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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 31st December, 2021*

\+ W.P.(C) 14862/2021

_____ ..... Petitioner

Through: Ms. Sneha Mukherjee and Ms. Surabhi Shukla, Advocates.

versus

GOVERNMENT OF NCT OF DELHI & ORS. ..... Respondents

Through: Ms. Hetu Arora Sethi, Additional Standing Counsel with Mr. Siddarth Aggarwal, Advocate for R-1 & 2.
Mr. Tanveer Oberoi, Advocate for R3.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

J U D G E M E N T

1. Present writ petition has been preferred by the Petitioner seeking the following reliefs:

> *"a. For a writ of mandamus or any other writ, order, directing the Respondents to allow the Petitioner to undergo Medical Termination of the Pregnancy.*
>
> *b. For an order directing the Respondent No. 3 for setting up an expert panel of doctors to assess the pregnancy and offer MTP to the petitioner in need of the procedure beyond the prescribed 20 weeks limit.*
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> *c. For any other order/ direction that this Hon'ble Court may deem fit."*

2. As per the case set out in the petition, Petitioner is 33 years old and has been undergoing regular check-ups from the 5th week of her pregnancy.

From the ultrasonography report dated 31.10.2021, conducted during the 20th week of gestation, it was revealed that there was choroid plexus cyst in the left lateral ventricle of the foetus. However, since the foetus was only 20 weeks old, foetal echocardiography was not performed. On completion of 24 weeks, foetal Echo-Doppler test was done on 02.12.2021 and various anomalies were found in the heart of the foetus, viz., Tetralogy of Fallot (TOF) with Absent Pulmonary Valve Syndrome (APV), presence of Pulmonary Stenosis and Regurgitation with Narrow Pulmonary Valves, Dilated Branch Pulmonary Artery and Large Malaligned VSD with overriding of Aorta.

3. Thereafter, Petitioner consulted many Doctors, including Paediatric Cardiologists, in different hospitals and as per the last medical opinion received by her on 15.12.2021, infants born with condition of TOF have 50 per cent chance of survival in the very first year of their birth and even if they do survive the first year, repeated surgeries have to be carried out and success of the surgeries depends upon the stimuli of the baby to the environment. Since the permissible limit of 24 weeks under the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as 'MTP Act') as amended by the Medical Termination of Pregnancy (Amendment) Act, 2021 was over, Petitioner approached this Court seeking a direction to the Respondents to allow her to undergo medical termination of pregnancy.

4. On 22.12.2021, this Court directed Respondent No.3/AIIMS to constitute a Medical Board at the earliest to examine the Petitioner, who had on the said date completed 28 weeks of pregnancy and after examination, to furnish its report regarding the necessity and feasibility of medical termination of the pregnancy. Relevant part of the order reads as follows:

> *"2. Learned counsel for the petitioner submits that as per the medical opinion based on the petitioner's ultrasound report and other medical test, it has been found that the petitioner's foetus is suffering from various serious deformities and therefore, has very grim chances of survival. Learned counsel for the therefore prays that the petitioner be permitted to undergo medical termination of her pregnancy.*
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> *xxx xxx xxx*
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> *5. Keeping in view the fact that the petitioner has undergone over 28 weeks of pregnancy, the respondent no.3 is requested to constitute a Medical Board at the earliest and after examining the petitioner furnish its report the necessity and feasibility of the medical termination of the petitioner's pregnancy. The reports be submitted on or before 27.12.2021."*

5. Pursuant to the said order, a multidisciplinary Medical Board (hereinafter referred to as 'Board') was constituted by AIIMS, Chaired by Additional Professor, Department of Obstetrics and Gynaecology. The Board rendered its Opinion on 24.12.2021, relevant portion of which is as under:

> *"OPINION – The Medical board after reviewing the records is of the following opinion:*
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> *The petitioner Mrs. Pratibha Gaur is a 33-year-old lady. This is her first pregnancy and she is currently 28 weeks of gestation by date which corresponds with the ultrasound finding. Ultrasound and fetal ECHO are suggestive of Tetralogy of Fallot with absent pulmonary valve syndrome which has been confirmed by USG and ECHO at AIIMS, New Delhi. To evaluate for the genetic etiology chorionic villus sampling was done and QFPCR is normal that rules out common numerical chromosomal abnormalities. Chromosomal microarray report is awaited for ruling out other structural aberrations.*

The couple has been explained about the postnatal outcomes (in case of a full term delivery) of the baby and the need for surgery in infancy. As per the assessment of the Pediatric cardiologist and the Neonatologist based on the current reports, evidence, and experience, the chances of a successful outcome if operated in time and optimally managed with regular follow up is more than 80%. In postoperative period the baby will continue to require follow-up care with the cardiac services and may need repeat cardiac surgery in adulthood.

