
(2016) 02 GUJ CK 0161
In the Gujarat High Court

Case No : Special Criminal Application (Direction) No. 1155 of 2016.

Bhavikaben D/o. Rameshbhai Solanki

APPELLANT

Vs

State of Gujarat & 3

RESPONDENT

Date of Decision : 19-02-2016

Acts Referred:

Medical Termination of Pregnancy Act, 1971 — Section 3

Citation : (2017) 1 CriCC 248 : (2016) 3 RCRCivil 312 : (2016) 3 RCRCriminal 362

Hon'ble Judges : Sonia Gokani, J.

Bench : Single Bench

Advocate : Jal Soli Unwala for Hardik J. Jani and Ms. Tejal A. Vashi, Advocates, for the Appellant; JK Shah, APP, for the Respondent

Final Decision : Disposed Off

Judgement

Sonia Gokani, J. (Oral) - This petition is preferred under Article 226 of the Constitution of India seeking termination of pregnancy under the Medical Termination of Pregnancy Act, 1971 ["MTP Act" for short] in the following factual background.

2. The petitioner herein was born on 1st June 1997 and is aged 18 years. She is victim of rape. Her mother has lodged a complaint against the accused persons, being IC. R No. 55 of 2015 registered with Chorwad Police Station, District Junagadh for the offence punishable under Sections 376, 506 (2) and 114 IPC. According to complainant on 26th September 2015, the victim was found from the bathroom, after having consumed acid, and therefore, she was immediately removed to Raghuvanshi Hospital at Keshod. On 2nd October 2015, a letter written by the accused to the victim since was found from the residence, she had revealed to the parents that as a minor she was lured by the accused and rape was committed on her. When she missed her monthly periodical cycle and on realising that she was carrying pregnancy, she revealed the fact to the accused and insisted on marrying him. The accused refused any such relation and

perturbed victim had chosen to end her life by consuming acid. A complaint also came to be filed by the mother of the victim which set the criminal machinery into motion.

3. By preferring the present Application, it is urged by the victim that consumption of acid in solid liquid form has damaged her organs like Esophagus, Liver, etc. She was advised to undergo surgery of esophagus, but the surgery could not be performed on account of her pregnancy. Having found that this continuance of pregnancy is causing serious threat to her physical and mental health and this may also create serious complications to the child that may be born, she contemplated termination of pregnancy under the provisions of MTP Act. The victim's parents are carrying on agricultural labour work on the field of others and the family has scant financial resources. Therefore, a request is made to allow her to terminate pregnancy, which is of 24 weeks.

4. This Court, vide its Order dated 17th February 2016, had passed the following order :

"A detailed medical report needs to be called for before permission of termination of pregnancy is acceded to. And therefore, the Medical Superintendent, Sola Civil Hospital, Sola, Ahmedabad is directed to cause to examine the petitioner by a panel of senior-most Gynecologists of the Sola Civil Hospital. The aforesaid team of doctors shall examine the victim on 18th February 2016 and after an interaction with her, shall give in writing opinion at the earliest, bearing in mind the advanced stage of pregnancy and her physical and mental condition, whether there will be a substantial risk to the life of the petitioner, if the child was born, or that the child would suffer from such physical or mental abnormalities as to be seriously handicapped.

The Medical Superintendent, Sola Civil Hospital, Ahmedabad shall admit the petitioner today itself and shall only discharge her after the Court's order.

A copy of this order shall be furnished to the learned advocates appearing for the respective sides for follow up action.

Intimation of this order shall be sent to the Medical Superintendent of Sola Civil Hospital, Sola, Ahmedabad forthwith by the learned APP Shri JK Shah appearing for the respondent-State.

Let this matter appear on 19th February 2016 with the report of the experts."

5. Today, the report of Medical Superintendent, GMERS Medical College and Hospital, Sola, Ahmedabad dated 18th February 2016 is produced on the record. It appears that a committee of six members was constituted by the Medical Superintendent and the said team of Doctors have given their opinion that continuation of pregnancy will adversely affect her mental status; of course, it will not affect her physical status. It had then been referred to the Professor and Head, OBGY Department, GMERS Medical College, Ahmedabad and according to the Professor and Head-OBGY Department, the pregnancy since at present is of

24 weeks and MTP Act permits termination of pregnancy till 20 weeks, the same can be carried out, if permitted by the Court's order, in extreme situation and considering the increased risk of termination at this gestational age. However, as per the opinion of team of Doctors, the survival of new born is very less due to extreme prematurity.

