

(2021) 10 BOM CK 0072
In the Bombay High Court
Case No : Writ Petition (L.) No.21977 Of 2021

XYZ

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 06-10-2021

Acts Referred:

Constitution Of India, 1950 — Article 21, 226

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

Citation : (2021) 10 BOM CK 0072

Hon'ble Judges : Ujjal Bhuyan, J;Madhav J. Jamdar, J

Bench : Division Bench

Advocate : Shriram S. Kulkarni, Minal Chavan, Sujay Palshikar, Pranjal M. Khatavkar, Radhali S. Kadam, Eeshan D. Khaire, Minal V. Chavan, Uma Palsuledesai, Purnima Awasthi

Judgement

1. Heard Mr.Kulkarni, learned counsel for the petitioner; and Ms.Palsuledesai, learned AGP for respondent Nos.1 and 3-State; and Ms.Purnima Awasthi, learned counsel for respondent No.2.

2. By filing this petition under Article 226 of the Constitution of India, petitioner seeks medical termination of her pregnancy which is stated to be in its 26th week on the ground that further continuation of pregnancy will adversely affect her mental health.

3. On 29th September, 2021 we had directed respondent No.3 Grant Government Medical College and Sir J.J.Group of Hospitals, Mumbai to constitute a medical board for examination of the petitioner including the status of her mental health due to her pregnancy and thereafter to submit report.

4. Report dated 4th October, 2021 was submitted yesterday, copy of which was furnished to learned counsel for the petitioner.

5. Report of the medical board dated 4th October, 2021 reads as under :-

"After careful clinical examination, psychiatric evaluation for 3 days and ultrasonography examination, the Committee has come to the opinion that at present no abnormality is detected in the foetus and the mother also does not have any medical or pregnancy related disease.

The mother has moderate depressive episode and with treatment the further continuation of pregnancy is unlikely to adversely affect her mental health.

The mental condition that the patient suffers from does not fulfill the criteria of substantial risk of causing grave mental injury to the mother and hence does not warrant medical termination of pregnancy.

As there is no mental, obstetric or medical reasons warranting termination of pregnancy in this case, the committee is of the opinion that termination of pregnancy cannot be recommended."

6. From a perusal of the above, we find that though there are no pregnancy related abnormalities in the petitioner as well as in the fetus, the report nonetheless says that petitioner has moderate depressive episode but opines that with treatment further continuation of pregnancy is unlikely to adversely affect her mental health. It is also stated that the mental condition that the patient suffers from does not fulfill the criteria of substantial risk of causing grave mental injury to the mother and hence does not warrant medical termination of pregnancy.

7. Mr.Kulkarni, learned counsel for the petitioner submits that the medical board has ignored psychological condition of the petitioner including her suicidal tendencies. He submits that on 30th September, 2021 petitioner was advised admission for psychological testing but the parents were not willing for admission. Placing reliance on a recent judgment of this court in Sidra Mehboob Shaikh Vs. State of Maharashtra, decided on 3rd August, 2021, he submits that it would be extremely difficult on the part of the petitioner to carry out the pregnancy having regard to her surrounding circumstances alongwith the stigma of being an unwed mother. He has also referred to various provisions of the Medical Termination of Pregnancy Act, 1971 and submits that notwithstanding the report of the medical board as above, present is a fit case for allowing medical termination of pregnancy of the petitioner. He additionally submits that petitioner has just completed 18 years of age and her entire life lies ahead of her. Compelling her to carry forward the pregnancy and to have an unwanted child would gravely violate her right to life under Article 21 of the Constitution of India.

8. Learned AGP on the other hand relies on the medical report as extracted above and submits that in view of such categorical finding of the medical board question of allowing medical termination of pregnancy of the petitioner does not arise. She has also referred to materials on record to point out that in the course of petitioner's medical examination she did not allege any rape or sexual assault. Therefore, the present is not a fit case for allowing medical termination of pregnancy.

9. Submissions made by learned counsel for the parties have received the due consideration of the court.

10. Section 3 of the Medical Termination of Pregnancy Act, 1971 (briefly "the Act" hereinafter) deals with situations when pregnancy may be terminated by registered medical practitioner.

Section 3 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 I.-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.-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 [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."

11. While section 4 deals with the place where the pregnancy may be terminated, section 5 enumerates the situations where sections 3 and 4 would not apply. Section 5 is reproduced hereunder :-

"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."

12. At this stage we may mention that Parliament has enacted the Medical Termination of Pregnancy (Amendment) Act 2021 whereby the upper limit for statutorily permitting medical termination of pregnancy has been extended from 20 weeks to 24 weeks. Learned counsel for the petitioner submits that the said amendment has been notified and has come into effect from 29th September, 2021.

13. We find that as per section 3(2)(b)(i), one of the grounds for permitting medical termination of pregnancy is that continuance of the pregnancy would cause grave injury to the mental health of the pregnant woman. As per sub-section (3) of section 3, in determining whether continuance of the pregnancy

would involve such risk of injury to the health of the pregnant woman, account may be taken of the pregnant woman's actual or reasonable foreseeable environment.

