

Court No. - 40

Case :- WRIT - C No. - 30708 of 2023

Petitioner :- Ms. X

Respondent :- State Of U.P. And 4 Others

Counsel for Petitioner :- Kamlesh Kumar Singh

Counsel for Respondent :- C.S.C.

Hon'ble Mahesh Chandra Tripathi,J.

Hon'ble Prashant Kumar,J.

1. Sri Kamlesh Kumar Singh, learned counsel for the petitioner makes a mention to the Court that he has filed the instant writ petition in the registry for commanding the respondent authorities to terminate the unwanted pregnancy of the petitioner, which is the result of rape committed upon her.

2. Today, the Advocates are abstaining from judicial work and considering the urgency in the matter, we have asked the registry to place the matter immediately.

3. By means of present writ petition the petitioner has sought following reliefs:-

"i. Issue a writ, order or direction in the nature of mandamus commanding the respondent authorities to terminate the unwanted pregnancy of the petitioner, which is the result of rape committed upon her, after making necessary arrangements for the same and;

ii. Issue a writ, order or direction in the nature of mandamus commanding the respondent authorities to bear the complete expenses (including ambulance, hospital bills, medicines etc.) so incurred in termination of pregnancy of the petitioner.

iii. Issue any suitable other order or direction which this Hon'ble Court may deem fit and proper under the circumstances of the case."

4. Learned counsel for the petitioner submits that the petitioner is studying in Class-X in R.N. Inter College, Bairi, Chakia, Chandauli. As per certificate given by the Principal of the aforesaid College, the date of birth of the petitioner is 01.01.2008 and as such, she is 15 years' old minor girl. The petitioner was subjected to rape and sexual assault multiple times by her neighbour. Consequently, the father of the petitioner had lodged an FIR against the accused person on 18.08.2023 and the same was registered as Case Crime No.236/2023 under Section 363 IPC, Police Station Chakia, District Chandauli. During investigation, the Investigating Officer has added Sections 366, 376 IPC and Section 7/8 of POCSO Act. Thereafter, the father of the petitioner has moved a representation on 30.08.2023 before the Chief Medical Officer, Chandauli (respondent no.4) to terminate the pregnancy of the petitioner and on receipt of the said representation, the medical examination of the petitioner was

conducted on 31.08.2023, wherein it was found that the petitioner is carrying a pregnancy of 29 weeks and 2 days. Since the period of pregnancy has already gone beyond 24 weeks, which is stipulated in Medical Termination of Pregnancy Rules, 2021, in order to terminate the pregnancy of the petitioner, there would be requirement of permission from the Court. It is submitted that the petitioner is carrying the pregnancy of more than 29 weeks and as such, she was beyond the permissible gestational age limit under the MTP Act, 1971. Hence, the petitioner was advised to approach this Court and seek judicial intervention.

5. We have heard Sri Kamlesh Kumar Singh, learned counsel for the petitioner and Sri Ambrish Shukla, learned Additional Chief Standing Counsel and Sri Sharad Chandra Upadhyay, learned Standing Counsel for the State respondent nos.1 to 5 and perused the material on record.

6. While pressing the urgency in the matter, the question posed before this Court is "to give birth to an unwanted child or not". The dilemma of the petitioner is compounded by the fact that her father has already lodged an FIR against the person, who is accused under Sections 363, 366, 376 IPC and Section 7/8 of POCSO Act. On realising that the petitioner was pregnant and was more than 28 weeks pregnancy, the instant petition has been filed before this Court through her father under Article 226 of the Constitution of India and Section 3 of the Medical Termination of Pregnancy Act, 1971, seeking a direction to the respondent authorities to terminate her pregnancy considering the grave injury that could result to her physical and mental health, from continuing with the pregnancy. In this backdrop, it is being pressed before us that medical termination of pregnancy could be done, if the Court permits after taking the consent of the parents and explaining the potential risk to her health.

7. In **Murugan Nayakkar v. Union of India & Ors.**, Writ Petition (Civil) No.749 of 2017, disposed of on 06.09.2017, Hon'ble Apex Court, while considering the case of a minor petitioner survivor of alleged rape and sexual abuse, held that it would be appropriate that termination of pregnancy be allowed in accordance with the opinion of the Medical Board constituted by an order of the Court, to the effect that termination of pregnancy should be carried out.

8. In SLP (Crl.) Dy. No.33790/2023 (**XYZ vs. the State of Gujarat & ors.**) decided on 21.08.2023 Hon'ble Supreme Court has recently considered similar issue in detail and permitted the victim, who was pregnant for more than 27 weeks, to terminate her pregnancy. Relevant portion of the judgement is reproduced hereinafter:-

"13. In Indian society, within the institution of marriage, generally pregnancy is a reason for joy and celebration and of great expectation, not only for the couple but also for their families and friends. By contrast, pregnancy outside marriage, in most cases, is injurious, particularly, after a sexual assault/abuse and is a cause for stress and trauma affecting both the physical and mental health of the pregnant woman the victim. Sexual assault or abuse of a woman is itself distressing and sexual abuse resulting in pregnancy compounds the injury. This is because such a pregnancy is not a voluntary or mindful pregnancy.