6. Rule returnable forthwith. Learned APP Shri JK Shah appears and waives service of notice of rule for and on behalf of the respondent-State. Considering the peculiar nature of the case, this matter is taken up for hearing today.

7. Both the sides have made their submissions at length. Learned advocate Shri JS Unwala appearing with Mr. Hardik Jani submits that Doctors when have clearly opined that continuation of pregnancy is going to affect her mental status, what is of prime importance is the health of the petitioner. He has urged that the "Best interests" is prescribed by the Apex Court is the requirement as to whether the decision would subserve the interest of the person in question and the decision of the Court should be guided by the interests of the victim alone and not of those of other stakeholders. He has urged fervently that it is the case not only of rape, but the petitioner had out of frustration and humiliation chosen to end her life by consuming acid and as a result of which she presently is unable to swallow anything and is having extremely frizzle health. It is also the say of the learned advocate that the parents of the victim are also undergoing traumatic condition seeing the condition of the girl, who herself barely turned 18 years, after the incident.

8. Learned PP Shri Mitesh Amin appearing with Shri JK Shah, APP has urged that the Court should left it to the discretion of the team of Doctors, as has been done in case of Chandrakant Jayantilal Suthar and Anr. v. State of Gujarat [Special Leave to Appeal (Criminal) No. 6013/2015 (Arising from Spl. Criminal Application No. 4255/2015)] wherein it had been observed that if the team of doctors is of the view that termination of pregnancy is immediately necessary to save life of the victim, the concerned doctor of the Civil Hospital shall perform necessary surgery, if the petitioner and the victim desire to go through such abortion, without taking any permission from the Court and if there is no unanimity amongst the doctors, majority view of the doctors shall prevail.

9. Before adverting to the facts in the instant case, provisions of MTP Act, particularly Section 3 requires reproduction -

"3. When pregnancies may be terminated by registered medical practitioners -

(1) Notwithstanding anything contained in the Indian Penal Code, 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,

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

10. This Act permits termination of pregnancy where the length of pregnancy does not exceed twelve weeks or where such length of pregnancy exceeds twelve weeks but does not exceed twenty weeks, if in the opinion of two registered medical practitioners, in cases of sub section [2](b) of Section 3, continuance of pregnancy would involve a risk to the life of a pregnant woman or of grave injury to her physical or mental health, or there is a substantial risk that if a child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. Explanation provides that 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. Pregnancy thus can be terminated by registered medical practitioner where it is not of more than twelve weeks. If it is of more than twelve weeks, but less than twenty weeks, two medical practitioners need to opine that continuance of pregnancy would involve a risk to the life of pregnancy woman or that it may cause grave injury to her physical or mental health. Likewise, physical or mental abnormalities of a child to be born is also one of the grounds for medical practitioners to terminate the pregnancy. Further, no pregnancy of any woman who has not attained the age of 18 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.

11. The Apex Court in case of Chandrakant Jayantilal Suthar and Anr. v. State of Gujarat [Supra] had left it to the discretion of the medical practitioners, considering the peculiar facts, who were to decide after interaction with the victim, as termination of pregnancy was immediately necessary to save life of the victim herself, it did not want the Doctors to wait for the permission of the Court, if there was a unanimity amongst the doctors; otherwise directed the majority view to prevail. While so doing, the Court directed the Hospital authorities to take necessary tissue from the fetus for DNA identification.

12. In case of Suchita Srivastava and Anr. v. Chandigarh Administration, reported in 2009 (3) GLH 468, the Apex Court has laid down the theory of best interest test to hold that the Court is required to ascertain the course of action which would serve the best interests of the person in question. The Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim. The Court's decision should be guided by the interest of the victim alone and not those of stakeholders such as guardians or society in general. Apt it would be, to reproduce the observations made in para 19 of the decision, which reads thus -

"19. As evident from its literal description, the "Best interests" test requires the Court to ascertain the course of action which would serve the best interests of the person in question. In the present setting this means that the Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim. It is important to note that the Court's decision should be guided by the interests of the victim alone and not those of other stakeholders such as guardians or society in general. It is evident that the woman in question will need care and assistance which will in turn entail some costs. However, that cannot be a ground for denying the exercise of reproductive rights."

