

(2008) 08 BOM CK 0118

In the Bombay High Court

Case No : Writ Petition (L) No. 1816 of 2008

Dr. Nikhil D. Dattar, Gynaecologist, Mr. X (Identification withheld for preserving confidentiality) and Mrs. Y (Identification withheld for preserving confidentiality)

APPELLANT

Vs

Union of India (UOI) and State of Maharashtra and Advocate General

RESPONDENT

Date of Decision : 04-08-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Medical Termination of Pregnancy Act, 1971 — Section 2, 3(1), 3(2), 3(4), 4(1)

Citation : (2008) 110 BOMLR 3293

Hon'ble Judges : R.M.S. Khandeparkar, J;A.A. Sayed, J

Bench : Division Bench

Advocate : P.M. Havnoor and Amit Karkhanis, for the Appellant; Rajendra Raghuvanshi, A.S.G., Rutuja Ambekar, Mandar Goswami and D.A. Athawale for Respondent No. 1 and D.A. Nalawade, Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

R.M.S. Khandeparkar, J.—Heard. Rule. By consent, heard forthwith. The learned advocates for the respondents waive service.

2. By the present petition, the petitioners are seeking declaration that Section 5 of The Medical Termination of Pregnancy Act, 1971, for short "the said Act", to the extent it does not include the eventualities specified u/s 3(2)(b)(ii) of the said Act is ultra vires and that, therefore, the Section 5(1) of the said Act should be read down to include the said eventualities, and consequently should be read to include the following words "and when 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" and hence direction should be issued to the respondents to allow the petitioner No. 3 to terminate the pregnancy.

3. The facts which are not in dispute are that the petitioner No. 3 is currently in

26th week of pregnancy. During 24th week of pregnancy, the petitioner No. 3 having undergone the necessary medical tests learnt that the foetus in her womb was diagnosed to have congenital complete heart block. The petitioner Nos. 2 and 3 consulted the petitioner No. 1 and sought his opinion about the possibility for termination of pregnancy after learning about the alleged anomalies in the foetus.

4. It is the case of the petitioners that though the termination of pregnancy has been advised, on account of statutory provisions comprised under the said Act, the doctors are reluctant to perform the necessary surgical operation in that regard.

5. The petition when came up for hearing on 29th July, 2008, after hearing the parties, by reasoned order, this Court (Sri J.N. Patel and Sri K.K. Tated, JJ) required the Chief Medical Officer/Dean of J.J.Hospital to constitute a Committee of gynaecologist and pediatrician experts in the field of Cardiology and to submit the report after examining the petitioner No. 3 on the aspect of termination of pregnancy. Accordingly, report was submitted and the matter came up for hearing on 1st August, 2008.

6. On 1st August, 2008, after going through the report, it was observed by this Court (Sri P.B. Majmudar and Sri A.A. Sayed, JJ) that:

Prima facie, we find contradiction in the report and since the Court is not in a position to get a clear picture from the report of the Committee, as at one place the Committee has said that on medical reasons the Committee feels that the findings do not have substantive significance to resort the termination of pregnancy and at another place it says that the Committee is of the opinion that there are very fair chances that child will be born incapacitated and handicapped to survive.

Having observed as above, the Court issued the following direction:

Learned Counsel for the petitioner may immediately serve this order to the Dean, J.J.Hospital, Mumbai. Let the Government Pleader also communicate this order to the Dean, J.J.Hospital, Mumbai, requesting the Committee Members to give further report as indicated above. Looking to the urgency of the matter, the Committee may give additional report by giving firm finding in this behalf by preparing the report latest by tomorrow evening. The Dean, J.J.Hospital may hand over the additional report/opinion in a sealed envelope giving their findings as indicated above to the Government Pleader before 10.00 a.m. on 4th August, 2008 so that such report can be made available to the Court when the matter is taken up for hearing. The learned Counsel for petitioner No. 3 submitted that Petitioner No. 3 may be granted liberty to get herself examined through an expert Paediatrist/Cardiologist/Gynaecologist and submit report in this behalf. It is for petitioner No. 3 to adopt such course. At this stage, we are not expressing any opinion.