In the immediate postnatal period child may require respiratory support as per clinical condition. Hence, the delivery of the baby should be planned in a centre with facilities for neonatal intensive care unit and paediatric cardiac services.

In case termination is done at this gestation, the plan regarding postnatal resuscitation and management needs to be clarified as fetus has gained viability and may have added co-morbidities related to prematurity.

The possible complications of the procedure of termination have been explained to the couple including a possibility of hysterotomy, if the medical management fails."

6. Vide order dated 27.12.2021, this Court, after perusal of the Opinion of the Medical Board, posed certain queries and sought for a report in response thereto. The Board, accordingly, answered the questions posed by the Court in the report dated 28.12.2021 and the relevant part is as under:

"OPINION: The Medical board after reviewing the records is of the following opinion:

1. The post-natal outcomes in case of a full-term delivery of the baby in the instant case:

Answer 1 Tetralogy of Fallot (TOF) with absent pulmonary valve (APV) is a rare congenital heart

disease with an incidence of approximately 3 per one lakh live births. The disease includes a hole in the heart (Ventricular Septal Defect, VSD) along with poorly developed valve that guards the blood vessel taking blood from right side of the heart (right ventricle) to lungs which leads to both obstruction & leaking of valve. The blood vessels of the lungs (pulmonary arteries) are usually grossly enlarged. In addition to the heart disease, the patient may also have associated airway problems that may lead to requirement of respirator support in one-third of cases with in first year of life. TOF with APV does not have impact on immediate post-natal survival.

2. The specific nature of the surgery needed in infancy and the stages when such would be required

3. The requirement of the operation in time as mentioned in the as mentioned in the opinion date 24.12.2021, which would result into a successful outcome of the child in case of a full-term delivery to the extent of more than 80% as mentioned in the opinion:

4. The kind of follow up care with cardiac services that may be required during childhood:

Answer to questions 2,3,4: If the baby is born at term, the child may need respiratory support. In a large majority (>70%), the child's condition stabilizes needing once in a month follow-up in a tertiary level cardiac center with a plan for cardiac surgery at around one year of age. The timing of surgery however may change according to the condition of the child. The cardiac surgery includes the closure of the hole in the heart, relief of stenosis and the reduction in the size of the pulmonary artery. If followed up is done regularly, and operated on time, the survival rate following surgery is approximately 80%. The follow-up would also include growth and neuro-developmental assessment of the child. The child would require follow up in cardiology and cardiac surgery, 2-3 times per

year initially and annually thereafter. Depending upon the status of the heart and residual leakage of pulmonary valve the patient may need repeat cardiac surgery or intervention in late adolescence/adulthood. Following successful surgical repair, the patient is likely to have an average physical capacity and growth. This may change accordingly upon the clinical condition, surgical repair and quality of medical care provided to the child.

5. The danger if any, to the petitioner in continuing with the pregnancy i.e. that both physical and mental:

Answer 5: Due to the present condition in the baby there is no additional risk to the physical health of the mother. Subsequent impact on mental health cannot be predicted at present.

6. The kind of post-natal resuscitation and management that would be required, in the event of termination being that at the present gestation.

Answer 6: If the baby is delivered at the present gestation, the baby would require postnatal resuscitation, the nature of which would depend on the situation at the birth. The baby would require stay in intensive care unit and may need respiratory support. The other associated concerns include premature brain and eye development and nutrition concerns."

