

THE HON'BLE SRI JUSTICE B. VIJAYSEN REDDY

WRIT PETITION No.24850 of 2021

ORDER:

This writ petition is filed by xxxxx, who is aged 16 years, through her mother and natural guardian, seeking for a direction to the respondent No.4 to terminate her pregnancy medically, as per the provisions of the Medical Termination of Pregnancy Act, 1971 and as amended in 2021.

2. It is stated in the affidavit by the petitioner that a member of her extended family sexually exploited her without her consent. She was threatened and emotionally abused with dire consequences. She did not reveal the situation to anyone in her family. Subsequently, when she was not keeping good health, she was taken for medical check up on 29.09.2011 to the respondent No.4/hospital. As directed by the said hospital, she approached C.C. Shroff Memorial Hospital for medical check-up where she was diagnosed with foetus of 25 weeks. Currently, the gestational age of the foetus is 26 weeks. On enquiry by the parents, the petitioner stated that she was threatened with dire consequences and the accused threatened to kill her mother. On a complaint lodged on 24.09.2021 by the mother of the petitioner against one Anjaneyulu @ Anji, FIR.No.239 of 2021 was registered for the offences under Sections 376(2) and 506 IPC and Section 6 read with Section 5 of the Protection of Children from Sexual Offences Act, 2012. Later during investigation, A2 was also included as accused.

3. It is submitted that during check-up at C.C. Shroff Memorial Hospital, the concerned doctors have submitted detailed observation stating the foetal biometry as 25 weeks as on 22.09.2021 and that the petitioner's health is not in a stable condition and she was advised with

necessary medical care. It is further submitted that there is a threat to the physical and mental health of the petitioner, aged 16 years, as the formation of foetus is not a choice but purely circumstantial, as the pregnancy is the result of sexual assault and rape. The petitioner at her tender age is not in a position to bear the child physically, mentally and financially. Considering the situation of the petitioner, who is in dire need of protection and dependency, she is not in a stage to bear or nourish the foetus. The respondent No.4/hospital did not terminate the pregnancy of the petitioner as the petitioner was beyond gestation period and needs permission as established by law.

4. Ms. Sravya Katta, learned counsel for the petitioner, submitted that a woman's right to make reproductive choice is also a dimension of personal liberty as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choice 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. A woman has self-rule over her body. The right to life and individual freedom under Article 21 of the Constitution of India envelops the option to settle on regenerative decisions. It is inhuman to subject woman, who is over 24 weeks pregnant, to legal deferrals. Infringement of right to life of a rape victim outweighs the right to life of the child in the womb.

5. It would be relevant to refer to Section 3(2) of the Medical Termination of Pregnancy (Amendment) Act, 2021, for the sake of convenience, as under:

"3. In section 3 of the principal Act, for sub-section (2), the following sub-sections shall be substituted, namely:—
"(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 twenty weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners are, of the 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 any serious physical or mental abnormality.

Explanation 1.—For the purposes of clause (a), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.—For the purposes of clauses (a) and (b), where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.”

3(2A) The norms for the registered medical practitioner whose opinion is required for termination of pregnancy at different gestational age shall be such as may be prescribed by rules made under this Act.

3(2B) The provisions of sub-section (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.

3(2C) Every State Government or Union territory, as the case may be, shall, by notification in the Official Gazette, constitute a Board to be called a Medical Board for the purposes of this Act to exercise such powers and functions as may be prescribed by rules made under this Act.

3(2D) The Medical Board shall consist of the following, namely:—

(a) a Gynaecologist;

- (b) a Paediatrician;
- (c) a Radiologist or Sonologist;
- (d) such other number of members as may be notified in the Official Gazette by the State Government or Union territory, as the case may be."

Be it noted that the upper limit for medical termination of pregnancy prior to 2021 amendments was 20 weeks, which has been extended to 24 weeks.

7. An order was passed by this Court on 01.10.2021 referring the petitioner to a Medical Board of the respondent No.4/hospital constituted in terms of Section 3 of amended Act, 2021 and the Board was directed to conduct medical examination of the petitioner and submit a report within a period of 48 hours.