7. Today, when the matter came up for hearing in the morning session, the report in terms of order dated 1st August, 2008 was placed before us. The said report reads thus:

As per the orders of the Hon''ble Court, Ms. Niketa Mehta has been examined by following 3 specialists and they have submitted their reports which are annexed for your kind perusal:

- 1) Dr. Ashok Anand, Gynaecologist.
- 2) Dr. N.O. Bansal, Cardiologist.
- 3) Dr. Neeta Sutay, pediatrician.

After discussing with all the 3 specialists, the finding seen on Sonography, the following observations are recorded:

- 1) The lady has 24 weeks gestation.
- 2) The fetal echocardiogram reports can be accurate in observations upto 80 to 85 % of the actual findings. Nowhere in the world findings can be 100% accurate.
- 3) Sonographic examination shows complete heart block with a ventricular rate of 50-55 per minute and heart is structurally and functionally normal.
- 4) Great arteries are in mal position (L-malposition) without any other structural defects and it is viable to normal life provided there are no other structural anomalies in the heart.
- 5) In the echocardiogram done outside, no other structural anomalies are identified.
- 6) Only small percentage of kids will be symptomatic and will require implantation of the pace make costing less than, one lakh of rupees which will be replaced by adult pace make at a later date, leading to normal life.

The consensus of the committee is that whatever is visualized and opined by the Gynaecologist from the pertaining area may not be 100% truth. The committee is of the opinion that there are very least chances that child will be born incapacitated and handicapped to survive. On medical reasons, the committee feels that the findings observed do not have substantive significance to resort the termination of pregnancy. However, it is the liberty of the patient to choose continuation of the pregnancy after knowing the reality.

8. On 1st August, 2008, the petitioners also had sought an opportunity to get the petitioner No. 3 examined through an expert and submit a report in that regard and accordingly, the learned advocate for the petitioners has submitted the opinion of Dr. Snehalata Deshmukh, Dr. Shakuntala Prabhu and Dr. Snehal Kulkarni. The report of Dr. Snehalata Deshmukh reads thus:

As per your interim order the petitioners have sought my opinion in the subject

matter.

This opinion is given strictly on the basis of professional experience as Pediatric Surgeon and after studying the reports produced by the petitioner. I have also reviewed the relevant literature.

I state as under.

1) Quality of life for this child is likely to be severely compromised. There is every possibility that this child may be incapacitated & handicapped. The risk is substantial risk if child were born.

2) The age of viability in Indian context is around 26-28 weeks of pregnancy.

9. The provision of law, as comprised u/s 3(1) of the said Act, provides that 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 the said Act. Sub-section (2) of Section 3 of the said Act provides that subject to the provisions of Sub-section (4), a pregnancy may be terminated by a registered medical practitioner, where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or 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 - 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 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 I 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. Explanation II provides that 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. Sub-section (3) thereof provides that 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 reasonable foreseeable environment. Sub-section (4) provides that 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, and save as otherwise provided in Clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

10. Section 5 of the said Act, which is yet another section dealing with the pregnancy, in its Sub-section (1) provides that 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. Sub-section (2) provides that notwithstanding anything contained in the Indian Penal Code, 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. Sub-section (3) provides that 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. Sub-section (4) provides that 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 provides that for the purposes of the said 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 the said Act. The Explanation 2 provides that for the purposes of the said 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.

