



**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR**

S.B. Civil Writ Petition No. 14827/2019

S (name withheld)

----Petitioner

Versus

1. The State Of Rajasthan, Through The Chief Secretary, Government Of Rajasthan, Secretariat, Jaipur (Raj.).
2. The Secretary, Department Of Medical And Health, Government Of Rajasthan, Jaipur (Raj.).
3. The District Collector, Churu (Raj.).
4. The Controller Of Principal Of Pandit Deendayal Upadhyay Associate Group Of Hospital And Medical, College, Churu, (Raj.).
5. The Chief Medical And Health Officer, Churu (Raj.).
6. The S.H.O., Police Station Bidasar, District Churu (Raj.).

----Respondents



For Petitioner(s) : Mr. Mohan Lal  
For Respondent(s) : Mr. Pankaj Sharma, Additional  
Advocate General with Mr. Rishi Soni  
Mr. Vivek Shrimali for Navjeevan  
Sansthan

**JUSTICE DINESH MEHTA**

**Judgment**

**Reportable**

**17/10/2019**

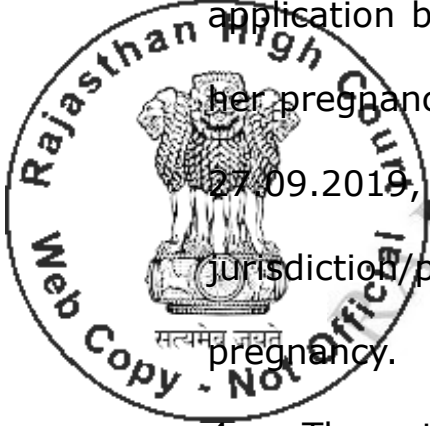
1. Looking to the issue involved and in order to maintain the secrecy, rather dignity of the petitioner, it is directed that the name of the petitioner in the cause-title be substituted with Ms. 'S' so that her identity is not revealed. The Registry of the Court shall substitute the name of the petitioner with Ms. 'S' in all records, including the official website of this Court.

2. The writ petition at hand has been filed by the petitioner 'S'- a 17 years old girl through her natural guardian, i.e. mother praying inter alia that she be allowed to terminate her pregnancy,



which had occasioned on account of sexual assault, against which an FIR came to be lodged and the proceedings are pending in a competent Court. Consequent to the rape committed on 'S', she was impregnated and the FIR came to be filed only after she came to realize of her pregnancy.

3. Prior to approaching this Court, the petitioner filed an application before the Trial Court seeking permission to terminate her pregnancy. Said application was turned down vide order dated 27.09.2019, inter alia, observing that it does not have jurisdiction/power to pass an order of medical termination of pregnancy.



4. The petitioner has, therefore, approached this Court invoking inherent jurisdiction under Article 226 of the Constitution of India by way of filing the present writ petition on 01.10.2019, in a bid to seek protection of right to privacy and right to live with dignity held to be covered within the ambit of right to life and liberty embodied under Article 21 of the Constitution of India.

5. On 04.10.2019, when the matter came up for motion hearing, this Court ordered to issue notices to the respondents and directed Mr. Pankaj Sharma, learned Additional Advocate General to complete his instructions and furnish medical report (if any) of victim 'S' particularly regarding the age of the foetus and whether termination of pregnancy is permissible, as per the provisions of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as "the Act" or "the MTP Act").

6. On 15.10.2019, when the matter came up for consideration, learned Additional Advocate General informed this Court that the foetus is now about 25 weeks and as per the report, the petitioner



is fit to carry the pregnancy and deliver the child safely. On such date, during the course of proceedings, the Court required a medical report to ascertain as to whether the termination of pregnancy will be conducive to the health of 'S' and/or it may pose any serious threat to her life, body and future maternity.

7. During the course of proceedings, Court asked to learned counsel appearing for the petitioner as to whether the petitioner and her mother are determined to get the pregnancy terminated or they are prepared for other alternative; more particularly handing over the prospective baby to some social organization or shelter home etc. With respect to Court's concern, learned counsel sought some time to complete his instructions.

8. During the proceedings of 15<sup>th</sup> October, 2019, Mr. Vivek Shrimali, learned counsel, put in appearance and volunteered that he has association with an organization, which is involved in philanthropic and welfare activities of embracing the destituted, abandoned and orphan children and then raising them, which may volunteer to bear the expenses of the delivery, so also take the custody of the child for his/her upbringing, if the Court so permits.

