



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

Date of decision: 16th OCTOBER, 2023

IN THE MATTER OF:

+ **W.P.(C) 13371/2023**

MRS. B

..... Petitioner

Through: Dr. Amit Mishra and Mr. Amit Rana,
Advs.

versus

THE UNION OF INDIA & ANR

..... Respondents

Through: Ms. Manisha Agarwal Narian, CGSC
with Ms. Archana Surve, GP, Ms.
Shivangi Gumber, Ms. Kholi
Rukuzhuro, Advs for UoI.
Ms. Mehak Nakra, ASC for GNCTD
with Md. Asif, Advs for R-2.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. The Petitioner has approached this Court seeking permission to terminate her ongoing pregnancy of 21 weeks 4 days, as per the ultrasound scan dated 06.10.2023, and as of today 22 weeks 4 days, through a Registered Medical Practitioner in any Government or Private Hospital under Section 3(2)(b)(i) and Section 3(3) of the Medical Termination of Pregnancy Act, 1971 (*herein after referred to as 'MTP Act'*) read with Rule 3B(C) of the MTP Rules, 2003.
2. Shorn of unnecessary details, facts leading to the filing of the instant writ petition are that the Petitioner herein is a 31 year old lady. It is stated that the on 11.05.2023, the Petitioner got married and started residing with her husband and father-in-law at her matrimonial home.
3. It is stated that on 21.06.2023, the Petitioner came to know about



carrying a single intrauterine pregnancy of 5 weeks 6 days. It is stated that right from the early stages of marriage, the Petitioner was being tortured, abused verbally, physically, mentally and emotionally by her husband at her matrimonial home. It is stated that on 07.07.2023, the husband of the Petitioner for the first time committed physical assault on the Petitioner. It is stated that the second instance of physical assault took place on 10.08.2023 when the Petitioner was 3 months pregnant and on the said date, the Petitioner came to her parental home and started staying there since then.

4. It is stated that the Petitioner has decided to separate from her husband and has decided to take divorce from him and, therefore, she does not want to continue with her pregnancy.

5. Section 3 of the MTP Act provides for termination of pregnancy by a registered medical practitioners. Section 3 of the MTP Act reads 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

(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 1 [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."

6. A perusal of the above section prescribes that a pregnancy which does not exceed 20 weeks can be terminated by a registered medical practitioner if he is of the opinion that 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 there is a substantial risk that if the child were born, wherein it would suffer from any serious physical or mental abnormality.

7. Rule 3(B) of the MTP Rules permits a woman to terminate her pregnancy up to twenty-four weeks. Rule 3(B) of the MTP Rules reads 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.”*

8. Learned Counsel for the Petitioner has drawn attention of this Court to a Judgment passed by the Apex Court in X vs. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Another, 2022 SCC OnLine SC 1321. The facts in the said case were that a girl was in consensual relationship and got pregnant. She was deserted by her partner. The Petitioner therein approached this Court for a direction for terminating her pregnancy because the pregnancy had exceeded 20 weeks and the medical practitioners refused to conduct the procedure for terminating her pregnancy. This Court refused to grant the interim order which was carried on to the Apex Court by filing Civil Appeal No. 5802 of



2022. The Apex Court in the said Judgment has interpreted the Rule 3(B) of the MTP Rules. Paragraph Nos.79 to 97 is being reproduced which read as under:

*"79. In order to avail the benefit of Rule 3B(a), the woman need not necessarily seek recourse to formal legal proceedings to prove the factum of sexual assault, rape or incest. Neither Explanation 2 to Section 3(2) nor Rule 3B(a) require that the offender be convicted under the IPC or any other criminal law for the time being in force before the pregnant woman can access an abortion. Further, there is no requirement that an FIR must be registered or the allegation of rape must be proved in a court of law or some other forum before it can be considered true for the purposes of the MTP Act. Such a requirement would be contrary to the object and purpose of the MTP Act. In fact, Explanation 2 triggers the legal presumption as to mental trauma "where any pregnancy is **alleged** by the pregnant woman to have been caused by rape."*

80. Rule 3B(b) includes minors within the category of women who may terminate their pregnancy up to twenty-four weeks. They have been included in the list of special categories of women because adolescents who engage in consensual sexual activity may be unaware that sexual intercourse often results in pregnancy or be unable to identify the signs of a pregnancy. The Protection of Children from Sexual Offences Act 2012⁸⁶ is gender neutral and criminalizes sexual activity by those below the age of eighteen. Under the POCSO Act, factual consent in a relationship between minors is immaterial. The proscription contained in the POCSO Act does not - in actuality - prevent adolescents from engaging in consensual sexual activity. We cannot disregard the truth that such activity continues to take place and sometimes leads to consequences such as pregnancy. The legislature was no doubt alive to this fact when it



included adolescents within the ambit of Rule 3B of the MTP Rules.