7. Learned counsel for the Petitioner submitted that as per the Medical Opinion, foetus is suffering from a rare congenital heart disease, TOF with APV, with an incidence of approximately 3 per one lakh live births. It is opined by the Board that in addition to the heart disease, patient may also have associated airway problems that may lead to requirement of respiratory support in one third of cases, within the first year of life. Opinion suggests that the child would require follow up in cardiology and cardiac surgery, 2-3 times per year initially and annually thereafter. Depending upon the status of

the heart and residual leakage of Pulmonary Valve, a repeat cardiac surgery may be required later in adolescence/adulthood. It was thus submitted that in view of the fact that undisputedly, there is a major foetal abnormality in the form of a rare congenital heart disease coupled with the assessment of the Paediatric Cardiologist and Neonatologist that chances of successful outcome, if operated in time and optimally managed with regular follow-up, is 80 per cent, Petitioner is highly stressed and not in the correct mental frame of mind to continue with the pregnancy. The fact that the foetus has substantial abnormalities and that the child, starting from the time of birth, will have medical complications and shall require repeated cardiac surgeries, which could be life threatening, is a source of severe mental trauma to the Petitioner. In this view of the matter, it was contended, that it is open to the Court to accord permission to terminate the pregnancy, keeping in view the object and intent of the Legislature behind enacting the MTP Act.

8. Referring to the provisions of Section 3(2)(b)(i) of the MTP Act, learned counsel articulated that the Statute permits termination of pregnancy, if continuance of the same involves a risk of grave injury to the mental health of the pregnant woman. This provision is to be read in conjunction with Section 3(3) of the MTP Act, which mandates that one of the factors in determining, whether continuance of pregnancy could involve injury to the mental health, is the actual or reasonably foreseeable environment. It was urged that looking at the Legislative intent, Court must give a liberal and purposive interpretation to the provisions of the Statutory provisions and relax the conditions, wherever required and not give a literal interpretation so as to defeat the very objective of the MTP Act.

9. It was also contended that as a facet of reproductive rights, a pregnant woman must be given the liberty to make reproductive choices, recognising

this as a dimension of 'personal liberty', enshrined in Article 21 of the Constitution of India. Reliance in this regard was placed on the judgment of the Supreme Court in ***Suchita Srivastava & Anr. v. Chandigarh Administration, (2009) 9 SCC 1*** and of the Bombay High Court in ***Shaikh Ayesha Khatoon v. Union of India, 2018 SCC OnLine Bom 11***.

10. Learned counsel further submitted that Guidelines being, 'Guidance Note for Medical Boards for Termination of Pregnancy Beyond 20 weeks of Gestation' have been formulated by the Ministry of Health and Family Welfare, Government of India, to bring uniformity and standardisation in the process of medical termination of pregnancy. According to these Guidelines, the Medical Board will determine if the foetal abnormality is sufficient enough to qualify as either incompatible with life or associated with significant morbidity or mortality in the child, if born, and for the said purpose, an indicative list is attached with the Guidelines as Annexure-2. It is submitted that perusal of Annexure-2 clearly shows that TOF is listed at Serial 'B8' and APV is at Serial 'B1' in the list of Cardiovascular Abnormalities and fall under the classification 'Major Abnormalities'.

11. Learned counsel for the Petitioner relied on the following judgements of the Supreme Court and various High Courts including this Court, to support her submissions and press the relief of permitting the Petitioner to terminate the pregnancy :-

1. ***Sarmishtha Chakrabortty v. Union of India, (2018) 13 SCC 339.***
2. ***Sonali Kiran Gaikwad v. Union of India, Writ Petition (C) No. 928 of 2017, decided on 09.10.2017 (Supreme Court).***
3. ***Poonam Chandan Yadav v. Union of India & Ors., Writ Petition (C) No. 930/2017, Order dated 07.10.2017 (Supreme Court).***

4. ***Kalpana Singh v. GNCTD, W.P.(C) 115/2021, decided on 11.01.2021 (Delhi High Court).***
5. ***Priyanka Shukla v. Union of India & Ors, 2019 SCC OnLine Del 9098.***
6. ***Mahima Yadav v. Govt. (NCT of Delhi), 2021 SCC OnLine Del 2828.***
7. ***Punam Abhinav Shah v. The State of Maharashtra & Anr., LD-VC-84 of 2020, Order dated 30.06.2020 (Bombay High Court).***

12. Learned counsel appearing on behalf of Respondent No.3, *per contra*, contended that termination of pregnancy can be permitted only when there is a danger to the life of the pregnant woman in proceeding with the pregnancy or where the baby suffers from such a medical abnormality, which is incompatible with life and/or prevents it from leading a normal and healthy life. In the absence of any of these factors, it is not advisable to terminate the pregnancy and pregnancy should be allowed to continue to its full term. Referring to the Medical Opinion, learned counsel submitted that while the foetus does suffer from a rare congenital heart disease and would require repeated corrective cardiac surgeries and regular follow-ups, yet with proper treatment and regular care, there are more than 80 per cent chances of success and the child may have an average physical capacity and growth. Learned counsel, however, did not dispute that the survival and quality of life of the child, would depend upon clinical conditions, surgical repairs, quality of medical care and the status of the heart and residual leakage of Pulmonary Valve, from time to time.

