

(2018) 02 BOM CK 0005
In the Bombay High Court
Case No : 920 of 2018

Mrs. Swati Chetan Fulzele

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 02-02-2018

Acts Referred:

Medical Termination of Pregnancy Act, 1971 — Section 3, 4, 5(1), 5, 3(2)(b)(ii)

Citation : (2018) 02 BOM CK 0005

Hon'ble Judges : R. M. Borde, Rajesh G. Ketkar

Bench : Single Bench

Advocate : Shriram S. Kulkarni, ??Chaitanya Nikte, Dhanesh R. Shah, Srinivas Bobde, Sandeep Babar

Judgement

1. Heard. Rule. By consent of the parties, the Rule is made returnable forthwith and the Petition is taken up for final hearing and disposal at the admission stage.

2. The Petitioner is undergoing pregnancy at 23rd week and prays for issuance of the directions to the Respondents to allow her to terminate her pregnancy on account of foetal anomalies. On examination by the Sonologist on 17.01.2018, following impressions are recorded :

"Impression:

Single live intrauterine gestation of 20-21 weeks - delayed conception.

Polyhydramnious.

Prominent Lateral Ventricles (11-12 mm)-mild hydrocephalus.

Absent vermis with key hole configuration of fourth ventricle communicating with

cistern magna (Spectrum of dandy walker malformation)"

3. The Petitioner contends that considering the medical condition of the fetus even if the baby is allowed to born, in all probabilities, is not likely to survive or will not have a normal life span or quality of life. Considering the prognosis, opinion of the expert on the medical examination of the petitioner, it is prayed that the petitioner may be permitted to undergo the procedure for medical termination of her pregnancy. Section 3 of the Act of 1971 (The Medical Termination Of Pregnancy Act, 1971), prescribes outer limit of 20 weeks for undergoing procedure for termination of pregnancy. In certain circumstances enumerated in section 5 of the Act, an exception is carved out and it prescribes termination of pregnancy in certain circumstances beyond 20 weeks. This court while dealing with the identical issue in the matter of Shaikh Ayesha Khatoon vs. Union of India and Ors ., reported in 2018 SCC OnLine Bom. 11, has observed in para 13 of the judgment, as quoted below :

"13. It is further observed that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a "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" [as per Section 3(2)(b)(i) of the Act of 1971] or 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" [as per Section 3(2)(b)(ii) of the Act of 1971]. It is true that Clauses (i) & (ii) of sub- section 2(b) of Section 3 are attracted in the case where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks. However, as has been recorded above Section 5 permits termination of pregnancy by a registered medical practitioner in 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. It shall also have to be construed that Section 5 brings within its ambit the provisions of Section 4 and so much of the provisions of sub- section (2) of Section 3 of the Act of 1971 except the limitation in respect of length of the pregnancy of 20 weeks as provided in sub-section (2)(b) of Section 3 of the Act of 1971. It would thus be logical to conclude that the contingencies

referred in Clauses (i) & (ii) of sub- section (2)(b) of Section 3 will have to be read in Section 5 of the Act of 1971 and it would be relevant to consider the threat perception and substantial risk involved if the

child were to born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. The contingencies laid down in Clauses (i) & (ii) of sub- section (2)(b) of Section 3 shall therefore equally apply to the request of a pregnant woman seeking permission to terminate the pregnancy beyond 20 weeks and accordingly Section 5(1) will have to be construed, to meet the object and purpose of enactment and to promote cause of justice.

4. This court has adopted a view that the provisions of section 3 of the Act so far as it relates to the circumstances, enabling the pregnant woman to undergo medical procedure for termination of pregnancy, as recorded in sub-section (b)(i) & (ii) of section 3, are attracted and shall have to be read as part of section 5 of the Act.

5. Considering these aspects, it would be permissible for this court to exercise jurisdiction and consider the request of the petitioner. The petitioner pursuant to the liberty granted by this court, appeared before the Medical Board of Sir J.J. Group of Hospitals, Mumbai consisting of : (i) Professor and Head of the Department of Obstetrics and Gynecology, (ii) Professor and Head of Department of Psychiatry, (iii) Professor and Head of Dept. of Radiology, (iv) Professor and Head of Paediatrics Surgery (v) Professor and Head of Department of Neurosurgery. So also the expert opinion of Associated Professor and Head of the Department of Neurology was secured. The Neurologist has opined that the fetus appears to have a dandy walker syndrome variant, which has a neurological abnormality and is associated with other neurological and non-neurological conditions. It is further reported by the Neurologist that as there is high mortality of this condition, the patient can undergo abortion. It is further

reported that the risk of termination of pregnancy is not going to be more than that of normal labour. The opinion of the said Committee is quoted below :

"COMMITTEE OPINION

The Committee after, reevaluation, examination and careful study of multiple sonography reports and expert Neurological Opinion from Head of the Department of Neurology, has confirmed that the fetus has Dandy-Walker

Syndrome Variant, a Neurological abnormality. The prognosis of this condition is unpredictable post-nataly. Presence of polyhydramnios, along with Dandy-Walker Syndrome Variant raises suspicion of chromosomal abnormalities. It can be also associated with Neurological and Non-Neurological conditions like.

Neurological conditions include - (1) Cortical Dysplasia, (2) Dysgenesis of Corpus Callosum, (3) Holoprocencephaly.

Non Neurological conditions include - (1) Cleft Palate, (2) Polydactyly (3) Cardiac Anomalies.

These abnormalities can be picked up later on U.S.G. the patient is anguished with the condition of fetus in-utero. The mortality can be upto 70% in live fetuses with associated anomalies.

The pregnancy has advanced upto 23 weeks and is beyond 20 weeks cut off of Medical Termination of Pregnancy Act . Hence she has approached the Honorable Court for termination of pregnancy.

If the Honorable Court permits the termination of pregnancy as desired by pregnant

woman, the pregnancy can be terminated. The risk of termination of pregnancy is not going to be more than that of normal labour."

Dr. Ashok Anand Dr.V.P.Kale Dr. Shilpa Domkundwar.

Dr. Vernon Velho Dr.D.R.Kulkarni Dr. Kamlesh Jagyasi

(Professors & Head of the respective Departments of GGMC, Mumbai.)"

6. On consideration of the medical opinion and more particularly the report as regards the foetal anomalies, the request made by the Petitioner deserves to be considered. It must be emphasized that Neurologist has specifically reported that the condition affecting fetus has high mortality and that the patient can undergo abortion and the risk of

termination of pregnancy is not going to be more than that of normal labour. The request of the petitioner for undergoing procedure of termination of pregnancy by a registered medical practitioner at a recognized and approved place / center as specified under section 4 of the Medical Termination of Pregnancy Act, 1971, deserved to be accepted and accordingly, the petitioner shall be permitted to undergo the procedure for medical termination of pregnancy.

7. The petitioner undertakes to report to the approved center for carrying out the procedure of medical termination of pregnancy within two days from today.

8. The counsel appearing for the petitioner states, on instructions, that the petitioner will bear the medical expenses of the procedure of medical termination of pregnancy at a specified medical facility centre.

9. It is clarified at this stage that the petitioner has been sensitized by the Committee/Medical Board about the risk factors involved and it would be open for the petitioner to undergo the procedure of medical termination of pregnancy at her own risk and consequences. It is further made clear that the Doctors 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.

10. Rule is accordingly made absolute. There shall be no order as to costs.