81. The absence of sexual health education in the country means that most adolescents are unaware of how the reproductive system functions as well as how contraceptive devices and methods may be deployed to prevent pregnancies. The taboos surrounding pre-marital sex prevent young adults from attempting to access contraceptives. The same taboos mean that young girls who have discovered the fact that they are pregnant are hesitant to reveal this to their parents or guardians, who play a crucial role in accessing medical assistance and intervention.

82. Furthermore, Section 19(1) of the POCSO Act requires that any person, including a child, who has knowledge of the commission of an offence punishable under the POCSO Act, or an apprehension that such an offence may be committed, is mandatorily required to provide information to the Special Juvenile Police Unit or the local police. Section 19(2) of the POCSO Act stipulates that every such report under Section 19(1) shall be ascribed an entry number and recorded in writing, read over to the informant, and entered in a book to be kept by the police unit. Failure to report, as mandated by Section 19, is a punishable offence under Section 21 of the POCSO Act. Neither the POCSO Act nor the Protection of Children from Sexual Offences Rules 2012 prescribe a template or a format for the report mandated under Section 19(1).

83. When a minor approaches an RMP for a medical termination of pregnancy arising out of a consensual sexual activity, an RMP is obliged under Section 19(1) of the POCSO Act to provide information pertaining to the offence committed, to the concerned authorities. An adolescent and her guardian may be wary of the mandatory reporting requirement as they may not want to entangle themselves with the legal process. Minors and their guardians are likely faced



with two options - one, approach an RMP and possibly be involved in criminal proceedings under the POCSO Act, or two, approach an unqualified doctor for a medical termination of the pregnancy. If there is an insistence on the disclosure of the name of the minor in the report under Section 19(1) of POCSO, minors may be less likely to seek out RMPs for safe termination of their pregnancies under the MTP Act.

84. To ensure that the benefit of Rule 3B(b) is extended to all women under 18 years of age who engage in consensual sexual activity, it is necessary to harmoniously read both the POCSO Act and the MTP Act. For the limited purposes of providing medical termination of pregnancy in terms of the MTP Act, we clarify that the RMP, only on request of the minor and the guardian of the minor, need not disclose the identity and other personal details of the minor in the information provided under Section 19(1) of the POCSO Act. The RMP who has provided information under Section 19(1) of the POCSO Act (in reference to a minor seeking medical termination of a pregnancy under the MTP Act) is also exempt from disclosing the minor's identity in any criminal proceedings which may follow from the RMP's report under Section 19(1) of the POCSO Act. Such an interpretation would prevent any conflict between the statutory obligation of the RMP to mandatorily report the offence under the POCSO Act and the rights of privacy and reproductive autonomy of the minor under Article 21 of the Constitution. It could not possibly be the legislature's intent to deprive minors of safe abortions.

85. As opposed to consensual sexual activity among adolescents, minors are often subjected to sexual abuse by strangers or family members. In such cases, minor girls may (due to their tender age) be unaware of the nature of abuse the abuser or rapist is subjecting them to. In such cases, the guardian of minor girls may



belatedly discover the fact of the pregnancy, necessitating the leeway granted by Rule 3B.

86. Rule 3B(d) includes women with physical disabilities within the special category of women. They may face additional complications arising from their disabilities and be unable to carry the pregnancy to term. They may also decide against carrying their pregnancy to term due to any personal difficulties (mental or physical) which may arise from their disability, either directly or indirectly.

*87. Women who are mentally ill (including “mental retardation”) are covered by Rule 3B(e). It extends to all categories of women who have mental illness. Women with mental illnesses may realize the fact of their pregnancy or determine that they do not want to carry it to term, later than usual. Further, men often sexually assault women with mental illnesses, especially if they have speech or communication disabilities, or reside in psychiatric care facilities. Their speech/communication disability may inhibit them from expressing that somebody has raped them. This may lead to a delay in the discovery of the pregnancy and its termination. This was found to be the case in *X v. Union of India*,⁸⁷ where a woman with Down's Syndrome had been raped by an unknown person. Her guardian discovered the pregnancy after the passage of twenty weeks.*

88. Rule 3B(f) includes that class of women where foetal anomalies have a substantial risk of being incompatible with life or where the child, if born, may suffer from physical or mental “abnormalities” and be seriously handicapped.

