

(2018) 12 KAR CK 0009

In the Karnataka High Court

Case No : Writ Petition No. 55411 Of 2018 (Gm-Res)

Anjali Chugh,

APPELLANT

Vs

State Of Karnataka

RESPONDENT

Date of Decision : 17-12-2018

Acts Referred:

Medical Termination of Pregnancy Act, 1971 — Section 3, 4, 5

Citation : (2018) 12 KAR CK 0009

Hon'ble Judges : B. Veerappa, J

Bench : Single Bench

Advocate : G. Vikram, Vijayakumar A Patil, Nagashree M.C.

Final Decision : Allowed

Judgement

1. The petitioner, who is 29 years old and 21 weeks pregnant is before this Court for permission to medically terminate her pregnancy under the medical care and supervision of Dr. Shefali Tyagi at Cloud 9 (Kids Clinic India Pvt. Ltd.) situated at Bellanduru Village, Varthur Hobli, Bangalore.

I - FACTS OF THE CASE

2. It is the case of the petitioner that she married Sri Ankit Chugh on 17.1.2017 and she is pregnant exceeding 21 weeks as of now. The ultrasound scan tests were carried out on the petitioner during 5th month of her pregnancy to ensure that every organ of the foetus was developed properly. The ultra sound scan dated 4.12.2018 depicts as under:

- a) 21 weeks aged single live gestation (calculated from LPM) showing 20 weeks four days size (50th percentile). This indicates ultra sound growth correlation with menstrual age.
- b) Duodenal atresia with T10 hemivertebra
- c) No evidence of tethered cord noted.

3. It is the further case of the petitioner that she got another ultra sound scanning done on 5.12.2018 at Cloudnine, Kids Clinic India Pvt. Ltd., which also revealed that:

a) the report also was suggestive of duodenal atresia

b) Evidence of hemi vertebra is noted, probably involving D10 vertebra body is seen.

Based on the ultra sound tests that were carried out on the petitioner, she was advised to medically terminate her pregnancy by Dr. Shefali Tyagi on 8.12.2018. It is further contended that Dr. Shreeja Karan has opined that the ultra sound reveals that the foetus has Duodenal Atresia which means a part of the intestine has not been developed which can cause complications like bilious vomiting/ intestinal obstruction after birth requiring emergency surgery on day one. The doctor has opined that the surgery may have complications resulting in secondary surgery. The morbidity and mortality is high. The baby might not survive with such complications soon after birth. Secondly, a part of the foetus backbone is not developed and that can lead to baby not being able to walk after birth and even if the baby survives it might confine to bed.

4. It is the further case of the petitioner that she also got the opinion from Dr. Deepti Nair, who has also opined that Duodenal atresia can be associated with other anomalies in 50 percent of the cases, in that case long term prognosis is not good which can be associated with Down Syndrome in 40 percent cases. Baby will require surgery soon after birth, the outcome of the procedure, short term and long term prognosis of which is variable and cannot be guaranteed. Therefore, the petitioner is before this Court for the relief as sought for.

II- THE ORDERS PASSED BY THIS COURT

5. When the matter had come up before this Court on 12.12.2018, the learned Government Advocate was directed to get instructions as to whether any Authority or Board is constituted for medical termination of pregnancy. Accordingly, the matter had come up on 13.12.2018, on which date, this Court directed respondent No.3 to constitute a Medical Board/Committee consisting of the Specialists, who are handling the cases of termination of pregnancy, so as to examine the petitioner and submit a report in a sealed cover to this Court. The petitioner was also directed to appear before the 3rd respondent on 14.12.2018 at 11.00 a.m., who shall take immediate action taking into consideration the peculiar facts and circumstances of the present case as the length of pregnancy of the petitioner exceeded 21 weeks and submit a report in a sealed cover to this Court on 17.12.2018. That is how the matter is listed today.