14. Issue of mental health which is a ground for allowing medical termination of pregnancy was examined at some length by this court in *Sidra Mehboob Shaikh*(supra). It was noted that while section 2(b) of the Act defines mentally ill person to mean a person who is in need of treatment by reason of any mental disorder other than mental retardation, the expression "mental health" is not defined in the Act. Therefore, it was held that the meaning of the expression "mental health" would have to be construed as is understood in common parlance. Relevant portion of this discussion made in this regard in *Sidra Mehboob Shaikh* (supra) are extracted hereunder :-

"14.2. Before proceeding further we may also mention that section 2(b) defines 'mentally ill person' to mean a person who is in need of treatment by reason of any mental disorder other than mental retardation.

14.3. From a reading of sub- section (2)(b)(i) of section 3 we find that a pregnancy may be terminated by a registered medical practitioner within the stipulated period if 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. Sub-section (3) says that in determining whether 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. Pausing here for a moment, we are of the view that while examining the expression 'mental health' of a pregnant woman it is also necessary to take note of such woman's actual or reasonable foreseeable environment. In other words, while construing grave injury to the mental health of the pregnant woman what is also required to be taken into consideration is the actual or reasonable foreseeable environment surrounding the pregnant woman. While examining the same, certainly social and economic factors which may confront the pregnant woman presently or in the near future are important and relevant considerations.

14.4. That apart though section 2(b) defines 'mentally ill person' what finds mention in section 3(2)(b)(i) is 'mental health' which expression is not defined in the Act. As noticed above, 'mentally ill person' has been defined to mean a person who is in need of treatment by reason of any mental disorder other than mental retardation. In other words, a person who suffers from any mental disorder other than mental retardation and who is in need of treatment would be construed to be a mentally ill person. But what then do we mean when we say mental health? As already mentioned, under the Act 'mental health' is not a defined expression. We, therefore, would have to look into its meaning as is understood in common parlance. World Health Organization (WHO) has defined 'mental health' as a state of well being in which every individual realizes his or her own potential, can cope with the normal stresses of life, can work

productively and fruitfully, and is able to make contribution to his or her community. In other words, mental health is more than not having any symptoms of mental illness; its being able to deal robustly with life's challenges. Many individuals with poor mental health may not be formally diagnosed with any mental illness. Mental state of a person is a continuum with good mental health being at one end and diagnosable mental illness at the opposite end. Therefore, mental health and mental illness, although sound similar, are not the same.

* * * * *

14.6. Therefore, mental health is more than just the absence of mental disorders or illness. Mental health is a state of well being in which an individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and is able to contribute to his or her community. When we say that a person is in good mental health it would mean that he is mentally equipoised or is at a mental equilibrium. Thus, from the above analysis we can safely say that the expression 'mental health' is a wider concept encompassing within its fold the expression 'mental illness'. In that context we may say that the Legislature has consciously used the expression 'mental health' in section 3(2)(b) (i) in contradistinction to the expression 'mental illness' or 'mentally ill person'."

15. Thus, we find that after making a detailed analysis this court held that the expression "mental health" is a wider concept encompassing within its fold the expression "mental illness". Many individuals with poor mental health may not be formally diagnosed with any mental illness. Mental state of a person is a continuum with good mental health at one end and diagnosable mental illness at the opposite spectrum. Therefore, though sounding alike the expressions "mental health" and "mental illness" are not the same. Legislature has consciously used the expression "mental health" in section 3(2) (b)(i) in contra- distinction to the expression "mental illness" or "mentally ill person".

16. Proceeding further this court relying on an earlier Division Bench judgment of this court in XYZ Vs. Union of India, 2019 (3) Bombay CR 400 held that the expression "grave injury to the mental health" finding place in section 3(2) is used in a liberal sense by the legislature itself. For determining whether continuance of pregnancy would involve risk of injury to mental health of the pregnant woman, account may be taken of the pregnant woman's actual or reasonable foreseeable environment.

17. Further reference was made to another decision of this court in High Court on its Own Motion Vs. State of Maharashtra, 2017 Cr.L.J. 218, where it was held that unwanted pregnancy would undoubtedly affect the mental health of the mother as there are social, financial and other aspects immediately attached to the pregnancy. The right to convert the body fertility and motherhood should be left to the decision of the woman and the woman Advocate. It was held as follows:-

"23. In High Court on its Own Motion Vs. State of Maharashtra, 2017 Cri.L.J.