13. Pointing to the third Report rendered by the Board on 30.12.2021, in response to the submission of the Petitioner, with respect to the Guidelines issued by the Ministry of Health and Family Welfare, it was submitted by

the learned counsel that the same may not be valid in view of the amendment to the MTP Act in 2021. In any case, the stand of the Board is consistent that the foetal abnormality in the present case may be a major abnormality, but is not lethal.

14. I have heard the learned counsels and examined their contentions as well as the Opinions of the Board.

15. Before proceeding further and adverting to the arguments put forth by the respective counsels, it would be imperative to examine the legal position pertaining to termination of pregnancy, as contemplated under the MTP Act, 1971, amended by the Amending Act 8 of 2021, effective from 24.09.2021. Section 3 of the MTP Act, as amended, reads as follows:

> ***"3. When pregnancies may be terminated by registered medical practitioners. –***
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> *(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.*
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> *(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,—*
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> *(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—*
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> *(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.

(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.

(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.

(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.

(2D) The Medical Board shall consist of the following, namely:—
(a) a Gynaecologist;
(b) a Paediatrician;
(c) a Radiologist or Sonologist; and

> *(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."*
>
> *(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."*

16. Perusal of the above provisions indicates that termination of pregnancy is permissible, where the length of pregnancy does not exceed 20 weeks, on an opinion formed in good faith of a single registered medical practitioner, that the pregnancy would cause risk to the life of the pregnant woman or grave injury to her physical or mental health or if there is a risk that upon birth of the child, it would suffer serious physical or mental abnormality. The second category is where the length of pregnancy exceeds 20 weeks but not 24 weeks and in such a case, termination is permissible on the opinion formed in good faith, of two registered Medical Practitioners, in the aforementioned eventualities. The third category and with which the present case concerns, is where the length of pregnancy exceeds 24 weeks. Under Section 3(2B), limitation of 20/24 weeks would not apply if the termination is necessitated on account of substantial foetal abnormalities.

17. In the present case, Petitioner has completed 28 weeks of pregnancy, which is beyond the maximum period of 24 weeks, permissible under the

MTP Act and therefore, on account of the proscription in Section 3 of the MTP Act, Petitioner has approached this Court, seeking directions to the Respondents to allow the Petitioner to undergo medical termination of pregnancy. The controversy, therefore, before this Court, is in a narrow compass and on the legal front, no longer *res integra*. Petitioner seeks medical termination of pregnancy on account of the fact that the foetus is suffering from a severe cardiac anomaly, i.e. TOF with APV, classified as 'major abnormalities' under the aforementioned Guidelines.

18. It is explicitly clear from a plain reading of the provisions of Section 3(2)(b)(i) of MTP Act, as amended, that grave injury to 'mental health' of a pregnant woman is a legal ground available to the woman to seek medical termination of pregnancy, with the caveat that the maximum period permissible under the Act, for termination, is 24 weeks. It is also clear from the Medical Opinion, in the present case, that the foetus suffers from a rare congenital heart disease, being TOF coupled with APV, which is also classified as a Major Abnormality by the Ministry of Health and Family Welfare in the Guidance Note for the Boards, as brought out by the learned counsel for the Petitioner. While the stand of Respondent No.3 is that there are no fresh Guidelines after the amendment to the MTP Act in 2021, but it is not the stand that the Guidelines have been superseded or do not hold the field today. Be that as it may, it is clearly mentioned in the third opinion, rendered by the Board on 30.12.2021, that the foetal abnormality in the present case, is a 'Major' Abnormality.

19. Learned counsel for the Petitioner has taken the Court to the various judgments, as alluded to above, where in cases of substantial foetal abnormalities and/or where the said abnormalities had consequent impact on the mental health of the pregnant woman, the Supreme Court as well as

other High Courts and this Court have permitted medical termination of pregnancy, beyond the statutory cap of 24 weeks. To avoid prolixity, I may allude to a few hereinafter.

20. In the case of ***Sarmishtha Chakrabortty (supra)***, though the pregnancy had continued for 25 weeks, on account of the opinion of the Board that the child, if born alive, would have to undertake complex cardiac corrective surgeries, stage by stage, which was prone to mortality, the Supreme Court allowed the prayer of the Petitioner for medical termination of pregnancy. Relevant would it be to note that the foetus in the said case was diagnosed with TOF, which is one of the abnormalities in the present case.