8. Accordingly, the Medical Board comprising of the following members was constituted, vide Lr/Spl/DME/2021 dated 02.10.2021 of the Director of Medical Education:

1. Dr K. Rajyalakshmi, Professor and Superintendent of Government Maternity Hospital, Koti (Chairman of the Board)
2. Dr Sashikala, Associate Professor, Paediatrics
3. Dr M Swathi, Assistant Professor of Radiology
4. Dr Sridevi, Assistant Professor, Anesthesia

9. The relevant portion of the report of the Medical Board is as under:

Per abdomen findings are

Symphysio fundal height corresponding to 26 to 28 weeks of gestation,

Uterine contour is normal that is globular in nature,

Fetal parts palpable, breech presentation,

On auscultation fetal heart is good

The blood investigation done at government institution (IPM), on 21/09/2021

CBP report is showing Hemoglobin 10.7 grams, normocytic normochromic blood picture with 2.3 lakhs platelet count.

Fasting blood sugar 55mg.dl, post lunch 91mg/dl

TSH 2.0mIU/ml

Viral makers are normal

Complete urine analysis is normal

REPORT:

Single live fetus (foetus) with breech presentation, liquor adequate, placenta upper segment and posterior, fetal (foetal) heart rate is good, baby in prone position. The gestational age of the fetus is 26 to 27 weeks, estimated weight 930 grams with expected date of delivery is 6/01/2022.

OPINION OF THE BOARD:

The medical board opined that the petitioner aged 16 years, according to the obstetric examination by the Chairman of the medical board is fit for termination of pregnancy provided the complications like post abortal bleeding which may require blood transfusions with risk of blood transfusion reactions presently and in later on life. Due to preterm pregnancy the aborting process may be lengthy may lead to sepsis and sometimes may be subjected for surgical procedure like hysterotomy. For surgical procedure the petitioner requires anesthesia which can risk her conscious levels and central nervous system derailment. In the due course above, the petitioner may have the above complications which can endanger her life during procedure, and later on may have psychological depression.

10. In **xxx. v. UNION OF INDIA**¹, the High Court of Kerala at Ernakulam held as under:

"9. The position of law regarding medical termination of pregnancy is well settled. When the period of gestation exceeds that prescribed in Sections 3 and 4 of the Medical Termination of Pregnancy Act, 1971 (for short 'the Act'), medical termination of pregnancy can be carried out only by an order of a Court of law. The statute has provided in Section 3 of the Act that if the length of pregnancy exceeds 12 weeks but does not exceed 20 weeks, termination can be carried out only after two registered medical practitioners form an opinion that the continuance of the pregnancy would involve a risk to the life of

¹ 2021 SCC OnLine Ker 1800

the pregnant woman or of grave injury to her physical and mental health or there is substantial risk to the child after born. Explanation 1 to Section 3 specifies that if the pregnancy is caused on account of a rape committed on the woman, it shall be presumed that the anguish caused by the pregnancy would constitute a grave injury to the mental health of the pregnant woman. The words used in explanation is "shall be presumed". The word "shall be presumed" created as a statutory presumption clearly shows the intention of the legislature. In the case of rape, the anguish on account of the pregnancy is statutorily regarded as a grave injury to the mental health of the pregnant woman, sufficient to terminate the pregnancy on the basis of opinion of two registered medical practitioners.

10. The period of gestation mentioned above has been changed to 24 weeks by the Amendment Act No.8 of 2021. The Explanation 1 to Section 3 has been changed to Explanation 2 to Section 3. Since in the present case, the period of gestation has reached 26 weeks and more, the question as to the effect of the amendment and whether the amendment has been notified are not being considered.

...

15. In view of the opinion of the Medical Board that the medical termination of pregnancy can be considered, if the higher risk and facts mentioned in the report are acceptable, this Court elicited the views of the parents of the victim through the counsel for the petitioner. They also expressed their desire to terminate the pregnancy taking into account the traumatic experience for the victim as well as the possible genetic disorders that may befall the unborn child due to the close relationship with the alleged offender of the rape.