9. Pursuant to the direction given by this Court, a Medical Board has examined the petitioner and gave report dated 16.10.2019 to the effect that she is having pregnancy of 25 weeks 3 days. It will be apt to reproduce the opinion expressed by the Medical Board:-

"In opinion of Medical Board, she is 25 W 3 D pregnancy (by sonography) with single live fetus, her blood investigations are within normal limits and she does not have any complication of pregnancy. At present her condition seems to be suggestive that there is no serious threat to her life in termination of pregnancy. However, at the time of termination or after termination risk of



known medical or surgical complication cannot be denied.”

10. An application has been moved by a society 'Navjeevan Sansthan' - running an orphanage 'Luv Kush Bal Vikas Kendra inter alia, volunteering to bear the expenses of the delivery and undertake the responsibility of raising and maintaining the child to be born. It has been stated in the application that applicant institution is a Society registered under the Rajasthan Societies Registration Act, 1958 and has been set up with an object to protect abandoned and destituted children. The State of Rajasthan, vide its order dated 21.12.1989, has recognized and declared it as "A fit Institution to work for the Welfare of abandoned and destituted children".

11. Learned counsel for the petitioner, however, maintained that petitioner wants termination of pregnancy. Inviting Court's attention towards explanation I to Sub-section (2) of Section 3 of the MTP Act, he contended that the rape itself is to be treated as grave injury to the mental health of the pregnant woman.

12. In support of his contentions, learned counsel invited Court's attention towards the judgment dated 29.01.2019, passed by this Court in ***Nisha Vaishnav Vs. State of Rajasthan & Ors. (S.B. Civil Writ Petition No.1271/2019)*** and submitted that this Court, while dealing with the law on the subject and various decisions, has permitted termination of pregnancy in almost similar facts, when the pregnancy was of 22 weeks.

13. Mr. Pankaj Sharma, learned Additional Advocate General appearing for the respondent State, assisted the Court by saying that as far as termination of pregnancy of 'S', in the present case,





is concerned, the same can legally be carried out in light of the series of judgments, including the recent judgment of Hon'ble the Supreme Court being **Z Vs. State of Bihar & Ors.** reported in **(2018) 11 SCC 572.** He added that in some cases, even pregnancy of 31 weeks has been allowed to be terminated, of course, looking to the health condition of the pregnant lady and the foetus.

14. In response to the application filed by the Society, learned AAG fairly urged that the State cannot and does not have any objection if the application of the Society is granted, while assuring that State would nevertheless provide all possible help to the petitioner.

15. Mr. Vivek Shrimali, learned counsel appearing for applicant Sansthan submitted that when the applicant society has volunteered not to just take care of the delivery but has also expressed desire to nurture the child by providing for his future needs, the termination of pregnancy should not even be considered as an option.

16. This Court is seized with an exigent scenario – a question of life and death; a choice of dignified life of 'S', who is voicing her cause through her mother vis-a-vis a baby to be born, who can caress or kick her mother but does not have voice of its own. On the one hand, petitioner- a victim unequivocally desirous to get rid of her 26 weeks' old foetus and on the other hand – a social organization, which has advanced its desire to not just protect a life but help it bloom.

17. The medical termination of pregnancy is permissible in cases covered by Explanations – 1 and 2 of Section 3 of the Act of 1971.



This Court has no doubt that in the present case the order as prayed can be passed, but should it be passed is the moot question. In the opinion of this Court, medical termination of pregnancy is permissible for the purpose of protecting the victim, from the trauma of being ravished, coupled with the fact that 'the baby to be born' will remain with her and continue to remind her of the offence committed. The baby, in turn, would cause and continue to cause mental agony. Abortion is also imperative so that the victim can settle in life, and the baby does not emerge as snag in her otherwise smooth life – termination is necessary to sever the maternal tie with the baby.



18. But is it the only way to sever the bond between the baby and the mother? Perhaps no. A bond can be disconnected in other ways and by other means too.....

19. While preserving the right to life of 'S', this Court cannot be oblivious of the right to life of the 'child to be born'. It is a well known fact that after six weeks, life is infused in the embryo, thus converting it into foetus. Once an embryo evolves into a foetus, the heart starts beating. In considered opinion of this Court, right to life of that foetus merits or deserves equal protection, if not more. Within a period of 16-20 weeks, the foetus/baby is completely formed and thereafter, it is mostly biological growth in the womb.