21. As rightly pointed out by learned counsel for the Petitioner, one of the grounds for permitting medical termination of pregnancy is grave injury to mental health of the pregnant woman and in this context, sub-section (3) of Section 3 of the MTP Act, becomes relevant, wherein Legislature has mandated that while determining the continuance of pregnancy on this ground, account must be taken of the pregnant woman's actual or reasonably foreseeable environment.

22. The High Court of Bombay in a recent judgment in ***Sidra Mehboob Shaikh v. State of Maharashtra & Anr., (2021) 3 RCR (Cri) 872*** has analysed the term 'mental health' in the context of Section 3(2)(b)(i) of the MTP Act and the relevant portion is as under:

> *"21. From a reading of sub-section (2)(b)(i) of section 3 we find that a pregnancy may be terminated by a registered medical practitioner within the stipulated period if 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. Sub-section (3) says that in determining whether*

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 reasonable foreseeable environment. Pausing here for a moment, we are of the view that while examining the expression 'mental health' of a pregnant woman it is also necessary to take note of such woman's actual or reasonable foreseeable environment. In other words, while construing grave injury to the mental health of the pregnant woman what is also required to be taken into consideration is the actual or reasonable foreseeable environment surrounding the pregnant woman. While examining the same, certainly social and economic factors which may confront the pregnant woman presently or in the near future are important and relevant considerations.

22. That apart though section 2(b) defines 'mentally ill person' what finds mention in section 3(2)(b)(i) is 'mental health' which expression is not defined in the Act. As noticed above, 'mentally ill person' has been defined to mean a person who is in need of treatment by reason of any mental disorder other than mental retardation. In other words, a person who suffers from any mental disorder other than mental retardation and who is in need of treatment would be construed to be a mentally ill person. But what then do we mean when we say mental health? As already mentioned, under the Act 'mental health' is not a defined expression. We, therefore, would have to look into its meaning as is understood in common parlance. World Health Organization (WHO) has defined 'mental health' as a state of well being in which every individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make contribution to his or her community. In other words, mental health is more than not having any symptoms of mental illness; its being able to deal robustly with life's challenges. Many individuals with poor mental health may not be

formally diagnosed with any mental illness. Mental state of a person is a continuum with good mental health being at one end and diagnosable mental illness at the opposite end. Therefore, mental health and mental illness, although sound similar, are not the same.

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23. Therefore, mental health is more than just the absence of mental disorders or illness. Mental health is a state of well being in which an individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and is able to contribute to his or her community. When we say that a person is in good mental health it would mean that he is mentally equipoised or is at a mental equilibrium. Thus, from the above analysis we can safely say that the expression 'mental health' is a wider concept encompassing within its fold the expression 'mental illness'. In that context we may say that the Legislature has consciously used the expression 'mental health' in section 3(2)(b)(i) in contradistinction to the expression 'mental illness' or 'mentally ill person'."

23. Reliance was placed by the Bombay High Court, in ***Sidra Mehboob (supra)***, on an earlier judgement of the Bombay High Court in ***XYZ v. Union of India, (2019) 3 Bom CR 400*** and relevant para in ***Sidra Mehboob (supra)*** is as follows:

"27. In XYZ v. Union of India, (2019) 3 Bom CR 400, a Division Bench of this Court held that the provisions of the Act has to be given a purposive interpretation. Division Bench has opined that for the purposes of section 3(2) of the Act, the expression 'grave injury to the mental health' is used in a liberal sense by the legislature itself. Further, for determining whether continuance of pregnancy would involve risk of injury to mental health of the pregnant woman, account may be taken of the pregnant woman's actual or reasonable

> *foreseeable environment. In fact, the aspect of a pregnant woman's actual or reasonable foreseeable environment has greater nexus to the aspect of mental health as compared to physical health. Division Bench proceeded to hold that this legislative liberality when it comes to expanding the concept of grave injury to mental health cannot evaporate no sooner the ceiling of 20 weeks prescribed in section 3(2)(b) of the Act is exceeded. If the expression 'life' in section 5(1) of the Act is not to be confined to mere physical existence or survival, then permission will have to be granted under section 5(1) of the Act for medical termination of pregnancy which may have exceeded 20 weeks if the continuance of such pregnancy would involve grave injury to the mental health of the pregnant woman."*

