

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.5286 of 2017

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Indu Devi Wife of Vinod Sharma, Currently residing at 'Shanti Kutir', Mahila
Punarwas Kendra, Patliputra, P.S.-Patliputra, District-Patna, Destitute Under the
Care of 'Shanti Kutir', Mahila Punarwas Kendra, Patliputra, P.S.- Patliputra,
District-Patna.

.... Petitioner/s

Versus

1. The State of Bihar, through the Principal Secretary, Social Welfare Government of Bihar, Patna.
2. The Superintendent, Patna Medical College and Hospital, Patna.
3. Youth Mobilisation for National Advancement, through its Secretary, Kumar Deepak, having its Office at Saket, 26/B, Road No. 3B, New Patliputra Colony, Patna.
4. Smt. Shradha Sinha, Home Superintendent, Shanti Kutir, Mahila Punarwas Kendra, Patliputra, P.S.-Patliputra, District-Patna.
5. Koshish, Field Action Project of Tata Institute of Social Sciences, through its Director, Md. Tarique, having its Office at 43, Saurabh Extension, 4th Floor, Behind J.D. Women's College, P.S.-Shastri Nagar, Patna.
6. Ms. Apurva Vivek, Research Officer, Koshish, Field Action Project of Tata Institute of Social Sciences, through its Director, Md. Tarique, having its office at 43, Saurabh Extension, 4th Floor, behind J.D. Women's College, P.S.-Shastri Nagar, Patna.
7. Mr. Nokhe Lal Sharma S/o not known R/o Chawk Shikarpur Vishwakarma Mandir, Patna.
8. Vinod Sharma S/o not known R/o Rastriya Ganj, P.S Phulwarisharif, Distt – Patna,
9. S.S.P., Patna
10. Director, IGIMS, Bailey Road, Patna.

.... Respondent/s

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Appearance :

For the Petitioner	:	Mr. Ansul, Adv. Mr. Archit Rajpal, Adv.
For the State, Respondent Nos. 1, 2 and 9	:	Mr. Kaushal Kr. Jha, AAG-8
For IGIMS, Respondent No. 10	:	Mr. Sunil Kumar, Adv.
For Respondent no.7	:	Mr. Javed Aslam, Adv.
For Respondent no.4	:	Mr. Arbind Kumar, Adv.
For Respondent no.8	:	Mr. Parashuram Singh, Adv.

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
ORAL JUDGMENT

Date: 26-04-2017

Heard Mr. Ansul, learned counsel for the petitioner,



Mr. Kaushal Kumar Jha, learned A.A.G.-8 for respondent nos. 1, 2 and 9, Mr. Arbind Kumar, learned counsel for respondent no.4, Mr. Jawed Aslam, learned counsel for respondent no.7, Mr. Parashuram Singh, learned counsel for respondent no.8 and Mr. Sunil Kumar, learned counsel for respondent no.10.

The present writ application has been filed under Article 226 of the Constitution of India for issuance of appropriate direction to the respondent authorities to facilitate medical termination of about 20 weeks of pregnancy of the petitioner by the Medical Board since she is HIV +ve (Human Immunodeficiency Virus) The prayer of the petitioner as stipulated in paragraph no.1 of the writ application, reads as follows:-

“A. (i). To ascertain the physical condition including the stage of pregnancy as well as the possibility of terminating the pregnancy as per the wish of the petitioner, a lady who has become pregnant as a consequence of forced sexual assault and who is HIV positive and is now approximately 20 weeks pregnant, by a medical board.

(ii). To direct the Respondents for taking immediate steps for medical care and rehabilitation of lady.

B. To any other relief/s to which the petitioner is found entitled to.”

The factual matrix of the case would unveil the background in which the prayer for medical termination of pregnancy



of the petitioner has been made. The petitioner (hereinafter is addressed as 'victim'), assessed to be 35 years of age, claiming to be a destitute, was rescued on 25.01.2017 by a Field Coordinator of 'Shanti Kutir', a Woman Rehabilitation Centre situated at Patliputra in the town of Patna. Shrimati Shradha Sinha, respondent no.4 is the Home Superintendent, Shanti Kutir. The said rehabilitation centre is run by an NGO namely Youth Mobilization for National Advancement (hereinafter referred to as 'YMNA') under Social Welfare Department, Government of Bihar under Chief Minister Scheme for eradication of Beggary. Secretary of the NGO, Kumar Deepak is respondent no.3 in the present writ application.