III - REPORT IN A SEALED COVER SUBMITTED BY THE LEARNED ADDITIONAL GOVERNMENT ADVOCATE

6. Sri Vijaya Kumar A. Patil, learned AGA, has submitted the report in a sealed cover which is opened in the Open Court in presence of the learned Counsel for

both parties, which reveals that the 3rd respondent has constituted a Medical Board comprising five panel of Doctors for examination of Mrs. Anjali Chugh, W/o Ankit Chugh in Vanivilas and Victoria Hospital Campus,

Bangalore Medical College and Research Institute,

Bangaluru as follows:

(1) Dr. Geetha Shivamurthy, Medical Superintendent of Vanivilas Hospital, BMCRI, Bengaluru.

(2) Dr. Savitha C., Professor and Head of Department of Obstetrics and Gynecology, Vanivilas Hospital, BMCRI, Bengaluru;

(3) Dr. Sarala Sabhapathy, Head of the Department of Paediatrics, Vanivilas Hospital, BMCRI, Bengaluru.

(4) Dr. Vijaya Kumar, Professor Department of Radiology, in-charge of Victoria Hospital, BMCRI, Bengaluru.

(5) Dr. Anand Alladi, Professor & HOD, PMSSY, BMCRI, Bengaluru.

After the petitioner's Physical Examination, OBG Examination, Paediatric Opinion, Radiology Examination - Ultrasonography and Paediatric Surgery Opinion, ultimately the doctors have expressed their opinion as under:

"Based on all the above examinations and investigations, Mrs. Anjali Chugh Aged 29 years, is G1-daigonsis with 21 weeks of gestation have anomaly on scan done at Victoria Hospital on 14-12-2018. And these are the findings.

1. Duodenal atresia

2. Hemivertebra with scoliosis.

? We are of the opinion that there is a congenital anomaly found in the baby.

? How ever baby should need major surgery and severity could be known after past delivery.

? If the patient and her family feels the mental trauma of delivering such a baby option of termination of pregnancy could be considered."

IV - AFFIDAVIT OF THE HUSBAND OF THE PETITIONER

7. Today, the learned Counsel for the petitioner has filed the affidavit of the petitioner's husband i.e., Ankith Chugh wherein at paragraphs-2 and 3, he has stated on oath as under:

"2. I state that I am married to the petitioner. I am the father of the foetus that the petitioner is presently carrying. I am aware of the facts and circumstances of the case. I submit that the petitioner who is none other than my wife is pregnant and the length of her pregnancy has exceeded 21 weeks. I am well aware that the present petition is filed by the petitioner seeking permission of this Hon'ble

Court to medically terminate her pregnancy.

3. I state that the ultra sound tests conducted on the petitioner revealed certain abnormalities. The doctors have unanimously opined that it would be in the best interest of the baby to medically terminate the pregnancy. I and the petitioner have discussed the opinion so rendered by the doctors and have come to a considered opinion that it would be better if the pregnancy is medically terminated. The said decision is taken in the interest of the baby and in the interest of the petitioner and not for any extraneous considerations without being forced, influenced or coerced by anyone."

V - ARGUMENTS ADVANCED BY THE LEARNED COUNSEL FOR THE PARTIES

8. I have heard the learned Counsel for the parties.

9. Sri G. Vikram, learned Counsel for the petitioner reiterating the grounds urged in the petition contended that the three specialized doctors have opined that if the petitioner were to deliver the baby, then the baby would suffer from such physical abnormalities as to be seriously handicapped as stated in the reports. The petitioner is into her 21st week of pregnancy and in view of the restriction contained in Section 3 of the Medical Termination of Pregnancy Act, 1971 (for short, hereinafter referred to as 'the Act') she is constrained to approach this Court seeking termination of pregnancy. He further contended that in view of the opinion given by private specialised doctors as well as the Medical Board appointed by this Court, which clearly depicts that the termination of pregnancy is inevitable as the child would suffer physical abnormalities and seriously handicapped and if the pregnancy is allowed to continue, it would endanger the life of the petitioner, who is aged about 29 years.

Therefore, he sought to allow the writ petition.