24. The Bombay High Court in ***Sidra Mehboob (supra)*** also considered another crucial aspect, i.e. reproductive rights of a pregnant woman. The Court relied on a very significant observation of the Supreme Court in ***Suchita Srivastava (supra)*** that reproductive choice is an insegregable part of 'personal liberty', envisaged under Article 21 of the Constitution of India. Reliance was also placed on earlier judgements of the Division Bench of the Bombay High Court in ***High Court on its Own Motion v. State of Maharashtra, 2017 Cri LJ 218*** and ***Shaikh Ayesha (supra)*** as well as on the judgement in the case of ***Siddhi Vishwanath Shelar v. State of Maharashtra, WP-ASDB-LD-VC-24 of 2020 decided on 02.06.2020***, wherein the Bombay High Court has taken a clear view that freedom of a pregnant woman of making a choice of reproduction, which is an integral part of personal liberty, whether to continue with the pregnancy or otherwise, cannot be taken away. The Court has taken note of the fact that the Legislature has widened the scope of termination of pregnancy by including injury to mental health to the pregnant woman and, therefore,

provisions of Section 5 of the MTP Act would have to be interpreted to advance the cause of justice. The case of ***Siddhi Vishwanath (supra)*** is particularly relevant in the present case, as in the said case, the Bombay High Court has delved in detail into the scheme of the MTP Act and held that the scheme of the Act places the interest of the mother on a higher pedestal than the interest of a prospective child. The Court has held that this is based on the logic that the foetus cannot have independent extra uterine existence and the life of the mother who independently exists, is entitled to greater consideration. In order to avoid burdening the judgement by separately quoting paragraphs from the aforesaid judgments, I may extract hereunder paragraphs from the judgement in ***Sidra Mehboob (supra)*** wherein the Bombay High Court has referred to each of these judgments as follows:

> *"29. In Suchita Srivastava v. State, (2009) 9 SCC 1, Supreme Court expressed the view that the right of a woman to have reproductive choice is an insegragable part of her personal liberty as envisaged under Article 21 of the Constitution of India. She has a sacrosanct right to her bodily integrity.*
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> *xxx xxx xxx*
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> *34. In High Court on its Own Motion v. State of Maharashtra, 2017 Cri LJ 218, a Division Bench of this Court held that a woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. Unwanted pregnancy would undoubtedly affect her mental health as there are social, financial and other aspects immediately attached to the pregnancy. The above decision came on the backdrop of jail visit by a judicial officer where she found one inmate giving a requisition for obtaining permission to terminate her pregnancy on the ground that it would be very difficult for her to maintain and*

take care of her five-month old child if she gives birth to another child. It was in that context, the Division Bench held as follows:—

> *"13. A woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. To be pregnant is a natural phenomenon for which woman and man both are responsible. Wanted pregnancy is shared equally, however, when it is an accident or unwanted, then the man may not be there to share the burden but it may only be the woman on whom the burden falls. Under such circumstances, a question arises why only a woman should suffer. There are social, financial and other aspects immediately attached to the pregnancy of the woman and if pregnancy is unwanted, it can have serious repercussions. It undoubtedly affects her mental health. The law makers have taken care of helpless plight of a woman and have enacted Section 3(2)(b)(i) by incorporating the words "grave injury to her mental health". It is mandatory on the registered medical practitioner while forming opinion of necessity of termination of pregnancy to take into account whether it is injurious to her physical or mental health. While doing so, the woman's actual or reasonable foreseeable environment may be taken into account.*
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> *14. A woman's decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child. These are decisions taken by responsible women who have few other*

options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health."

35. Proceeding further, the Division Bench observed that pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. How she wants to deal with such pregnancy is a decision she alone can make. The right to control the body, fertility and motherhood should be left to the woman alone. In so far the provision of section 3(2)(b)(i) is concerned, the Division Bench held that the said provision is an extension of the human right of a woman which needs to be protected. The right of exercise of reproductive choice though restricted by the Act, also recognizes and protects her right to say no to the pregnancy if her mental or physical health is at stake.