14. In *Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1, this Court expressed that the right of a woman to have reproductive choice is an inseparable part of her personal liberty, as envisaged under Article 21 of the Constitution. She has a sacrosanct right to her bodily integrity.

15. In *Sarmishtha Chakraborty and Another v. Union of India Secretary and Others*, (2018) 13 SCC 339; this Court, considered the medical report and held that unless the pregnancy was terminated, the life of the mother and that of the baby to be borne would be in great danger and, therefore, permitted termination of the pregnancy.

16. A three-Judge Bench of this Court in *Murugan Nayakkar v. Union of India & Ors.*, Writ Petition (Civil) No.749 of 2017, disposed of on 06.09.2017, while considering the case of a minor petitioner survivor of alleged rape and sexual abuse, held that it would be appropriate that termination of pregnancy be allowed in accordance with the opinion of the Medical Board constituted by an order of this Court, to the effect that termination of pregnancy should be carried out. A direction was issued that on a very next date i.e. 07.09.2017, the petitioner was to be present so that on 08.09.2017 the termination of pregnancy could be carried out.

17. More recently, in the case of *X vs. The Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi and Ors.*, AIR 2022 SC 4917; this Court, in another three-judge Bench led by Dr. D.Y. Chandrachud, J. (as the learned Chief Justice then was) observed that a woman can become pregnant by choice irrespective of her marital status. In case the pregnancy is warranted, it is equally shared by both the partners. However, in case of an unwanted or incidental pregnancy, the burden invariably falls on the pregnant woman affecting her mental and physical health. Article 21 of the Constitution recognizes and protects the right of a woman to undergo termination of pregnancy if her mental or physical health is at stake. Importantly, it is the woman alone who has the right over her body and is the ultimate decision-maker on the question of whether she wants to undergo an abortion.

18. In the context of abortion, the right of dignity entails recognising the competence and authority of every woman to take reproductive decisions, including the decision to terminate the pregnancy. Although human dignity inheres in every individual, it is susceptible to violation by external conditions and treatment imposed by the State. The right of every woman to make reproductive choices without undue interference from the state is central to the idea of human dignity. Deprivation of access to reproductive healthcare or emotional and physical well-being also injures the dignity of women.

19. The whole object of preferring a Writ Petition under Article 226 of the Constitution of India is to engage with the extraordinary discretionary

jurisdiction of the High Court in exercise of its constitutional power. Such a power is vested with the constitutional courts and discretion has to be exercised judiciously and having regard to the facts of the case and by taking into consideration the relevant facts while leaving out irrelevant considerations and not vice versa.

20. In view of the above discussion and on perusal of the latest medical report we permit the appellant to terminate her pregnancy. We direct the appellant to remain present before the KMCRI Hospital, Bharuch, Gujarat during the course of the day, today (21.08.2023) or 09:00 A.M. tomorrow (22.08.2023) as she deems fit so that the termination of pregnancy could be carried out preferably during the course of the day today (21.08.2023) or tomorrow i.e. 22.08.2023.

21. Subsequently to the medical procedure to be carried out either today or tomorrow, in the event, the foetus is found to be alive, the hospital shall give all necessary medical assistance including incubation either in that hospital or any other hospital where incubation facility is available in order to ensure that the foetus survives. Further, in case the foetus survives, then State shall take steps for ensuring that the child could be adopted in accordance with law.

22. At this stage, learned Senior Counsel for the appellant sought a direction to the concerned doctors to preserve evidence for subsequent DNA Test Report by drawing tissues from the foetus in order to use it as a piece of evidence in the ensuing trial to be prosecuted by the appellant herein. We direct the concerned medical experts to have regard to the feasibility of such a procedure being done, in the event of the foetus being alive or in the event the foetus not being alive or is still born and accordingly take steps as sought for by the appellant herein.

23. It is needless to observe that in the event tissues are drawn for the purpose of DNA test the same shall be handed over to the investigating agency by the concerned hospital. 24. A copy of this order passed today be handed over to learned Senior Counsel for the appellant and learned Standing Counsel for the State of Gujarat. 25. The appeal is allowed in the aforesaid terms."

9. At present, the issue before this Court is, whether under the facts and circumstances a rape victim of 15 years, who is carrying the pregnancy of more than 29 weeks, can be permitted to terminate the same.

10. In order to appreciate the contentions of the petitioner and decide the issue, it would be apt to reproduce Section 3 of MTP Act as under:-

"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 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
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(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."

