20 weeks, two registered medical practitioners should be of the opinion, formed in good faith that the continuance of pregnancy would involve risk to the life of the pregnant woman or of grave injury to her physical and mental health or there is substantial risk, if the child were born, same would suffer

from physical or mental abnormality, has to be seriously handicapped. The explanation 1 provides for termination of pregnancy which was caused by rape and such rape is presumed to constitute a grave injury to the mental health of the victim woman. Explanation 2 to section 3 provides for the grave injury to the mental health of the pregnant woman, in case if the pregnancy occurs as a result of failure of any

device or method used by married woman or her husband for the purpose of limiting the number of children.

13 Section 5 of the Act provides for non attraction of provisions of section 3, in case the opinion of two registered medical practitioners which is formed in good faith that the termination of such pregnancy is immediately necessary to save the life of the woman.

14 In the aforesaid background, what is to be noticed is the Statute provides for the termination of pregnancy by registered medical practitioner in the circumstances prescribed under section 3 of the Act.

15 It is not the case of the petitioner that she is of unsound mind or there is any physical or mental deformity which prompts her not to continue with the pregnancy. As observed herein before, there is no material whatsoever brought on record to substantiate the said claim.

16 If the case of the petitioner in its entirety is appreciated, what is to be noticed is the petitioner is seeking permission to terminate pregnancy by issuing appropriate

directions merely for asking when the fact remains that she is carrying pregnancy out of her marital life and she is major and educated.

17 That being so, in our opinion, the prayer put forth by the petitioner does not warrant any indulgence at the hands of this

Court.

18 The Apex Court in the matter of **Suchita Srivastava V/s. Chandigarh Administration**[1] has expressed that right of a woman to have reproduction, the choice is insegregable part of her personal liberty as envisaged under Article 21 of the Constitution. It is also observed by the Apex Court that such woman has sacrosanct right to have her bodily integrity.

The Apex Court in the matter of **Suchita Srivastava** [*cited supra*] had an occasion to consider the provisions of the Act *qua* fundamental rights. While dealing with the said issue, the Apex

Court in para 11 has observed thus:

> *"11. A plain reading of the above-quoted provision makes it clear that Indian law allows for abortion only if the specified conditions are met. When the MTP Act was first enacted in 1971 it was largely modelled on the Abortion Act of 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified 'right to abortion' and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers. There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means*

[1] **[2009 (9) SCC 1]**

that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birthcontrol methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices".

19 The Apex Court in the matter of **Z *V/s.* State of Bihar and others**[2] while dealing with the Statutory provisions of the aforesaid Statute has observed thus:

*"**27.** Thus, the opinion has to be formed by the registered practitioners as per the Act and they are required to form an opinion that continuance of pregnancy would involve a grave mental or physical harm to her. We have already referred to Explanation 1 which includes allegation of rape. As is perceivable, the Appellant had gone from a women rehabilitation centre, had given consent for termination of pregnancy and had alleged about rape committed on her, but the termination was not carried out. In such a circumstance, we are obliged to hold that there has been negligence in*

[2] **[AIR 2017 SC 3908]**

carrying out the statutory duty, as a result of which, the Appellant has been constrained to suffer grave mental injury.

30. *In that context, the Court adverted to the distinction between the 'mental illness' and 'mental retardation'. It also noted that the expert body's findings were in favour of continuation of pregnancy and took note of the fact that the victim had clearly given her willingness to bear a child. In that context, the Court stated:*

"The victim's reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter. We have adopted this position since the applicable statute clearly contemplates that even a woman who is found to be "mentally retarded" should give her consent for the termination of a pregnancy."

And again:

"There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood Under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling State interest" in protecting the life of the prospective child. Therefore, the termination of a pregnancy

is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices."

31 *Explaining the provision of the Act, the Court opined that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a continuance of the pregnancy would involve risk to the life of the pregnant woman or of grave injury to her physical or mental health or when 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. While the satisfaction of one medical practitioner is required for terminating a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period.*

32 *The Court in* ***Suchita Srivastava*** *also took note of the provision that termination of the pregnancy has been contemplated when the same is the result of a rape or a failure of birth control methods, since both of these eventualities have been equated with a grave injury to the mental health of a woman. The Court emphasized that in all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. The three-Judge Bench referred to the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, '1995 Act') and opined that in the said Act also "mental illness" has been defined as mental disorder other than mental retardation.*

37 *The Court referred to the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971 [GA Res 2856 (XXVI) of 20-12-1971] and relied on principle No. 7 of the same. Principle No. 7 reads as follows:*