11. The above provisions of law comprised under the said Act clearly disclose the circumstances under which pregnancy can be terminated. Undoubtedly, Section 5 of the said Act relates to the right of a pregnant woman to terminate pregnancy in case it is found necessary to save her life. Section 5 nowhere speaks of any right of a pregnant woman to terminate the pregnancy on the ground that delivery of a child may result in some abnormalities in or to the child to be born. It strictly restricts to the cases where life of the pregnant woman would be in danger in case the pregnancy is not terminated and does not refer to any other circumstances. Undoubtedly, the opinion in that regard has to be formed by a registered medical practitioner and such opinion should be in good faith. The expression "good faith" discloses that the opinion has to be based on the necessary examination required to form such an opinion.

12. As far as Section 3(2)(b)(ii) is concerned, it clearly speaks of right to terminate the pregnancy where there is a substantial risk in allowing the child to take birth as it would suffer from such physical or mental abnormalities as to be seriously handicapped. However, such right is restricted to the maximum period of twenty weeks of pregnancy and not beyond it. Section 3(2)(b)(ii) is very clear in that regard. It also provides that before opting for such pregnancy within the said period, it is necessary for two registered medical practitioners to form an

opinion in good faith for termination of the pregnancy. In case, the pregnancy has not exceeded twelve weeks, then such an opinion can be formed in good faith by any one medical practitioner.

13. In the case in hand, the opinion expressed by the Committee which was constituted pursuant to the direction of this Court has clearly opined that "there are very least chances that child will be born incapacitated and handicapped to survive. On medical reasons, the committee feels that the findings observed do not have substantive significance to resort the termination of pregnancy."

14. The findings which have been arrived at on examination of the petitioner No. 3 and various reports of her medical examination and which have been reproduced in the earlier part of the order, undoubtedly refer to "complete heart block with a ventricular rate of 50-55 per minute,"; however, it also discloses the finding to the effect that "heart is structurally and functionally normal. Great arteries are in mal position (L-malposition) without any other structural defects and it is viable to normal life provided there are no other structural anomalies in the heart. In the echocardiogram done outside, no other structural anomalies are identified. Only small percentage of kids will be symptomatic and will require implantation of the pace maker costing less than, one lakh of rupees which will be replaced by adult pace make at a later date, leading to normal life."

15. The report which is submitted on behalf of the petitioners, that of Dr. Snehalata Deshmukh, nowhere discloses possibilities of any physical or other abnormalities of serious nature having been noted by the doctor, or that the opinion has been formed to the effect that there is a every possibility that the child may be incapacitated and handicapped. The report on the face of record nowhere discloses the opinion having been formed on the basis of any finding arrived at by the concerned expert about possible abnormalities in the child on or after its birth on the basis of examination of the reports.

16. As far as the report by Dr. Shakuntala Prabhu and Dr. Snehal Kulkarni is concerned, it is in the form of questions and answers. The report discloses that the questions were posed by the petitioner No. 1 and they were answered by the said two doctors. With reference to the question regarding the findings on examination, the doctors have stated that the upper two chambers beating at rate of 133 per minute, and Lower two chambers beating at 50 per minute suggest functional abnormality; the atrioventricular connections are abnormal (av discordance). Vessel which needs to arise from right ventricle arises from left and vice a versa, (av discordance) suggest structural anomaly. As regards the question regarding diagnosis, it was stated that "corrected transposition of great vessels with complete heard block." To the question as to whether there are only two defects noticed and will the same require cardiac surgery at or after birth of child, the answer was in the negative, and further it was stated that "on post delivery sonography, 50% of babies show additional defects, and in such cases, cardiac surgery would be required." To the specific question as to whether in the opinion of doctors, whether the child would need a pace maker at birth or

afterwards, it was stated that "the literature shows that 80% patients need pace maker with heart block and since the heart rate is very slow, it is surely required pace maker at birth." To the question as to whether the pace maker is a one time solution to the problem, the same was answered in the negative. It was further stated that:

Q. Is pacemaker a one time solution to problem ?

Ans: No. Pacemaker has to be changed again. Average interval of change is 4-5 years.

