

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WP-AS-DB-LD-VC- 314 OF 2020

Mrs. X Y Z. ... Petitioner.
V/s.
The Dean of B.J.Government Medical
College and Sassoon Hospital an others. ... Respondents.

Mr.Tejesh Dande i/b. Tejesh Dande & Associates
for the Petitioner.
Mr.R.P.Kadam, AGP for the Respondent-State.

CORAM : NITIN JAMDAR AND
MILIND JADHAV, JJ.

DATE : 17 September 2020.
(Through Video Conferencing)

P.C. :

The Petitioner, by this petition, is seeking termination of her pregnancy in the twenty-second week.

2. The Petitioner and her husband are employed. The Petitioner, upon becoming pregnant, visited her Consultant on 12 August 2020 for a check up. The sonography report indicated that the foetus has left cleft lip and cleft palate deformity. The Petitioner then consulted another medical practitioner, and the doctor also

confirmed the deformity in the foetus. Because of Section 3 of the Medical Termination of Pregnancy Act, 1971, which does not permit medical termination of pregnancy after 20 weeks, the Petitioner has invoked the writ jurisdiction of this Court. The Petitioner seeks termination because the foetus has a deformity, and there is a likelihood of mental trauma to the Petitioner and, therefore, termination of pregnancy is necessary.

3. The petition came up on board on 27 August 2020, and a Medical Board was directed to be constituted to examine the Petitioner. The Medical Board was accordingly constituted. It consisted of Dean, PSM; Professor and Head of Department, Obstetric & Gynaecology, Professor and Head of Department, Medicine; Professor and Head of Department, Paediatrics; Professor and Head of Department, Radiology; Associate Professor, Paediatric Surgery; Associate Professor, Psychiatry; and Assistant Professor, Plastic Surgery. The Medical Board submitted its report opining that the termination of pregnancy is not warranted. The report was placed on record on 3 September 2020 after which the Petitioner took time to take instructions. The Petitioner has filed an additional affidavit.

4. We have heard the learned counsel for the parties, and we have perused the report.

5. Section 3 of the Act of 1971 reads as under:

“3. When pregnancies may be terminated by registered medical practitioners.-- (1) Notwithstanding anything contained in the Indian Penal Code (45 of 1960), 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 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 a grave injury to the mental health of the pregnant woman.

Explanation 2.-- 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.

6. The Division Bench of this Court in the case of *XYZ v. Union of India*¹, took a review of the case-law on the subject and laid down certain guiding principles. The Court held that it is permissible for the Writ Courts to issue a direction for termination of pregnancy after the expiry of stipulated period notwithstanding the mandate of the Act of 1971. While exercising this jurisdiction, the Court will have to take into account various factors such as physical and mental abnormalities of the child, right of the mother to make reproductive choices and the State interest. After the expiry of the stipulated period, there is a compelling State interest in protecting the rights of prospective or potentiality of the life. The compelling State interest can be overridden by if there is a threat to the life of the mother or if the child was to suffer mental or physical abnormalities to be seriously handicapped and the factors indicated in the Act. This being a delicate balance to achieve, each case will have to be examined on the existent set of facts.

7. We now turn to the report of the Medical Board submitted before us. The report reads thus:

“On clinical and sonographic examination mother has pregnancy of 23 weeks. She has no medical and obstetric complications. Fetal anomalies of cleft lip and palate found

¹ 2019 SCC Online Bom 560

on ultrasonography are surgically correctable with good cosmetic and functional outcome.

Thus for these anomalies medical termination of pregnancy is not recommended.”

Thus, the Medical Board has clearly opined that the abnormalities of cleft lip and cleft palate is surgically correctable and termination of pregnancy is not warranted.

8. By way of additional affidavit, the Petitioner has placed certain material on record found through internet search. Based on this material, the Petitioner seeks to contradict the report of the Medical Board. It is not possible to accept this contention. We will have to go by the report of the Medical Board of experts specially constituted to examine the Petitioner, which clearly states that the deformity is not so serious and can be surgically corrected.

9. The learned counsel for the Petitioner submitted that the Medical Board has not looked into the mental trauma, which would result from being forced to raise a child with this deformity. The Petitioner relied upon the decision of this Court in the case of *Shaikh Ayesha Khatoon v. Union of India*² wherein this Court held that the mental trauma of the mother would be one of the considerations. This was a case where the foetus had developed several serious abnormalities. In this case, the medical report had stated that chances of independent neonatal survival was negligible. The

² WPST No.36727/2017 decided on 9 January 2018

decision of this Court in the Suo Motu Public Interest Litigation No.1/2016 (*High Court on its own v. State of Maharashtra*) was a case where the mother was a prisoner and already had a baby of five months old suffering from convulsion/epilepsy and in that condition she had become pregnant where the termination of her pregnancy was granted. None of these cases is close to the facts of the matter in hand.

10. Having given our anxious consideration to the relevant factors of the case, we are of the opinion that this is not a case where the termination of pregnancy is warranted. The foetus suffers from cleft lip and cleft palate, which is surgically correctable. The Medical Board has opined that there is no danger to the Petitioner in the normal delivery process. The likelihood of the mental trauma in future sought to be projected by the Petitioner, in the peculiar circumstances of this case, cannot be accepted as a ground for termination of pregnancy. We decline to exercise our equity jurisdiction.

11. The writ petition is rejected.

12. This order will be digitally signed by the Personal Assistant/Private Secretary of this Court. All concerned to act on production by fax or email of a digitally signed copy of this order.

(MILIND JADHAV, J)

(NITIN JAMDAR, J)