10. Per contra, Sri Vijay Kumar A. Patil, learned AGA for respondent Nos. 1 and 3 submits that in view of the provisions of Sections 3 and 4 of the Act, the hospitals established or maintained by the Government has the authority to terminate the pregnancy which shall be made in accordance with law considering the report of the Medical Board appointed by this Court. He would further contend that the pregnancy can be terminated where the length of the pregnancy exceeds 12 weeks, but does not exceed 20 weeks, if at least two medical practitioners are of the opinion that the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical and mental health. Therefore, he submits that if the petitioner wants to terminate her pregnancy as prayed for in the petition, it is at her own risk and expenses and should not blame the Government.

11. Smt. M.C. Nagashree, learned Central Government Counsel appearing for respondent No.2 submits that this Court has to take into consideration the opinion expressed by the experts in the medical field and proceed in accordance with law.

VI - THE POINT FOR DETERMINATION

12. In view of the rival contentions urged by the learned Counsel for the parties, the only point that arises for consideration is:

"Whether it would be justified and legal to terminate the pregnancy of the petitioner as prayed for, when the medical report itself reveals as of now 21 weeks 3 days duration in the facts and circumstances of the present case"?

VII - CONSIDERATION

13. I have given my anxious consideration to the arguments advanced by the learned Counsel for the parties and perused the material on record including the medical report carefully.

14. It is an undisputed fact that the petitioner, who is aged about 29 years is before this Court at the stage of pregnancy of 21 weeks 3 days under the medical care and supervision of Dr. Shefali Tyagi at Cloud 9, (Kids Clinic India Pvt. Ltd.) situated at Bellanduru Village, Varthur Hobli, Bangalore. The material on record clearly depicts that Dr. Shefali Tyagi by his opinion dated 8th March, 2018 has recorded as under:

"The ultra sound tests revealed that the small intestine of the foetus was not developed and in such case when baby is born, it cannot feed from day 1 since intestine is important in food digestion.

Hence this baby will need immediate surgery after birth and outcome after that surgery is also not good. The baby might die due to extensive surgery or infection or blood loss. The prognosis of such surgery is not that good and baby might expire even after surgery. Secondly a part of the foetus backbone is not developed and it can lead to baby not being able to walk after birth even if the baby survives and might have to be confined to bed. Such life will be full of struggle for parents and the baby both will suffer. Hence I, Dr. Shefali Tyagi, have opined that the pregnancy has to be terminated."

15. Dr. Shreeja Karan, Consultant-Obstetrician, by her opinion dated 8th December, 2018 has stated as follows:

"The length of her pregnancy has exceeded 21 weeks as of now. The ultrasound revealed that the foetus has duodenal Atresia that means a part of the intestine has not developed which can cause complications like bilious vomiting/intestinal obstruction after birth requiring emergency surgery on day 1. The surgery can have complications like reflux gastritis/ jaundice, bowel obstruction etc. and might also need secondary surgery. The morbidity and mortality is high and condition needs a long follow up. The baby might not survive such complications soon after birth. Secondly a part of foetus backbone is not developed and it can lead to baby not being able to walk after birth even if the baby survives and might have to confine to bed.

16. Dr. Deepti Nair, Consultant, Pediatrics & Neonatology, in her opinion dated

8th December, 2018 has opined as under:

"The length of her pregnancy has exceeded 21 weeks as of now. The ultrasound done during the 21st week of her pregnancy revealed following:

- a) 21 wks aged single live gestation (calculated from LPM) showing 20 weeks four days size (50th percentile). This indicates ultrasound growth correlation with menstrual age. b) Duodenal atresia with T10 hemivertebra.
- c) No evidence of tethered cord noted.

Duodenal atresia can be associated with other anomalies in 50 percent of cases, in that case long term prognosis is not good. It can be associated with Down syndrome in 40 percent cases. Baby will require surgery soon after birth, the outcome of the procedure, short term and long term prognosis of which is variable and cannot be guaranteed. The parents has been explained about these in details. "

17. In spite of the said opinion by the specialised doctors, in order to follow the procedure as contemplated under the provisions of Sections 3 and 4 of the Medical Termination of Pregnancy Act, 1971, this Court directed the 3rd respondent to constitute a Medical Board/ Committee as stated supra. Accordingly, the Medical Board has appointed five Specialists and has opined as stated supra.

