

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

WRIT PETITION (L) NO. 11131 OF 2021

'X' (since minor through her
father Mr. Jitendra Kumar Singh) Petitioner
Vs.
The State of Maharashtra Respondent

Ms. Ruchita Padwal i/b Ms. Aditi Saxena. Advocate for
Petitioner.
Ms. P.H. Kantharia, GP, for Respondent/State.

**CORAM: K.K.TATED &
ABHAY AHUJA, JJ**

DATED : MAY 11, 2021

(VACATION COURT THROUGH VC)

P.C.

1. Rule. With the consent of the counsel for the parties, Rule is made returnable forthwith.
2. Petitioner has been named 'X' in order to protect her identity.
3. This petition is filed by petitioner who is a minor girl aged 16 years, through her father, for permission to undergo medical termination of pregnancy at KEM Hospital, in her 24th week of pregnancy.
4. It is mentioned in the petition that an FIR was lodged at Manikapur Police station under section 376 of the I.P.C. and under sections 4, 8 & 12 of the Protection of Children

from Sexual Offences, Act, 2012. The victim was raped by accused residing nearby. As a result of sexual offence, the victim became pregnant. Petitioner did not get her menstrual cycle for three months. Petitioner's mother noted change in the Petitioner's abdomen area and so took her to local clinic for check-up, where doctor after examination informed Petitioner's mother that Petitioner was pregnant and sent the Petitioner for medico-legal checkup to R. N. Cooper Hospital. The said test was conducted on 23rd April 2021 and police were informed. Medical examination of Petitioner revealed that, she was pregnant and pregnancy was of 20 weeks gestation. The FIR was lodged on 24th April 2021. Since the pregnancy had exceeded the statutory period of 20 weeks prescribed under the Medical Termination of Pregnancy Act, 1971 (the "MTP Act"), Petitioner is seeking permission from this court to terminate her pregnancy.

5. We have heard Ms. Padwal, the learned Counsel for the petitioner and Ms. Kantharia, the learned GP for the Respondent.

6. The learned Counsel for the petitioner relied on a few judgments passed by the Hon'ble Supreme Court as well as different Division Benches of this Court dealing with the issue of granting permission for termination of pregnancy even after the statutory period of twenty weeks provided under the MTP Act was over. He submitted that the mental trauma that the victim petitioner is undergoing because of the pregnancy caused due to the offence of rape was causing

serious injury to her mental health. Besides this, there was inherent risk to her life because of pregnancy at such a tender age.

7. Considering the various directions issued by the Hon'ble Supreme Court, as well as, by different Division Benches of this Court, this Court on 6th May 2021, directed the Medical Board at the Sir J. J. Group of Hospitals and Grant Medical College, Mumbai to submit a report about permitting medical termination of Petitioner's pregnancy to this Court.

8. Today, the report of the Committee is tendered before us in sealed envelope. The envelope is opened in the court. The report dated 10th May 2021 of the Committee reads thus:

“After careful clinical examination, ultasonography examination and psychiatric evaluation, the committee has come to the opinion that at present no abnormality is detected in the fetus or the pregnant minor mother. Pregnant minor and her parents do not wish to continue the pregnancy. The minor (16 years old) is anguished with the pregnancy.

Continuation of pregnancy in minor may lead to pregnancy related complications like anemia, pregnancy induced hypertension as well as increased operative interference during labour. It is also going to have psychological impact on pregnant minor with uncertain future.

Termination of pregnancy at 23 weeks will carry risks similar to delivery at term.

Pregnant minor and her parents have expressed their desire to terminate the pregnancy and are made aware of the dangers of continuation of pregnancy, as well as termination of pregnancy.

Since the pregnancy has advanced to 23 weeks, well beyond legal limit of termination of pregnancy i.e. 20 weeks, the termination can only be done with Honourable High Court's permission.

Though at 23 weeks of gestation, termination of pregnancy carries substantial risk to pregnant minor, continuation of pregnancy will have both physical and mental stress to minor mother. Hence, it is advisable to terminate the pregnancy in whichever institute the minor and her parents desire.

If the permission for termination of pregnancy is granted, the honourable High Court is requested to instruct the parents to bear responsibility of the child and the required neonatal management if born alive.”

9. It is clear from the above opinion of the committee that continuation of pregnancy of minor may lead to pregnancy related complications like anemia, pregnancy induced hypertension as well as increased operative interference during labour; also going to have psychological impact on pregnant minor with uncertain future; and that

termination of pregnancy at 23 weeks will carry risks similar to delivery at term and though at 23 weeks of gestation, termination of pregnancy carries substantial risk to pregnant minor, continuation of pregnancy will have both physical and mental stress to minor mother. The members of the Board have opined that the pregnancy can be terminated with permission of this Court.

10. In this background, we considered various aspects of the matter in the light of the law laid down in this behalf by the Hon'ble Supreme Court and this Court. Since this is an unusual and unfortunate case, 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 I.—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 II.—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 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 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 sub-section 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 16 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. Petitioner has entered into 23rd week of her pregnancy and, therefore, the MTP Act does not permit medical termination of pregnancy in such cases.

13. However, 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. *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* has discussed and dealt with similar issue. 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. It was observed in paragraphs-79 and 80 that 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, which direction appears to have found place in the 2021 amendments, though yet to be made effective.

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 Petitioner will have to be permitted to undergo medical termination of pregnancy.

21. The report of the committee also mentions that, the pregnant minor and her parents have been made aware of

the dangers of continuation of pregnancy as well as termination of pregnancy.

22. Another Division Bench of this Court (Coram: R.M. Borde & N.J. Jamadar, JJ.) in Writ Petition No.6613/2019 on 13.6.2019 has dealt with another important issue. It was observed in that judgment that since the pregnancy in that case was a result of physical abuse and since the FIR was lodged, directions were issued for preservation of the tissue sample, blood sample of the fetus for carrying out necessary medical tests including DNA, finger printing/mapping and the Investigating Officer was directed to forward the same to the Regional Forensic Laboratory. The learned Counsel for the petitioner submitted that similar directions needed to be issued in the instant case as well.

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

ORDER

i. The petitioner is permitted to undergo medical termination of pregnancy as per Committee's report dated 10th May 2021, at KEM Hospital, Mumbai.

ii. The Dean of the KEM Hospital, Mumbai shall ensure that the procedure is performed at a place which satisfies all the requirements of the MTP Rules 2003 and the procedure shall be conducted by the Medical Practitioner who satisfies the conditions laid down under those rules.

iii. The blood sample and tissue sample of the fetus shall be preserved for the purpose of carrying out necessary medical tests including DNA and other tests. The Investigating Officer conducting investigation shall ensure that the samples are forwarded to Forensic Science Laboratory and the samples shall be preserved for the purpose of trial of the offence.

iv. 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 it's life.

V. In case, if the child is born alive and if the petitioner and her parents 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 child.

vi. Rule is made absolute in the aforesaid terms.

vii. No order as to costs.

viii. All concerned parties to act on the authenticated copy of this order. Learned A.G.P. is directed to send an authenticated copy of this order to the Investigating Officer who is conducting investigation in the present case.

(ABHAY AHUJA, J.)

(K.K.TATED, J.)