

(2018) 11 BOM CK 0102

In the Bombay High Court

Case No : Writ Petition No. 12447 Of 2018

Sarika Shivaji Gaikwad

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 28-11-2018

Acts Referred:

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

Citation : (2018) 11 BOM CK 0102

Hon'ble Judges : S.S. Shinde, J;K.K. Sonawane, J

Bench : Division Bench

Advocate : A.D. Gadekar, K.N. Lokhande

Final Decision : Disposed Off

Judgement

K.K. Sonawane, J.

1] Heard. Rule made returnable forthwith and matter is taken up for final hearing on merit with the consent of learned counsel for the parties.

2] The petitioner - a - 25 years old, married woman, approached to this court seeking direction to the respondents to allow her to undergo medical

termination of her 26th week pregnancy owing to multiple fetal abnormalities, as reflected from the medical examination of the petitioner carried out

by the medical experts.

3] It has been contended that during the course of ante-natal ultra-sonography, it was transpired that the petitioner is carrying pregnancy of 21 weeks

but the fetus has some spinal defect with Sacral Menigomyelocle. The medical expert further opined that the fetus is having Hydrocephalus Spina

Bifida. The sonologist has reported the following anomalies :-

â??E/o. Dialated Lateral Ventricle. AP diameter 16 mm.

Dangling of Choroid.

E/o. Spinal Defect with Sacral Menogomylocele.

IMPRESSION : Single live fetus changing lie AGA 21 weeks

Anterior Placental position Hydrocephalus Spina Bifida.â??

The petitioner apprehended danger to her life after having discovered that there was substantial risk to the fetus.

4] in view of the anomalies in regard to the physical condition of the fetus, notices were issued to the respondents. It was also directed to get the

petitioner examined by the concerned Medical Board constituted at the Government Medical College and Hospital, Aurangabad consisting of

Chairman, Head of Department of Obstetrics and Gynecology, The Superintendent of GMC, The HOD, Anesthesia, The Professor and HOD

Radiology, The Professor and HOD Paediatrics and The Professor and HOD Psychiatry. Opinion of neurologist was also directed to be taken.

5] Pursuant to the directions issued by this court, the petitioner appeared before the concerned Medical Board for medical check up. She was

medically and radiologically examined on 22.11.2018. The 8 members of the Committee consisting of [1] Dr. Kailas Zine (Chairman), Medical

Superintendent, GMCHA [2] Dr. Prussian Bhingare (Member), Asso. Prof. OBGY, [3] Dr. Ajay Vare, (Member), Asso. Prof. Radiology [4] Dr.

Jirvankar P.S., (Member), Asso. Prof. Medicine [5] Dr. Pradip Deshmukh (Member} Assit. Prof. Psychiatry [6] Dr. Prabha Khaire (Member),

Asso. Prof. Pediatrics [7] Dr. Ansari Sir (Member), Asso. Prof, Surgery and 8[Dr. Mukund Parchandikar (Member) Asso. Prof. Anaesthesia, all

were present at the time of medical check-up of petitioner. They all observed that the petitioner was carrying 26 weeks and 3 day's pregnancy and on

obstetric ultra-sonography dated 22.11.2018, they recorded their findings as under :-

â??Sacral Myelomeningocoele with type II Arnold Chiari malformation and fetal hydrocephalus.â??

According to the members of the Medical Board (Experts Committee), there is substantial risk to the fetus. Therefore, they advised that the

pregnancy can be terminated with due risk.

6] The learned counsel appearing for the petitioner, therefore, urges that in view of aforesaid medical complications and infirmities with the fetus, this

is a fit case to allow the petitioner to undergo medical termination of her pregnancy as per her choice at Government Medical College and Hospital,

Aurangabad. The chances of survival of the fetus appear less and it would also hazardous to the life of the petitioner. Therefore, the learned counsel

requested to grant permission to the petitioner. The learned AGP did not put in controversy the findings of the Medical Board under report dated

22.11.2018 and fairly conceded to pass suitable order in the interest of physical and mental health of the petitioner.

7] The Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as, 'the Act of 1971') is enacted for providing mechanism to

terminate certain pregnancies by the registered Medical Practitioners and for matters connected therewith or incidental thereto. The provision of sub-

section (2) of Section 3 contemplates that subject to provision of Section 4 of the Act of 1971, the pregnancy may be terminated by registered medical

practitioner, (a) where the length of pregnancy does not exceed twelve week, 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 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.