11. Section 3 of MTP Act provides that termination of pregnancy

of a woman where it exceeds 20 weeks but does not exceed 24 weeks can only be allowed in special categories, and where the medical practitioners are of the opinion that continuance of such pregnancy would either involve a risk to the life of the women or cause grave injury to her physical health or grave injury to her mental health. The categories, under which pregnancy can be terminated where pregnancy is between 20 to 24 weeks, has been prescribed by the Central Government under the Medical Termination of Pregnancy, Rules 2003 [as amended by Medical Termination of Pregnancy (Amendment) Rules, 2021], wherein seven categories have been provided which are as under: -

"3B. Women eligible for termination of pregnancy up to twenty-four weeks.--

The following categories of women shall be considered eligible for termination of pregnancy under clause (b) of sub-section (2) Section 3 of the Act, for a period of up to twenty-four weeks, namely:-

- (a) survivors of sexual assault or rape or incest;
- (b) minors;
- (c) change of marital status during the ongoing pregnancy (widowhood and divorce);
- (d) women with physical disabilities [major disability as per criteria laid down under the Rights of Persons with Disabilities Act, 2016 (49 of 2016)];
- (e) mentally ill women including mental retardation;
- (f) the foetal malformation that has substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped; and
- (g) women with pregnancy in humanitarian settings or disaster or emergency situations as may be declared by the Government."

12. A perusal of the aforesaid Rule reveals that clause (a) relates to victims of sexual assault, rape or incest and clause (b) relates to minors. In the present case, the victim falls under both, i.e. clause (a) and (b) as she is a minor aged around 16 years, who is alleged to have been raped. Therefore, the victim would fall under the special categories as enumerated by the Central Government under the rules notified as per the mandate of section 3(2)(b) of MTP Act.

13. Furthermore, Explanation 2 to the aforesaid provision explicitly provides that where pregnancy is alleged to have been caused by an act of rape, the anguish caused by such a pregnancy shall be presumed to constitute grave injury to the mental health of pregnant woman as required under Section 3(2)(i) of MTP Act. Therefore, it is not in dispute that in case of a minor victim, who is alleged to be sexually assaulted or raped and as a consequence of which she has conceived, the injury that is caused to her mental health is presumed even statutorily.

14. The question before this Court now remains as to whether this Court, using its extraordinary powers under Article 226, should allow the termination of pregnancy of minor victim at the stage of around 28 weeks of pregnancy.

15. During the mid of the hearing, learned counsel for the petitioner further submits that the pregnancy is more than gestational age of 28 weeks, which requires proper facilities, which are not available at District Chandauli. There is proper medical facilities at Sir Sunder Lal Hospital, Banaras Hindu University, Varanasi, wherein, in case the Medical Board permits, her pregnancy may be terminated under the able guidance of medical experts.

16. In this backdrop, we have asked learned counsel for the petitioner to implead "Sir Sunder Lal Hospital, Banaras Hindu University, Varanasi" through its Medical Superintendent as respondent no.6 to the writ petition, forthwith and immediately notice has also been served upon Sri Hem Pratap Singh, Advocate, who represents the newly impleaded respondent no.6 before this Court.

17. Though the statute does not provide for termination of pregnancies over the gestational age of 24 weeks except in case of detection of substantial foetal abnormalities, the provision in regard to which is Section 3(2B) of MTP Act, the extraordinary powers of the Constitutional Courts, however, have been recognized even by the Hon'ble Supreme Court of India and exercised several times by the High Courts to allow termination of pregnancies even in cases where pregnancy has exceeded the limit of 24 weeks.

18. In the case of sexual assault, denying a women right to say no to medical termination of pregnancy and fasten her with responsibility of motherhood would amount to denying her human right to live with dignity as she has a right in relation to her body which includes saying Yes or No to being a mother. Section 3(2) of the MTP Act reiterates that right of a woman. To force the victim to give birth to child of a man who sexually assaulted would result in unexplainable miseries.

19. Considering the urgency in the matter and taking humanitarian view as the petitioner is a 15 years rape victim, we request the Medical Superintendent of "Sir Sunder Lal Hospital, Banaras Hindu University, Varanasi" to constitute a Five-Members Team headed by Department of Obs & Gynae; Department of Anaesthesia and Department of Radio Diagnosis to examine the petitioner tomorrow i.e. 05.09.2023 and submit a report before this

Court in sealed cover on 06.09.2023 through Sri Hem Pratap Singh, learned counsel for the Banaras Hindu University.

20. The District Magistrate, Chandauli is directed to ensure that the victim alongwith her parent may appear before the Medical Board on **05.09.2023 at 10 AM.**

21. Put up this matter again as fresh on **06.09.2023 at 10.30 AM.**

22. Let a copy of the order be given to learned counsel for the petitioner; Sri Ambrish Shukla, learned Additional Chief Standing Counsel and Sri Hem Pratap Singh, learned counsel for the Banaras Hindu University free of cost today for compliance.

Order Date :- 4.9.2023

RKP