18. The provision of Section 3 of the 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 twelve weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that-

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation 1.- Where any pregnancy is alleged by the pregnant woman to have

been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken to the pregnant woman's actual or reasonable 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 4 [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.

19. A careful perusal of the said provision clearly depicts that the provision deals with termination of pregnancies of different durations, and the procedure contemplated therefor. Section 3 leaves no room for doubt, that it is not permissible to terminate a pregnancy after 20 weeks. However, the provisions of Section 5 of the Act lays down exceptions to Section 3.

20. The provisions of Section 5 of the Act reads as under:

5. Sections 3 and 4 when not to apply.-

(1) The provisions of section 4, and so much of the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

[(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

(3) Whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

(4) Any person being owner of a place which is not approved under clause (b) of section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

Explanation 1.-For the purposes of this section, the expression "owner" in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act.

Explanation 2.-For the purposes of this section, so much of the provisions of clause (d) of section 2 as relate to the possession, by registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply.]

VIII - CONCLUSION

21. A careful perusal of Section 5 of the Act makes it clear that termination of pregnancy, which is necessary to save the life of pregnant woman, is permissible. Having careful perusal of the medical reports submitted by three private specialised doctors and the opinion of the Medical Board consisting of five specialised doctors stated supra, clearly depicts that there is a risk in continuation of pregnancy which gravely endangers the physical and mental health of the petitioner. The Medical Board also expressed and advised that if the patient and her family feel the mental trauma of delivering such a baby, option of termination of pregnancy could be considered. In view of the opinion expressed by the Specialists stated supra, this Court is of the considered opinion that, it would be justified and legal to terminate the pregnancy of the petitioner in terms of the provisions of Section 5 of the Act. Accordingly, answer the point raised in the present writ petition in the affirmative.

22. It is relevant to consider the provisions of Section 4 of the Act which reads as under:

[4. Place where pregnancy may be terminated.-

No termination of pregnancy shall be made in accordance with this Act at any place other than-

(a) a hospital established or maintained by Government, or

(b) a place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee.

Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to time.]

The said provision makes it clear that no termination of pregnancy shall be made in accordance with the Act at any place other than a hospital established or maintained by Government, or at a place, which is approved by the Government or a District Level Committee constituted by that Government.

Admittedly, the Government has not appointed either the State or District Level Committee (Medical Board) or established a hospital maintained by the Government till today. Therefore, the patient like the petitioner is forced to approach the well equipped private hospitals having specialized doctors.

IX - RESULT/DECISION

23. In view of the above, writ petition is allowed in the following terms/directions:

- (1) The petitioner is permitted to undergo medical termination of her pregnancy in a hospital having medical facility of her choice as prayed for in the writ petition i.e., under the Medical care and supervision of Dr. Shefali Tyagi at Cloudnine (Kids Clinic India Pvt. Ltd) situated at Bellanduru Village, Varthur Hobli, Bangalore, at her own medical expenses and on her own risk and consequence and the concerned Doctor shall ensure the safety of the petitioner;
- (2) It is further made clear that the doctors (both private and Government Specialised), who have put their opinions on record, shall have the immunity in the event of occurrence of any litigation arising out of the instant petition;
- (3) The Government shall take necessary steps to constitute State and District Level Committee (Medical Board) in accordance with the provisions of the Medical Termination of Pregnancy Act, 1971, Rules 2003 and Regulations 2003 and in accordance with law at the earliest;
- (4) Rule is accordingly made absolute;
- (5) All concerned including the approved Medical Centres, shall act upon the authenticated copy of this order;
- (6) The Registry is directed to send a copy of this order to the Chief Secretary, Government of Karnataka, forthwith to take necessary steps.