9] At this juncture, it would profitable to refer the relevant provision of Section 3 (2)(b) and section 5 of the Act, which are reproduced as below :-

Section 3. When pregnancies maybe terminated by registered medical practitioners :-

[1] xxxx

[2] Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner :-

[a] xxx

[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.

Section 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.

10] In view of aforesaid legal provisions, it is evident that section 3 of the Act of 1971 prescribed the outer limit of twenty weeks in the matter of

termination of pregnancy in certain circumstances as mentioned in clauses (i) and (ii) of sub-section 2(b) of Section 3. However, section 5 carves out

an exception to sections 3 and 4. It is provided that 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 opinion of not less than two medical practitioner, shall not be made applicable to the termination of a pregnancy by a

registered medical practitioner, in a case where he is of the opinion, formed in good faith that the termination of such pregnancy is necessary to save

the life of the pregnant woman.

11] In the matter in hand, it has been contended that due to pregnancy the petitioner is likely to suffer grave injury to her physical and mental health. It

would also cause danger to her life. It shall be construed that exercise of a choice in the event there are foetal abnormalities found and the chances of

survival of the baby, if allowed to take birth, are minimum, is a matter to be considered within the parameters of Section 5 of the Act of 1971. The

learned counsel for the petitioner, in support of his contention, relied upon the legal guidelines delineated in the following judicial precedents :-

[1] Shaikh Ayesha Khatun vs. Union of India and others 2018(3) Mh.L.J. 486 [2] XYZ vs. Union of India and others 2018(3) Mh.L.J. 280T; a pasya

Umesh Pisal vs. Union of India and others 2018(3) All M.R. 450 (SC); [4] Mamta Warma vs. Union of India and others 2018 All SCR 531 [5] X vs.

Union of India (2016)14 SCC 382 [6] Suchita Shrivastav and another vs. State of

Maharashtra 2009 All SCR 1953.

12] Admittedly, as per the report of the Expert Committee, there is a substantial risk to the fetus following serious abnormalities. Therefore, on the

touchstone of legal guidelines laid down in aforesaid judicial precedents, there would not be any impediment to accord permission to terminate the

pregnancy of the petitioner by taking recourse to section 5 of the Act of 1971.

13] It is to be noted that, during the course of hearing, the Chairman of the Expert Committee Dr. Kailash Zine secured his presence to assist this

Court for just and proper conclusion in regard to claim of the petitioner seeking permission for termination of pregnancy, apprehending danger to her

life. During interaction, the Medical Expert Dr. Zine, expressed his opinion that there is 84 % substantial risk to the fetus and also continuation of

pregnancy would cause danger to the life of the petitioner. The learned counsel for the petitioner filed consent affidavit on record and submits that the

petitioner was being explained about the risk factors of the pregnancy. She was well informed about the condition of the fetus and outcome of

termination of pregnancy. She voluntarily expressed her desire to terminate the pregnancy. According to Dr. Zine, Member of the Expert Committee,

at this stage, the risk of termination remains the same as that of natural labour and if the court permits, the pregnancy can be terminated as desired by

the petitioner.

14] It is evident that the continuation of pregnancy can pose severe physical and mental injury to the petitioner. It would also endanger to her

life. There is no point in allowing the pregnancy to run its full course since there is 84% substantial risk to the fetus as well as physical health of the

petitioner, as described by Dr. Zine referred above. The learned Government Pleader has fairly conceded the same. He has not opposed the prayer of

the petitioner on any of the grounds, legal or medical. In view of the circumstances, there is no impediment to accord permission to the petitioner to

undergo medical termination of pregnancy at medical facility of her choice. The petitioner, in her affidavit, has stated that she is willing to carry out the

procedure of medical termination of pregnancy at Government Medical College and Hospital, Aurangabad. Hence, we proceed to pass the following

order :-

-: O R D E R :-

The writ petition stands allowed in terms of prayer clause (D) seeking direction to allow the petitioner for medical termination of her pregnancy. The

procedure of medical termination of pregnancy be carried out at the Government Medical College and Hospital, Aurangabad as per the desire/choice

of the petitioner and at her own risk.

The termination of pregnancy of the petitioner shall be performed by the concerned Doctors of the Government Medical College and Hospital,

Aurangabad under the supervision of members of the Experts Committee. The Hospital Authority shall maintain the complete record of the procedure

which is to be performed for termination of pregnancy of the petitioner.

The petitioner shall bear the medical expenses, if any, for medical termination of her pregnancy. Accordingly, the writ petition is hereby disposed of in

above terms. Rule is made absolute. There shall be no orders as to costs. Parties to act upon authenticated copy of this order.