Q. Are there any complications associated with pacemaker ?

Ans: Since it is a surgical procedure it has its own set of complications such as infections, risk of anaesthesia.

Q. Is pacemaker put in clinic?

Ans: No.

Q. Do you need hospital, ICCU, operation theatre for the procedure?

Ans: Yes. It cant be put in clinic and patient sent home. It needs hi tech operation theatre to perform procedure.

Q. After putting the pacemaker will child be able to sleep, run, swim etc. like all other children.

Ans: Definitely there will be restrictions on activities and it may affect quality of life.

Q. If any such activity is undertaken by the child what will be the problem?

Ans: The child may have heart arrythmia, sudden death. failure,

Q. Can this fetus develop "hydrops foetalis" (swelling all over the body) and what are the effects on the foetal brain ?

Ans: Yes. There is high possibility and can have detrimental effects on fetal brain.

Q. How may children with this abnormality have you seen who are leading totally normal life?

Ans: hardly anybody.

Q. If you would have faced the same problem in your family, would you consider the problem as "substantive risk to fetal life"?

Ans: Yes. We both of are the opinion that in such set of anomaly, there is a substantial risk that if child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

17. Undoubtedly, the opinion given by Dr. Shakuntala Prabhu and Dr. Snehal Kulkarni refers to the possibility of "a substantial risk if the child were born it

would suffer from physical or mental abnormalities as to be seriously handicapped." However, the opinion itself discloses the necessary treatment which is required to be given to overcome the problem which the child on its birth may face, apart from the fact that considering the defects as they are noticed today, both the doctors are not sure that cardiac surgery would be required at or after the birth to the child and according to them, it would all depend upon post delivery sonography to be conducted. The question No. 3 and answer thereto is very clear in this regards and reads thus:

Q.3 Since there are only two defects noticed, can you surely say that the cardiac surgery will not be required at/after birth?

Ans: No.

On post delivery sonography, 50% of babies show additional defects. In such cases cardiac surgery is required.

Being so, taking into consideration the opinion expressed by the doctors committee from J.J.Group of Hospital as well as the Two Expert Committee of two doctors which was constituted by the petitioners themselves, there is no categorical opinion before us from the medical experts to the effect that "if the child were born, it would suffer from physical or mental abnormalities as to be seriously handicapped." Apart from the fact that already the period of 26 weeks of pregnancy has passed, even the requirements of the provisions of law u/s 3(2) (ii) read with Section 3(2)(b) are not satisfied. In other words, even if the petitioners were to approach this Court before the expiry of 20 weeks of pregnancy, based on the medical opinion placed before us, it would not have been possible for this Court to issue direction for exercise of right in terms of Section 3 of the said Act.

18. It was sought to be argued on behalf of the petitioners that the pre-amble of the said Act clearly provides that there is avoidable wastage of the mothers health, strength and, sometimes, life, and therefore, the legislation in the form of the said Act seeks to liberalise certain existing provisions relating to termination of pregnancy which is nothing but a health measure in cases where there is danger to the life or risk to physical or mental health of the woman as also on humanitarian grounds such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc., and where there is substantial risk that the child, if born, would suffer from deformities and diseases, and considering the eventualities under which the pregnancy can be terminated in terms of Section 3, the same should be read in Section 5 also. According to the learned Advocate, there was lapse on the part of the legislators in not including such eventualities u/s 5 of the said Act and relying upon the decision of the Apex Court in the matter of Union of India (UOI) Vs. Association for Democratic Reforms and Another, , the learned advocate for the petitioners submitted that the said lacuna is required to be filled in by reading down Section 5 to include such eventualities.

19. We are afraid the contention on behalf of the petitioners if accepted would virtually amount to legislating upon Section 5 of the said Act. Under the guise of reading down a provision of law, the Courts are not empowered to legislate upon a statute. That is essentially the function of the legislature.