20. The Hon'ble Apex Court has held in unexceptionable terms that the approach of the Court in MTP Cases has to be fact-specific; each case depends on its own facts, and no straight jacket rule can be laid down. See **Sarmishtha Chakraborty v.**



**Union of India, (2018) 13 SCC 339 : 2017 SCC OnLine SC**

**897:**

Para **10.** "The orders [*Savita Sachin Patil v. Union of India*, (2017) 13 SCC 436] [*Sheetal Shankar Salvi v. Union of India*, (2018) 11 SCC 606] which have been referred to by Mr Panda, in our considered opinion, rest on their own facts. Frankly speaking, cases of this nature have to rest on their own facts because it shall depend upon the nature of the report of the Medical Board and also the requisite consent as engrafted under the Medical Termination of Pregnancy Act, 1971."

Sec 3 of Medical Termination of Pregnancy Act, 1971 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 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.

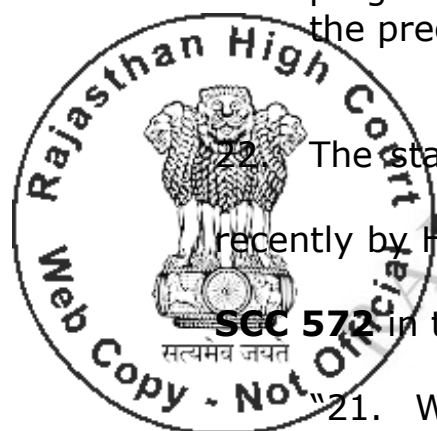
Explanation 2- Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the 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 of the pregnant women's actual or reasonable 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 lunatic, 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."



The statutory prescription under Sec. 3 has been reiterated recently by Hon'ble Apex Court in **Z v. State of Bihar, (2018) 11**

**SCC 572** in the following terms:

"21. We have underlined the relevant part of the provision for the purpose that where length of pregnancy exceeds 12 weeks but does not exceed 20 weeks, two registered medical practitioners, after forming an opinion in good faith, that 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 and that there is substantial risk that if the child were born, it would suffer from physical or mental abnormalities as to be seriously handicapped, may terminate the pregnancy. Explanation 1 to sub-section (2) of Section 3 to which our attention has been drawn postulates that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the same has to be presumed to constitute a grave injury to the mental health of the pregnant woman. Once such a statutory presumption is provided, the same comes within the compartment of grave injury to mental health. Sub-section (4) of Section 3 requires consent of the guardian of a minor, or a major who is mentally ill person. The opinion to be formed by the medical practitioners is to be in good faith."

23. Certain overarching principles are also found under the international conventions like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1993. The duty to protect the right of a woman in her reproductive choices is





sacrosanct. There is however another principle, more of a peremptory norm, in the form of the right to life.

24. There is a compelling State Interest in protecting the right to life of prospective child as held by Hon'ble Apex Court in **Suchita**

**Srivastava v. Chandigarh Admn., (2009) 9 SCC 1 :**

**"21.** 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.

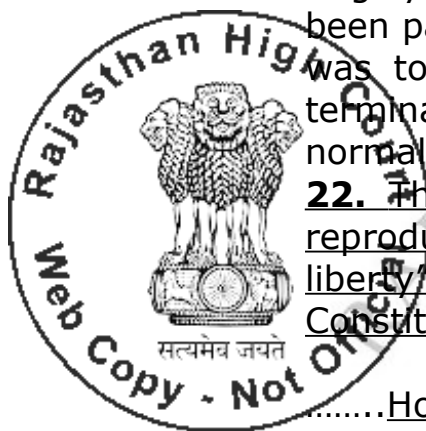
**22.** There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. ....

.....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.

**34.** In the impugned orders, the High Court has in fact agreed with the proposition that a literal reading of Section 3 of the MTP Act would lead to the conclusion that a mentally retarded woman should give her consent in order to proceed with the termination of a pregnancy. However, the High Court has invoked the doctrine of "parens patriae" while exercising its writ jurisdiction to go beyond the literal interpretation of the statute and adopt a purposive approach. The same doctrine has been used to arrive at the conclusion that the termination of pregnancy would serve the "best interests" of the victim in the present case even though she has not given her consent for the same. We are unable to accept that line of reasoning.