36. This judgment was also referred to and discussed at length in the later judgment of this Court in XYZ v. Union of India (supra). This Court held that the principle of narrow or literal construction cannot be adopted when it comes to interpretation of section 3(2) and section 5 of the Act. Rather, the principle of liberal or purposive interpretation is to be adopted. On such interpretation, Supreme Court has consistently permitted medical termination of pregnancies which had exceeded the ceiling of 20 weeks where continuance of pregnancy involved grave injury to the mental health of the pregnant woman or where there was substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. On the question of compelling state interest, the Division Bench in

paragraph 91 clarified that the issue of compelling state interest can perhaps arise in a case where circumstances set out in clauses (i) and (ii) of section 3(2) of the Act do not exist and yet the pregnant mother seeks medical termination of pregnancy whether within or beyond the ceiling limit. Division Bench further noted that the Act lays great emphasis on the grave injury to not just the physical but also to the mental health of the pregnant woman. The expression 'grave injury to her mental health' has to be liberally construed and while so construing account may be taken of the pregnant woman's actual or reasonable and foreseeable environment. Referring to section 3(3) of the Act this Court held that the expression 'pregnant woman's actual or reasonable foreseeable environment' is particularly relevant when it comes to dealing with cases of women from rural areas or rural background. Provisions of the Act have to be so construed so as not to impose any unreasonable or disproportionate burden on pregnant women who on account of circumstances set out in clauses (i) and (ii) of section 3(2)(b) of the Act seek medical termination of pregnancy even though the ceiling prescribed may have crossed. This Court held that in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India, it can permit petitioners to undergo medical termination of their pregnancies in contingencies set out in clauses (i) and (ii) of section 3(2)(b) of the Act even though the length of such pregnancies may have exceeded 20 weeks in certain circumstances and contingencies certainly include grave injury to mental health. The grant or refusal of such permission will be governed by varied factors, including but not restricted to the opinion of the medical board.

37. In Shaikh Ayesha Khatoon v. Union of India reported in (2018) 3 Bom CR 399, a Division Bench of this Court took the view that the freedom of a pregnant woman of making a choice of reproduction

which is an integral part of personal liberty, whether to continue with the pregnancy or otherwise cannot be taken away. Noting that the legislature has widened the scope of termination of pregnancy by including injury to mental health of the pregnant woman, it was held that if continuance of pregnancy is harmful to the mental health of a pregnant woman, then that is a good and legal ground to allow termination of pregnancy if all the conditions incorporated in legal provisions are met. Provisions of section 5 of the Act would have to be interpreted in a manner that advances the cause of justice.

38. In a recent judgment of this Court in Siddhi Vishwanath Shelar v. State of Maharashtra decided on 02.06.2020, petitioner had approached this Court seeking permission to undergo medical termination of pregnancy contending that it would be extremely difficult for her to carry the pregnancy to its full term along with the stigma of being an unwed mother. It was also contended that it would be difficult for her to maintain the child on account of her poor financial background and lack of mental support, besides not being mentally ready to be a mother at that stage. While granting the prayer of the petitioner in that case, this Court held that compelling state interest though is quite a weighty consideration, the same cannot be stretched to extreme extent when continuance of pregnancy beyond 20 weeks would involve a grave injury to the mother's physical or mental health. Scheme of the Act places the interest of the mother on a higher pedestal than the interest of the prospective child. It has been held as under:—

> *"90. In so far as the aspect of 'compelling State interest' is concerned, again, no doubt, this is quite a weighty consideration. But such consideration cannot be stretched to some extreme extent by insisting that the State has compelling interest even in saving a pregnancy where the potentiality of human life is almost*

extinct or where the child, if born, were to suffer from such physical or mental abnormalities as to be seriously handicapped. Similarly, there can also be no compelling State interest, in insisting upon continuance pregnancy beyond 20 weeks where it would involve a grave injury to the mother's physical or mental health. The scheme of the MTP Act, even otherwise, places the interests of a mother on a higher pedestal than the interests of a prospective child. This is based on the logic that the fetus cannot have independent extra uterine existence and the life of the mother who independently exits, is entitled to greater consideration.""