89. Rule 3B(g) comprehends within its fold a change in the material circumstances of the pregnant woman by accounting for pregnant women in “humanitarian settings or disaster or emergency situations.” Refugees who have had to flee their homes



for any reason or those who find themselves the victims of a natural or man-made disaster, or otherwise in an emergency would fall within the ambit of this rule. They may not realise that they are pregnant due to difficulty in accessing medical facilities. For instance, in Siddhi Vishwanath Shelar (supra), the petitioner was unable to visit a doctor due to the lockdown instituted by the government in light of the COVID-19 pandemic and became aware of her pregnancy only after twenty weeks had elapsed.

90. *Further, the decision to give birth to and raise a child is necessarily informed by one's material circumstances. By this, we mean the situational, social, and financial circumstances of a woman or her family may be relevant to her decision to carry the pregnancy to term. Those who fall victim to emergencies or disasters may unexpectedly find themselves without a home or separated from their families. They may have lost loved ones. Their livelihood may be adversely affected and they may undergo other deeply impactful changes in their lives, both material and psychological. The possibility that they have suffered grave injuries which alter their mobility or quality of life cannot be discounted. The myriad changes that may take place in the aftermath of a disaster, emergency, or humanitarian crisis cannot be exhaustively listed or envisaged. Each woman's circumstances are unique and we have merely listed (by way of illustration) some of the many potential repercussions of the catastrophes accounted for in Rule 3B(g).*

91. *A woman in such situations may have decided to have a child before the emergency or disaster which changed her material circumstances. However, this change may understandably impact each woman's evaluation of her ability to raise a child as well as her willingness to carry the pregnancy to term. While many women may decide to carry the pregnancy to term, others may no longer find the pregnancy to be a viable*



or practical option. It is ultimately the prerogative of each woman to evaluate her life and arrive at the best course of action, in view of the changes to her material circumstances.

92. Rule 3B(c) states that a “change in the marital status during the ongoing pregnancy (widowhood and divorce)” renders women eligible for termination of their pregnancy under Section 3(2)(b). The impact of the continuance of an unwanted pregnancy on a woman's physical or mental health should take into consideration various social, economic, and cultural factors operating in her actual or reasonably foreseeable environment, as provided in Section 3(3). The rationale behind Rule 3B(c) is comparable to the rationale for Rule 3B(g) i.e., a change in a woman's material circumstances during the ongoing pregnancy.

93. Rule 3B(c) is based on the broad recognition of the fact that a change in the marital status of a woman often leads to a change in her material circumstances. A change in material circumstance during the ongoing pregnancy may arise when a married woman divorces her husband or when he dies, as recognized by the examples provided in parenthesis in Rule 3B(c). The fact that widowhood and divorce are mentioned in brackets at the tail end of Rule 3B(c) does not hinder our interpretation of the rule because they are illustrative.

94. A change in material circumstance may also result when a woman is abandoned by her family or her partner. When a woman separates from or divorces her partner, it may be that she is in a different (and possibly less advantageous) position financially. She may no longer have the financial resources to raise a child. This is of special concern to women who have opted to be a homemaker thereby forgoing an income of their own. Moreover, a woman in this situation may not be prepared to raise a child as a single parent or by coparenting with her former



partner. Similar consequences may follow when a woman's partner dies.

95. Women may undergo a sea change in their lives for reasons other than a separation with their partner (Rule 3B(c)), detection of foetal “abnormalities” (Rule 3B(f)), or a disaster or emergency (Rule 3B(g)). They may find themselves in the same position (socially, mentally, financially, or even physically) as the other categories of women enumerated in Rule 3B but for other reasons. For instance, it is not unheard of for a woman to realise that she is pregnant only after the passage of twenty weeks.⁸⁸ Other examples are if a woman loses her job and is no longer financially secure, or if domestic violence is perpetrated against her,⁸⁹ or if she suddenly has dependents to support. Moreover, a woman may suddenly be diagnosed with an acute or chronic or life-threatening disease, which impacts her decision on whether to carry the pregnancy to term. If Rule 3B(c) was to be interpreted such that its benefits extended only to married women, it would perpetuate the stereotype and socially held notion that only married women indulge in sexual intercourse, and that consequently, the benefits in law ought to extend only to them. This artificial distinction between married and single women is not constitutionally sustainable. The benefits in law extend equally to both single and married women.