13. Bearing in mind the decision of the Apex Court and keeping the "Best interests" test as the parameter, in the opinion of this Court, in the present set of circumstances, careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim, if are considered, this Court is of the opinion that termination of pregnancy requires to be permitted, which is in the best interest of the victim.

14. It is to be noted that the team of Doctors have on 18th February 2016 submitted report and opined, thus -

"After reviewing history and detailed examination, blood reports and sonography done at Civil Hospital, Sola, our opinion is as follow:

- Psychiatric evaluation suggest patient is not suffering from any psychiatric disorder and patient is psychiatrically fit. Considering involuntary pregnancy and unwillingness of victim to continue pregnancy her mental trauma may increase if pregnancy continues.

- Anesthetic evaluation suggest that slightly more risk of anesthesia if pregnancy will terminated at present.
- Medical and surgical evaluation suggest that if proper nutrition and care is maintained through feeding jejunostomy, there is no physical harm in continuation of pregnancy or termination of pregnancy at present.
- There is same or slight increase risk to victim if pregnancy is terminated before term than physiological normal delivery at term.
- As per MTP Act, termination of pregnancy can be done up to 20 week of pregnancy. At present, patient had 24 week live pregnancy.
- If the child will born at present, the chances of survival of new born is very less due to extreme prematurity. But, if it delivers at term there will not increase chance of physical or mental abnormalities or seriously handicapped.

Considering all experts opinion continuation of pregnancy will adversely affect her mental status but will not affect her physical status."

15. Professor and Head, OBGY Department, GMERS Medical College, Sola, Ahmedabad has opined, thus -

"(1) Pregnancy at present is 24 weeks. As per MTP law, MTP can be carried out only till 20 weeks in said case.

(2) However termination can be carried out, if permitted by the Court order in extreme situation considering increased risk of termination at this gestational age in the said situation. As per the opinion of Pediatrician, the child born at this age is not likely to survive due to extreme prematurity."

16. If the opinion of the team of Doctors is taken into consideration, it could be noticed that her mental status will adversely be affected, if pregnancy continues. She, therefore, falls under the criteria set out in the MTP Act. This continuance of pregnancy since involves grave injury to her mental health as her pregnancy being the result of rape, the anguish caused also is to be constituted as a grave injury to the mental health of the victim, and therefore also, termination of pregnancy is permitted.

17. This Court had noticed, before referring the victim to the team of medical experts, that she is being fed through Rielis tube and except liquid naturally nothing could be provided. Her frail physical and mental health is on account of trauma of rape she underwent and it appears almost an impossibility for her to look after herself. She also attempted suicide when humiliated by the accused. All these factual circumstances that emerge on record, particularly very young age of the petitioner leads this Court to conclude in favour of grant of her request. Delay in approaching this Court has placed statutory constraints which is because of various grounds narrated - chief amongst the same is her poor health and poverty stricken condition of parents. However, when medical opinion does not indicate this act of termination to risk her life, following the best

interest test, request warrants to be acceded to.

18. Therefore, it is being directed that with best medical facilities available and on ensuring the proper care and supervision, termination of pregnancy shall be carried out. Doctors shall take necessary tissue from the fetus for DNA identification by following scientific practise prescribed by the Standard Medical Practise for DNA identification.

19. Intimation of this order shall be sent to the Medical Superintendent, Sola Civil Hospital, Ahmedabad forthwith by the registry and a copy of this order shall also be sent to the learned PP for onward communication.

20. Learned advocate for the petitioner shall also be provided a copy of this Order for follow up action.

21. Let the Medical Superintendent, GMERS Medical College and Hospital, Sola, Ahmedabad apprise this Court, the well being of the victim and for that purpose alone, this matter is listed on 24th February 2016. Direct service to be made forthwith.