**35.** The doctrine of "parens patriae" has been evolved in common law and is applied in situations where the State must make decisions in order to protect the interests of those persons who are unable to take care of themselves. Traditionally this doctrine has been applied in cases involving the rights of minors and those persons who have been found to be mentally incapable of making informed decisions for themselves.

**36.** Courts in other common law jurisdictions have developed two distinct standards while exercising "parens patriae" jurisdiction for the purpose of making





reproductive decisions on behalf of mentally retarded persons. These two standards are the "best interests" test and the "substituted judgment" test.

**37.** As evident from its literal description, the "best interests" test requires the Court to ascertain the course of action which would serve the best interests of the person in question. In the present setting this means that the Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim. It is important to note that the Court's decision should be guided by the interests of the victim alone and not those of the other stakeholders such as guardians or the society in general. It is evident that the woman in question will need care and assistance which will in turn entail some costs. However, that cannot be a ground for denying the exercise of reproductive rights.

**38.** The application of the "substituted judgment" test requires the Court to step into the shoes of a person who is considered to be mentally incapable and attempt to make the decision which the said person would have made, if she was competent to do so. This is a more complex inquiry but this test can only be applied to make decisions on behalf of persons who are conclusively shown to be mentally incompetent.

**39.** In the present case the victim has been described as a person suffering from "mild mental retardation". This does not mean that she is entirely incapable of making decisions for herself. The findings recorded by the expert body indicate that her mental age is close to that of a nine-year-old child and that she is capable of learning through rote memorisation and imitation. Even the preliminary medical opinion indicated that she had learnt to perform basic bodily functions and was capable of simple communications. In light of these findings, it is the "best interests" test alone which should govern the inquiry in the present case and not the "substituted judgment" test."

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25. Given that the prospective child in womb has no say in the present proceedings, this Court has to substitute itself as the parent – the *Parens Patriae* and do a balancing exercise. This Court is to decide between the great mental agony that the Petitioner has to bear as against the right to life of the unborn child. The Legislature in its wisdom has not given an absolute and unfettered right to abort, but has restricted it in a phase wise and stage wise manner. The two explanations appended to Sec. 3



serve as guiding principles (though not exhaustive) for interpretation of what constitutes mental agony.

26. However, the entire scheme of Sec. 3 applies in two stages, one up to 12 weeks, and second from 12 to 20 weeks. In the case at hand, the threshold set by the Legislature has crossed as the pregnancy has crossed the cut-off period of 20 weeks. Sec. 5 takes into consideration the eventuality of 20 weeks threshold being crossed, and further limits the discretion available to permit termination of pregnancy.

27. What constitutes an agony is subjective and only the Petitioner can feel the real pain of being a victim of an act as abhorrent as Rape. No words can describe her pain, no expressions can meet her anguish. Given the predicament at hand, this Court feels constrained in applying the judgments cited, and is forced to take up a case-specific evaluation. This balancing exercise is necessitated due to the 20 weeks threshold having been crossed, where the mental agony is a relevant factor for permitting termination of pregnancy. Post the 20 weeks threshold, the mental agony remains, may even become more excruciating, but the Court cannot be unmindful of the voice of the 'yet to be born' - a fully alive prospective child in the womb.

28. While doing this balancing exercise, this Court has two very striking factors to reckon - the adolescent age of 'S' - 17 years; and that the petition has been filed by victim's widow mother. She can naturally see the social stigma and feel the turmoil of her daughter, but cannot possibly perceive the feeling of a mother carrying a baby. On the other hand is standing an NGO, which is



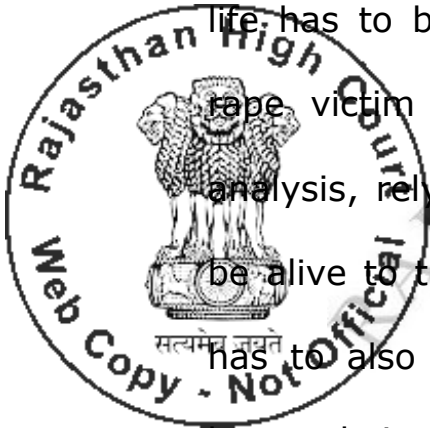


more than willing to protect unborn life while assuring the dignified life of the petitioner.

29. The Medical Termination of Pregnancy is statutory in nature, with constitutional underpinnings, on the other hand the right to life is flowing directly from Art. 21. The Petitioner who is pregnant is carrying a life, and the "compelling State interest" in preserving life has to be balanced vis-à-vis the right of the Petitioner as a rape victim from suffering unnecessary mental agony. In this analysis, relying on the judgments cited above, this Court has to be alive to the excruciating mental agony of the Petitioner and it has to also hear the voice of the unheard "foetus in womb"; a human being which too is alive, though yet to be born.