96. A recognition of the fact that there may be a change in a woman's material circumstance animates Rule 3B(c), Rule 3B(g) and Rule 3B(f). However, Rule 3B does not enumerate all the potential changes that a woman's material circumstances may undergo. It merely specifies some of the potential changes to a woman's material circumstances, in sub-rules (c), (f) and (g). From the object and purpose of the MTP Act, its overall scheme, and the categories of women specified in Rule 3B, it is evident that it was not the



intention of the legislature to restrict the benefit of Section 3(2)(b) and Rule 3B only to women who may be confronted with a material alteration in the circumstances of their lives in the limited situations enumerated in Rule 3B. Rather, the benefit granted by Rule 3B must be understood as extending to all women who undergo a change of material circumstances.

97. It is not possible for either the legislature or the courts to list each of the potential events which would qualify as a change of material circumstances. Suffice it to say that each case must be tested against this standard with due regard to the unique facts and circumstances that a pregnant woman finds herself in."

(emphasis supplied)

9. Though, in the present case, the facts are entirely different inasmuch as the Petitioner in the present case is a married lady. Moreover, she has not filed any FIR against her husband complaining of physical abuse. She has not filed any petition for divorce or judicial separation from her husband. She has also not approached any Court under the Domestic Violence Act. However, the ratio of the Apex Court is that it is the prerogative of each women to evaluate her life and arrive at the best course of action in view of the change in material circumstance. The Apex Court was of the opinion that change in material circumstance may result when a woman separates from her partner and she may no longer have the financial resources to raise the child. The Apex Court has included the cases of domestic violence perpetrated on a woman under Rule 3B(c) of the MTP Rules wherein a woman is permitted to terminate her pregnancy up to 24 weeks on the ground of change of marital status during the ongoing pregnancy. The Apex Court has held that the right to reproductive autonomy is closely linked with the right to bodily autonomy. The Apex Court has held that the



consequences of an unwanted pregnancy on a woman's body as well as her mind cannot be understated and, therefore, the decision to carry the pregnancy to its full term or terminate it is firmly rooted in the right to bodily autonomy and decisional autonomy of the pregnant woman. The Apex Court has relied on the observations of made by the Apex Court in K S Puttaswamy v. Union of India, (2017) 10 SCC 1, wherein it was held that a “woman's freedom of choice whether to bear a child or abort her pregnancy are areas which fall in the realm of privacy.” The Apex Court further held that the right to reproductive choice also includes the right not to procreate and in doing so, it situated the reproductive rights of women within the core of constitutional rights and held that decisional autonomy is an integral part of the right to privacy and decisional autonomy is the ability to make decisions in respect of intimate relations. It was finally held by the Apex Court that the MTP Act recognises the reproductive autonomy of every pregnant woman to choose medical intervention to terminate her pregnancy.

10. The opinion of a Medical Board would be necessary for consideration as to whether it would be safe for the Petitioner to undergo the procedure for termination of pregnancy by a registered medical practitioner and also to ascertain the conditions of the foetus.

11. For this purpose, this Court is inclined to direct All India Institute of Medical Sciences, New Delhi to immediately constitute a Medical Board to consider as to whether it will be safe for the Petitioner herein to undergo the procedure for termination of pregnancy or not and also on the condition of fetus. Let the report of the Medical Board, so constituted, be forwarded to this Court within 48 hours from today.

12. Issue Notice.

13. Ms. Manisha Agarwal Narian, learned CGSC, accepts notice for



Respondent No.1.

14. Ms. Mehak Nakra, learned ASC, accepts notice for Respondent No.2.

15. The Petitioner has chosen not to implead her husband in the array of parties. The Petitioner is directed to amend the memo of parties impleading her husband during the course of the day.

16. On amended memo of parties being filed let notice be issued to the Husband of the Petitioner through all modes, including *Dasti*. The husband of the Petitioner be also served notice through local police station.

17. List on 19.10.2023 at 05:00 PM.

SUBRAMONIUM PRASAD, J

OCTOBER 16, 2023

S. Zakir