16. Considering all the above factors, it is declared that pregnancy of petitioner's minor daughter is liable to be terminated forthwith."

11. In **xxx. v. UNION OF INDIA**², the High Court of Kerala held as under:

"7. This Court has, in the judgments in *ABC v. Union of India* : (2020) 4 KLT 279, *Ms. % v. State of Kerala* : (2016) 4 KLT 745,

² 2021 SCC OnLine Ker 808

etc., ordered termination of pregnancy exceeding 20 weeks in the case of rape victims who were not mentally prepared to deliver the child, in order to save their lives. The Apex Court has in the judgment in *A v. Union of India* : (2018) 4 SCC 75 permitted termination in a case where the gestations age was 25-26 weeks. In *Murugan Nayakkar v. Union of India* : 2017 SCC OnLine Sc 1092 allowed termination of pregnancy in the case of 13 year old child and in *Sarmishtha Chakraborty v. Union of India* : (2018) 13 SCC 339, permitted termination of pregnancy when the gestational age was 26 weeks, in view of the recommendation of the medical board and the medical report revealing the threat of several mental injury to the woman and multiple complex problems to the child, if born alive, involving complex cardiac corrective surgery stage by stage after birth, in the event of continuation of the pregnancy. In *Meera Santosh Pal v. Union of India* : (2017) 3 SCC 462 also permission was granted when the pregnancy crossed 24 weeks, in view of the medical reports pointing out the risk involved. In the judgment reported in *Neethu Narendran v. State of Kerala* : 2020 (3) KHC 157 also this Court permitted termination of pregnancy when gestational age crossed 23 weeks. As found in those cases the minor victim in this case is also not prepared to deliver a baby in this situation. In view of the trauma that the minor girl has undergone and taking note of the opinion of the Psychiatrist, I am of the view that the Writ Petition can be allowed permitting termination of pregnancy.

9. Therefore, the petitioner is permitted to subject her daughter to medical termination of pregnancy. As any delay in undertaking the termination will involve serious consequences affecting the girl as well as the life of the baby in the womb, there shall be a direction to the Superintendent of Government Medical College Hospital, Thiruvananthapuram to see that the termination of pregnancy of the minor girl, the daughter of the petitioner, is undertaken by competent doctors under his/her supervision, at the earliest point of time, if possible, today itself in accordance with the provisions of the Medical Termination of Pregnancy Act, 1971, its rules and all other rules, regulations and guidelines prescribed for the purpose. The Medical Board shall maintain a complete record of the procedure which is to be performed on the girl for termination of her pregnancy.

10. There will be further direction to the Doctors to take the tissue of the foetus for DNA identification and to maintain the same intact for future purposes, especially due to the fact that a criminal case is pending in the instant case. If the child is born alive, despite the attempts at medical termination of the pregnancy, the Doctors shall ensure that everything, which is reasonably possible and feasible in the circumstances and in contemplation of the law prescribed for the purpose, is offered to such child so that he/she develops into a healthy child”.

12. In **ABC v. STATE OF MAHARASHTRA**³, a Division Bench of the High Court of Bombay held as under:

“14. Thus, it is settled position of law that in certain circumstances, this Court being a Constitutional Court has the power under writ jurisdiction to direct termination of pregnancy, the length of which being beyond twenty weeks ...

16. Therefore, in the facts of the present case, it becomes clear that the Medical Board/Committee constituted on the order of this Court has examined the daughter of the petitioner and recommended medical termination of pregnancy, although the length of such pregnancy is beyond twenty weeks. It is evident from the material on record i.e. FIR dated 02.03.2021, the statements made in the present writ petition as also contents of the aforesaid report dated 12.03.2021 submitted by the Medical Board that the daughter of the petitioner is a minor who is pregnant due to alleged sexual assault and rape and she is found to be suffering mild intellectual disability. Explanation-1 to Section 3(2) of the Act of 1971 provides that it is to be presumed that pregnancy alleged to have been caused by rape and the anguish caused by such rape constitutes a grave injury to mental health of such girl/woman. We are of the opinion that therefore, direction can be issued for medical termination of pregnancy is beyond twenty the daughter of the petitioner, although length of the pregnancy of twenty weeks, because continuance of such pregnancy would result in grave injury to the mental health of the daughter of the petitioner.”