30. Taking strength from the constitutional position, where "bodily integrity" **is a facet** inter alia of the right to life, whereas "being alive" **is** the right to life; this Court is constrained to hold that the *per-se* right to life of the prospective child needs to be given precedence over the right of the Petitioner, particularly in the given situation. The Court being mindful of what the Petitioner would go through, and placing reliance on the law enunciated in **Z v. State of Bihar, (2018) 11 SCC 572** (para 48-57) proposes to pass following directions for ensuring comfortable pregnancy and delivery, in a setup that must guarantee utmost privacy and respect for the dignity of the Petitioner.

31. Hence, right to life of the foetus is also required to be considered. Right to life guaranteed by the Constitution of India under Article 21 of the Constitution of India, cannot be invoked for the victim alone. Protection of Article 21 is as much available to







the child to be born, unless protection of foetus poses an eminent threat to the life of mother.

32. In the facts obtaining in the present case, when the applicant society has volunteered, this Court is not inclined to permit medical termination of the pregnancy, as prayed by the petitioner 'S' and instead deems it appropriate in the interest of the 'yet to be born baby' to allow the application filed by the applicant - Society Navjeevan Sansthan'.

33. However, with a view to strike the balance between the right to privacy of the victim 'S' and the right to life of the 'child to be born', this Court deems it appropriate to pass the following directions:-

- (i) To maintain the secrecy of her pregnancy, the State will ensure petitioner's admission in Nari Niketan, Jodhpur until her delivery and convalescence.
- (ii) State will also permit petitioner's mother to live with her to give moral and emotional support.
- (iii) In case 'S' and her mother wish to live in their own residence, they may do so.
- (iv) If the petitioner and her mother move to Nari Niketan, Jodhpur, the State will ensure safe delivery of the child at the place where she resides.
- (v) In case the petitioner refuses to be admitted to Nari Niketan, Jodhpur, the CMHO, Churu-respondent No.5 and if she comes to Nari Niketan, Jodhpur then CMHO, Jodhpur will ensure requisite pre-natal and post-natal medical care.



(vi) After the birth of the child, the custody of the child will be handed over to the applicant "Navjeevan Sansthan", as soon as feasible, of course after taking consent of 'S', her mother and a fitness certificate of paediatrician.

(vii) This Court has no doubt that the applicant society will take utmost care of the child to be born.

(viii) For a period of 12 months, the society (Navjeevan Sansthan) will not give such child in adoption or otherwise. The petitioner shall have liberty to take back the custody of the child within the period interregnum, if she chooses so to do, after becoming major.

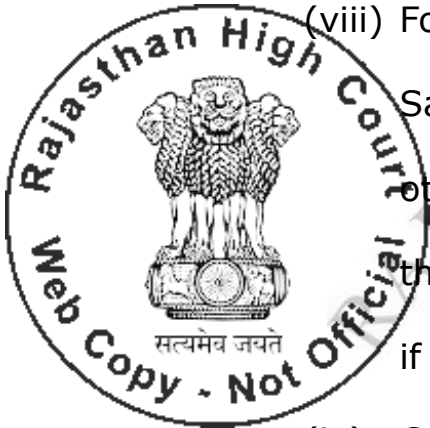
(ix) Concerned CMHO shall take DNA sample of the child and ensure its handing over to learned AAG so that the same be forwarded to the concerned Court, in case it is required in the trial.

(x) In the entire process, all concerned will ensure that secrecy of the pregnancy, anonymity of the petitioner and the 'child to be born' is maintained.

(xi) It shall equally be the responsibility of the applicant society to ensure that the child does not know about his/her mother, and of course about the order instant.

34. This Court feels that if that be done, petitioner's right to privacy and right to live with dignity will be protected, while letting the unborn child live, who would be desperate to see and embrace this beautiful world.

35. This Court cannot but resist from recording appreciation for learned counsel Mr. Vivek Shrimali and "Navjeevan Sansthan" for





coming forward for the noble cause of protecting the future, which otherwise would have been stifled for the existence of the present.

36. Writ petition and all interlocutory applications stand disposed of.

**(DINESH MEHTA),J**

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RAJASTHAN HIGH COURT



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