218, a Division Bench of this Court held that a woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. Unwanted pregnancy would undoubtedly affect her mental health as there are social, financial and other aspects immediately attached to the pregnancy. The above decision came on the backdrop of jail visit by a judicial officer where she found one inmate giving a requisition for obtaining permission to terminate her pregnancy on the ground that it would be very difficult for her to maintain and take care of her five-month old child if she gives birth to another child. It was in that context, the Division Bench held as follows:-

"13. A woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. To be pregnant is a natural phenomenon for which woman and man both are responsible. Wanted pregnancy is shared equally, however, when it is an accident or unwanted, then the man may not be there to share the burden but it may only be the woman on whom the burden falls. Under such circumstances, a question arises why only a woman should suffer. There are social, financial and other aspects immediately attached to the pregnancy of the woman and if pregnancy is unwanted, it can have serious repercussions. It undoubtedly affects her mental health. The law makers have taken care of helpless plight of a woman and have enacted Section 3(2)(b)(i) by incorporating the words "grave injury to her mental health". It is mandatory on the registered medical practitioner while forming opinion of necessity of termination of pregnancy to take into account whether it is injurious to her physical or mental health. While doing so, the woman's actual or reasonable foreseeable environment may be taken into account.

14. A woman's decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child. These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health."

23.1. Proceeding further, the Division Bench observed that pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. How she wants to deal with such pregnancy is a decision she alone can make. The right to control the body, fertility and motherhood should be left to the woman alone. In so far the provision of section 3(2)(b)(i) is concerned, the Division Bench held that the said provision is an extension of the human right of a woman which needs to be protected. The right of exercise of reproductive choice though restricted by the Act, also recognizes and protects

her right to say no to the pregnancy if her mental or physical health is at stake."

18. Reliance was placed on a recent decision of this court in *Siddhi Vishwanath Shelar Vs. State of Maharashtra*, decided on 2nd June, 2020. In that case prayer for medical termination of pregnancy was made on the ground that petitioner was an unwed mother having poor financial background. In the circumstances, it would be extremely difficult for her to carry the pregnancy to its full term alongwith the stigma of being an unwed mother. After surveying the scheme of the Act this court held that interest of the mother is placed on a higher pedestal than the interest of the prospective child. Though compelling state interest to preserve life is a weighty consideration, it was held that it cannot be stretched to the extreme extent when continuation of pregnancy beyond 20 weeks or 24 weeks would involve a grave injury to the mother's physical and mental health. It was held as follows:-

"26. In a recent judgment of this Court in *Siddhi Vishwanath Shelar Vs. State of Maharashtra* decided on 02.06.2020, petitioner had approached this Court seeking permission to undergo medical termination of pregnancy contending that it would be extremely difficult for her to carry the pregnancy to its full term along with the stigma of being an unwed mother. It was also contended that it would be difficult for her to maintain the child on account of her poor financial background and lack of mental support, besides not being mentally ready to be a mother at that stage. While granting the prayer of the petitioner in that case, this Court held that compelling state interest though is quite a weighty consideration, the same cannot be stretched to extreme extent when continuance of pregnancy beyond 20 weeks would involve a grave injury to the mother's physical or mental health. Scheme of the Act places the interest of the mother on a higher pedestal than the interest of the prospective child. It has been held as under:-

"90. In so far as the aspect of 'compelling State interest' is concerned, again, no doubt, this is quite a weighty consideration. But such consideration cannot be stretched to some extreme extent by insisting that the State has compelling interest even in saving a pregnancy where the potentiality of human life is almost extinct or where the child, if born, were to suffer from such physical or mental abnormalities as to be seriously handicapped. Similarly, there can also be no compelling State interest, in insisting upon continuance pregnancy beyond 20 weeks where it would involve a grave injury to the mother's physical or mental health. The scheme of the MTP Act, even otherwise, places the interests of a mother on a higher pedestal than the interests of a prospective child. This is based on the logic that the fetus cannot have independent extra uterine existence and the life of the mother who independently exists, is entitled to greater consideration."

19. Reverting back to the facts of the present case, we find that petitioner is 18 years old and is unmarried. She has one elder sister, one elder brother and one younger sister. The father of the petitioner is an auto-rickshaw driver whereas

the mother sells vegetables near the house. Petitioner has completed higher secondary education in the year 2020.

20. From the above, the socio-economic condition/ status of the petitioner is clearly discernible. Sub-section (3) of section 3 as extracted above mandates that while taking the decision as to whether continuance of pregnancy would involve such risk of injury to the health of the mother, account may be taken of the pregnant woman's actual or reasonable foreseeable environment which expression was elaborately explained by us in Sidra Mehboob Shaikh (supra). In the facts and circumstances as narrated above, compelling the petitioner, a girl of tender age, to have an unwanted child may lead to disastrous consequences for the rest of her life not only for the petitioner but for the entire family.

21. Unfortunately the above factors were not taken into consideration by the medical board while submitting its report.

22. Hence, the following order:-

ORDER

1. After careful consideration of the matter, we grant liberty to the petitioner to undergo medical termination of her pregnancy in respondent No.3-Hospital i.e. Grant Government Medical College and Sir J.J. Group of Hospitals, Mumbai expeditiously.
2. Outcome of the procedure shall be informed to the court on the next date.
3. Stand over to 14th October, 2021.