13. The petitioner is a victim of sexual abuse and aged 16 years. As per the report of the Medical Board, the gestational age of foetus is

³ 2021 SCC OnLine Bom 419

26 to 27 weeks and expected date of delivery is 06.01.2022. It is certified by the Medical Board that the petitioner is fit for termination of pregnancy. However, it is stated that there may be medical complications like bleeding and the petitioner may be subjected to surgical procedure, which requires anesthesia. It is clear from the report that the health condition of the petitioner and foetus is stable. However, it needs to be noted that under Explanation 2 to Section 3(2) of the Act of 2021, there is a presumption that anguish caused to the rape victim by pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

14. The circumstances which lead to the petitioner's pregnancy on account of unfortunate events of sexual abuse without any shadow of doubt would cause mental and physical stress and anguish to the petitioner. Though there is restriction under the statute for terminating pregnancy, if the gestation of foetus is more than 24 weeks, it is settled law that the Constitutional Courts are empowered to direct termination of pregnancy. If the petitioner is compelled to continue with pregnancy caused by rape, it would infringe her right to life guaranteed under Article 21 of the Constitution of India.

15. A woman has right to make a choice to carry pregnancy, at the same time, it is her right not to carry pregnancy, however, subject to conditions and restrictions enumerated under the provisions of the Act of 2021. If the petitioner is not permitted to terminate the pregnancy, there is every possibility of the petitioner undergoing severe physical and mental stress, which may have adverse effect on her future health and prospects. So also it needs to be noted, the petitioner is 16 years old, and with the mental stress she is undergoing, it cannot be said with certainty that the petitioner would be able to carry the pregnancy

until the child and that too a healthy child is delivered. There may be medical complications encountered by the petitioner and also to the foetus or to be born child. The parents of the petitioner have expressed, through their counsel, that the petitioner is not in a position to continue the pregnancy and there is threat to life of the petitioner on account of physical and mental stress she is undergoing on day-to-day basis.

16. This Court is of the opinion that the life of the foetus or to be born child cannot be placed at higher pedestal than that of the life of the petitioner. The dignity, self-respect, healthy living (mental or physical) etc. are facets of right to life and personal liberty enshrined under Article 21 of the Constitution of India, which also include right of a woman to make a choice of pregnancy and terminate pregnancy, in case, where pregnancy is caused by rape or sexual abuse or for that matter unplanned pregnancy, subject to reasonable restrictions under law.

17. In view of the above observations, the writ petition is allowed with the following directions:

- a) The respondent No.4/hospital shall forthwith admit the petitioner, conduct medical examination and by taking all necessary precautions, terminate pregnancy of the petitioner medically or through surgical procedure as may be required, within a period of 48 hours.
- b) The termination of pregnancy or surgical procedure, as the case may be, shall be performed by a senior most Gynecologist of the respondent No.4/hospital.
- c) The respondent No.4/hospital is directed to collect the tissue and blood samples of the foetus for conducting DNA and other tests.

- d) The Investigation Officer, while conducting investigation in FIR.No.239 of 2021, shall forward the tissue and blood samples of the petitioner to the concerned Forensic Laboratory for DNA and other relevant medical tests.
- e) The blood samples and results of medical tests shall be preserved for the purpose of trial.
- f) In case, the petitioner applies for victim compensation, the Legal Services Authority, High Court, shall render necessary assistance to the petitioner and ensure that compensation as provided under law is adequately granted.

Pending miscellaneous petitions, if any, shall stand closed.

There shall be no order as to costs.

B. VIJAYSEN REDDY, J

October 5, 2021

Note:

- 1. Issue CC today.
- 2. LR Copy to be marked
(**B/o**) DSK