20. The Statement of Objects and Reasons of the said Act undoubtedly discloses that the legislation in the nature of the said Act was enacted to regulate the matters in relation to the termination of certain pregnancies. Sections 3 and 5 clearly speak of right to terminate pregnancy under the specified circumstances and after taking necessary precautions and after obtaining medical opinion of the medical experts who are required to give their opinion in good faith in that regard. Section 5 can be resorted to for termination of pregnancy when the non-termination of pregnancy would be dangerous to the life of pregnant woman. It is not a mere desire to terminate the pregnancy that will entitle either pregnant woman to go for termination of pregnancy or for the doctors to assist the pregnant woman to terminate the pregnancy by taking resort to Section 5 of the said Act. There has to be an opinion formed in good faith by a medical experts in that regard before going for termination of pregnancy. Undoubtedly, the experts have to ascertain whether there is danger to the life of a pregnant woman on account of pregnancy.

21. As regards the physical or mental abnormalities of serious nature to the child to be born which could be the cause for termination of pregnancy, the legislature in its wisdom has imposed certain period within which the pregnancy can be terminated. Nothing is placed on record on behalf of the petitioners even to remotely suggest that the period so prescribed by the statute has been arbitrarily prescribed or that there is no logic behind the period prescribed by the legislature in that regard.

22. In the circumstances, the petitioners have not placed on record even any material which could perhaps justify the exercise of our discretion in writ jurisdiction to allow the petitioner No. 3 to terminate the pregnancy. No exceptional case in that regard has been made out so as to exercise discretionary jurisdiction under Article 226 of the Constitution of India to issue any writ in the matter.

23. The decision of the Apex Court in Association for Democratic Reforms's case (supra) is of no help to the petitioners. In the said case, the Apex Court was dealing with the matter relating to the power of Election Commission in the matter of conduct of election and the scope of the word "elections" in that regard. The Apex Court has held that mere absence of any provision in relation to the procedure to be followed for effective exercise of the powers of the Election Commission, it is not helpless to formulate the regulations in that regard. It was specifically held that the word "elections" includes the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the process of choosing a candidate and to maintain the purity of elections and in particular to bring

transparency in the process of election, the Commission can ask the candidates about the expenditure incurred by the political parties. It was essentially in respect of the procedure to be followed by the Election Commission to ensure that the elections are held in healthy atmosphere and the rules of required discipline to be observed in the process of election.

24. It cannot be disputed that in the matter of procedure, in the absence of any specific provision in that regard, nothing prohibits this Court from laying down certain guidelines whenever required for effective implementation of any statutory provision. However, that would not include the power to frame law relating to substantive rights of the parties. Being so, the decision of the Apex Court in Association For Democratic Reforms's case (supra) is of no help to the petitioners in the matter in hand.

25. It was clearly held by the Apex Court in Divisional Manager, Aravali Golf Club & Anr. v. Chander Hass and Anr. reported in 2008 AIR SCW 406 that the judiciary cannot encroach into the domain of the legislature or executive. In P. Ramachandra Rao Vs. State of Karnataka, , it was ruled that the doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the existing law. Though in reality such watertight separation does not exist, yet one organ of the State should not perform a function that essentially belongs to another organ. It was specifically held that making of an entirely new law, through directions, is not a legitimate judicial function. Further in Union of India and another Vs. Deoki Nandan Aggarwal, it was held that it is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature, the Court could not go to its aid to correct or make up the deficiency. Courts shall decide what the law is and not what it should be. Having held so, with reference to the facts of the case before the Apex Court, it was observed that "Modifying and altering the scheme and applying it to others who are not otherwise entitled to under the scheme will not also come under the principle of affirmative action adopted by courts sometimes in order to avoid discrimination. If we may say so, what the High Court has done in this case is a clear and naked usurpation of legislative power."

26. For the reasons stated above, we find no case is made out for the reliefs asked for. Hence, the petition fails and is hereby dismissed. The rule is discharged accordingly. No order as to costs.