> *"50. ….**7.** Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.*
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> ***61** The legislative intention of 1971 Act and the decision in **Suchita Srivastava** prominently emphasise on personal autonomy of a pregnant woman to terminate the pregnancy in terms of Section 3 of the Act. Recently, Parliament has passed the Mental Healthcare Act, 2017 which has received the assent of the President on 7th April, 2017. The said Act shall come into force on the date of notification in the official gazette by the Central Government or on the date of completion of the period of nine months from 7th April, 2017. We are referring to the same only to highlight the legislative concern in this regard. It has to be borne in mind that element of time is extremely significant in a case of pregnancy as every day matters and, therefore, the hospitals should be absolutely careful and treating physicians should be well advised to conduct themselves with accentuated sensitivity so that the rights of a woman is not hindered. The fundamental concept relating to bodily integrity, personal autonomy and sovereignty over her body have to be given requisite respect while taking the decision and the concept of consent by a guardian in the case of major should not be over emphasized."*

20 Similar issue was considered by this Court in the matter of **Shaikh Ayesha Khatoon** [*cited supra*]. The Division Bench of this Court had an occasion to consider

the provisions of section 3 & 5 of the Act. The Division Bench while dealing with same has observed as under:

> *"11. Section 3 of the Act of 1971 thus prescribes the outer limit of 20 weeks in the matter of termination of pregnancy in certain circumstances enumerated in Clauses (i) & (ii) of subsection 2(b) of Section 3. Section 5 carves out an exception to Sections 3 & 4. It is provided that 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. It is contended relying on the provisions of sub-section (1) of Section 5 by the petitioner that the bar contained in subsection (2) of Section 3 laying down the conditions for according permission to terminate the pregnancy is not absolute bar and in appropriate cases such permission can be accorded. Section 5 of the Act of 1971 carves out an exception in relation to the outer limit provided under sub-section (2) of Section 3 of the Act of 1971 i.e. 20 weeks in case where the termination of such pregnancy is immediately necessary to save the life of the pregnant woman. It is the contention of the petitioner that firstly the trauma that the petitioner is likely to suffer is life threatening and it shall be construed that exercise of a choice in the event there are foetal abnormalities found and the chances of survives of the baby, if allowed to take birth, are minimum, is a matter to be considered within the parameters of Section 5 of the Act of 1971. Apart from this, the petitioner contends that the provisions of sub-section (2) including clauses (i) & (ii) of sub-section (2)(b) of Section 3 are required to be read in Section 5 except the outer limit of twenty weeks that has been provided in sub-section (2)(b) of Section 3 of the Act of 1971.*
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> *12. The petitioner thus contends that if 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, it will be open for the Court to accord*

permission to terminate the pregnancy by taking recourse to Section 5 of the Act of 1971. It is further contended that the concluding portion of Section 5 prescribing the limitation in permitting such a choice or issuing direction in respect of termination of the pregnancy only in the event to save the life of the pregnant woman shall have to be interpreted harmoniously and looking to the object of the provision. It also needs to be considered that a pregnant woman has a right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. In this context reliance can be placed on the observations of Hon'ble Supreme Court in the matter of Suchita Srivastava vs. Chandigarh Administration reported in 2009 (9) SCC 1. In paragraph-11 of said judgment, it is observed by the Hon'ble Supreme Court as narrated below :

"11. A plain reading of the above-quoted provision makes it clear that Indian law allows for abortion only if the specified conditions are met. When the MTP Act was first enacted in 1971 it was largely modelled on the Abortion Act of 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified 'right to abortion' and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers. There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birthcontrol methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified

> *in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices."*

21 From the observations made by the Apex Court in the matter of ***Suchita Srivastava*** *and* **Z *V/s.* State of Bihar and others** [*cited supra*] it is abundantly clear that provisions of the 1971 Act were examined in the backdrop of Article 21 of the Constitution of India.

The Apex Court was sensitive to the women's right of reproduction choice *qua* operation as provided under the Statute. The right to terminate the pregnancy on the said grounds which were beyond the control of such victim women are dealt with in detail and the Apex Court observed that in case a grave injury to mental health of a pregnant woman, in case of a rape, aids, mental incapacity such as mental retardation will be prevailing circumstances in exercising powers under section 3 of the Act. It is also required to be noted that in the matter of **Suchita Srivastava** [*cited supra*] the Apex Court has held that the provisions of 1971 Act can be viewed as putting reasonable restrictions on exercise of reproduction choice of a woman.

22 In the wake of law laid down and discussed herein before, the fact remains that the ground which is sought to be espoused by the petitioner seeking termination of pregnancy is no more germane to the requirement under section 3 of the Act. Her matrimonial discord cannot be considered as a reason for permitting her to have termination of pregnancy by invoking provisions of the Medical Termination of Pregnancy Act, 1971. For the eventualities which are spelt out in the petition, it is really difficult to consider and grant the request of the petitioner for permitting her to have termination of pregnancy.

23 Apart from above, though the petitioner has raised a plea of challenge to provisions of Section 3 of the Act being violative of Article 14 & 21 of the Constitution of India, the petitioner has hardly tried to justify her claim as no arguments are canvassed on the said issue.

24 That being so, this Court has reached to a conclusion that there is no substance in the present petition and same deserves to be dismissed and accordingly dismissed.

[NITIN W. SAMBRE, J.] **[SHANTANU KEMKAR, J.]**