25. In this context, I may also refer to para 28 of the said judgement wherein the Bombay High Court has referred to the version of the World Health Organization ('WHO') on the reproductive rights of the woman to decide freely the spacing, timing etc. of the children. Para 28 reads as under:

> *"28. WHO has defined reproductive rights as those rights which are based on the recognition of the basic right of all individuals and couples particularly the women to decide freely and responsibly the number, spacing and timing of their children; to have the information and the means to do so and includes the right to attain the highest standard of sexual and reproductive health. Reproductive rights also include the right of the woman to take a decision concerning reproduction free of discrimination, coercion and violence. Coercion and violence need not always be physical. It can be deduced from surrounding circumstances. Thus reproductive rights are legal rights associated with accompanying freedoms relating to reproduction and reproductive health. Women's reproductive rights may include the right to legal and safe abortion, the right to birth control, freedom from coerced sterilization and contraception, the right to access good quality reproductive health care and the*

> *right and access to education in order to make free and informed reproductive choice. Therefore, the core issue is the control a woman has or exercises over her own body and reproductive choice. Control over reproduction is a basic need and a basic right of all women. Linked as it is to women's health and social status, it is from the perspective of poor women or women of rural areas that this right can be best understood."*

26. Last but not the least, I may refer to a more recent judgement of the Division Bench of the Bombay High Court in ***XYZ v. State of Maharashtra, 2021 SSC OnLine Bom 3353*** decided on 06.10.2021, wherein dealing with an identical issue, the Bombay High Court allowed the Petitioner to undergo medical termination of her pregnancy, finding that continuation of pregnancy could cause grave injury to her mental health.

27. Coming to the present case, from the reports of the Board, it is clearly discernible that the foetus in the present case suffers from a rare congenital heart disease. The diagnosis indicates existence of Tetralogy of Fallot with Absent Pulmonary Valve Syndrome. As clarified in the report dated 28.12.2021, the disease includes a hole in the heart (Ventricular Septal Defect), along with poorly developed valve that guards the blood vessel taking blood from the right side of the heart to lungs, which leads to both obstruction and leaking of valve. In addition to the heart disease, the patient is also likely to have associated airway problems leading to requirement of respiratory support in the first year of life. The Board has also opined that the child, if born, would have to undergo repeated cardiac surgeries. The opinion, therefore, shows that there are serious and substantial foetal abnormalities and the baby, after birth, would require regular follow-ups in hospitals and repeated surgical interventions, with associated risks of major

surgeries and post-operative care, including the risk of deterioration or perhaps even survival, at any stage of life. This Court cannot also overlook the opinion of the Board that the child would require cardiac surgery not only in the initial stage of life but may also need a repeat cardiac surgery in late adolescence or adulthood. This entire medical regime would expose the child to intra and post-operative complications and may lead to further complexities, adversely impacting the quality of the child's life. While the Board has opined that following surgical repair, patient is 'likely' to have an average physical growth, but the same is with a caveat that the surgical repair is 'successful'. The opinion indicates that the entire life of the child, if born, would largely depend on the clinical condition and quality of medical care provided to the child. Thus, lack of compatibility of the foetus with a healthy and normal life is looming large. The mental frame of the Petitioner, a mother, in such circumstances, in taking a tough call to terminate pregnancy, is perhaps understandable.

28. Petitioner, in my view, is justified in contending that continuing with the pregnancy, once it is known that the foetus suffers from a rare congenital heart disease, which is a 'substantial foetal abnormality', with attendant complications and risks, would have a deleterious impact on the mental health of the Petitioner. Keeping in line with the judgements referred to above, purposively and liberally interpreting the provisions of Section 3(2)(b)(i) of the MTP Act, as amended, this Court finds merit in the contention of the Petitioner that continuing the pregnancy would cause grave injury to the mental health of the Petitioner. As repeatedly held by the Courts, in the judgements referred above, reproductive choice is a facet of reproductive rights of a woman and a dimension of her 'personal liberty', enshrined in Article 21 of the Constitution of India and thus the Petitioner

cannot be deprived of the freedom to take a decision to continue or not to continue with the pregnancy, in the backdrop of the foetal abnormalities brought forth in the Medical Opinion of the Board.

29. For the reasons recorded above, the writ petition is allowed. Petitioner is permitted to undergo medical termination of pregnancy at a medical facility of her choice. Board has explained the possible complications of the procedure of termination at this stage to the couple. Accordingly, it is for the Petitioner to take the final decision to undergo the procedure of medical termination of pregnancy, which would be at her own risk and consequences.

30. The Court appreciates the assistance rendered by the Board, who has rendered the medical Reports with commendable promptitude. It is clarified that the Doctors who have put in their opinions as a part of the Board shall have immunity in the event of any litigation arising out of the instant petition.

31. Writ Petition is accordingly disposed of, with no order as to costs.

JYOTI SINGH, J
(VACATION JUDGE)

DECEMBER 31, 2021/st/sn