One of the field coordinators came across the victim and brought her to Shanti Kutir (a Woman Rehabilitation Centre) on 25.01.2017. The victim underwent medical test on 26.01.2017 and was found pregnant. On 02.02.2017, the victim was taken to Patna Medical College and Hospital (hereinafter referred as 'PMCH') where a number of tests were advised and on the basis of ultrasound test conducted on 08.02.2017, it was found that the victim was carrying pregnancy of 13 weeks and 6 days. The ultrasound report has been brought on record as Annexure-1. The victim was also examined by Dr. Rakesh Kumar, Consultant, Neuro-Psychiatrist, on 28.01.2017 who noticed abnormal behavior and wondering tendency and prescribed certain medicines which gets reflected from the medical



prescription, as contained in Annexure-2. The victim is still under the treatment of Dr. Rakesh Kumar, who is the visiting doctor of NGO, Shanti Kutir. Again the victim was taken to PMCH on 06.03.2017, the medical prescription to that effect has been brought on record as Annexures- 3 and 4, which suggest the age of the victim as 35 years, and that the victim was carrying pregnancy of five months (22 to 24 weeks) as also that she was diagnosed to be HIV +ve. It is stated in paragraph no.9 of the petition that the victim was taken to PMCH on 03.04.2017 when she was found HIV +ve.

For the first time, on 14.03.2017, the victim disclosed that she was subjected to forceful physical relationship and the pregnancy she is carrying is outcome of such forceful relationship, but she failed to disclose about this incident to anybody. After 14.03.2017, the victim expressed her willingness to the management of the NGO, for getting the pregnancy terminated. Initially she was not very coherent, but after some time she disclosed the incident, leading to registration of Patna Mahila P.S. Case No. 13 of 2017 on 18.03.2017 under Section 376 of the IPC. The FIR has been brought on record as Annexure-6. On 18.03.2017, the Home Superintendent of Shanti Kutir, the Women Rehabilitation Centre, respondent no.4 transmitted a representation to the Superintendent, PMCH, respondent no.2 intimating in detail about the victim with a prayer for termination of the pregnancy. At PMCH, the pregnancy could not be terminated



since the father of the victim, though signed the consent paper, but failed to produce any proof of his identity. Thereafter, the present writ application was filed on 07.04.2017.

On 10.04.2017, for the first time the matter was taken up, when this Court permitted the counsel for the victim to implead the husband and father of the victim, Sr. S.P., Patna and Director of IGIMS as party respondents. Since Kaushal Kumar Jha, learned AAG-8 was representing Sr. S.P., Patna and Mr. Sunil Kumar, Advocates was representing the Director, IGIMS, Patna, hence notices were not issued to them, though, notices were issued to respondent nos. 7 and 8. Respondent no.4, the Superintendent, Shanti Kutir, Woman Rehabilitation Centre, appearing in person, was advised to file counter affidavit. Similarly learned A.A.G.-8 was directed to file counter affidavit on behalf of respondent nos. 1, 2 and 9, the State of Bihar, Sr. S.P., Patna and Superintendent, PMCH, respectively. The Sr. S.P., Patna was directed to submit an interim report by 17.04.2017 with regard to the progress in investigation of Patna Mahila P.S. Case No. 13 of 2017, as also with regard to the time frame in which the investigation is likely to be concluded. The Director, IGIMS, Patna was directed to constitute Multi Disciplinary Medical Board consisting of Head of the Department of Gynecology, Head of the Department of Neurology, Head of the Department of Forensic Medicine, In charge, Antiretroviral Therapy Centre or any Doctor of



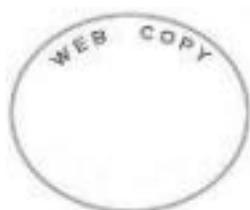
such discipline. The Director, IGIMS was given further liberty to nominate one or more Doctors as Members of Multi Disciplinary Board. It was recorded in the order that it is expected from the said Medical Board to examine the victim with regard to her present physical and mental state, which includes stage of pregnancy, overall condition of foetus, how far the termination of pregnancy will be detrimental to the victim and if the petitioner is allowed to complete the full course of pregnancy then how far it will be detrimental to the petitioner and the foetus, particularly in view of the earlier medical report suggesting the petitioner being mentally abraded and HIV +ve or whether it will be medically safe to allow her to complete the full term of pregnancy and give birth to a baby. The petitioner was directed to make herself present before the Director, IGIMS on 11.04.2017 at 10.30 AM and thereafter the Director, IGIMS, Patna was given liberty to fix further time schedule for getting her medically examined. The Director, IGIMS, Patna was directed to submit a comprehensive report to this Court on 17.04.2017 at 10.30 AM. On 17.04.2017, the medical report was submitted on behalf of respondent no.4 in a sealed cover and the matter was passed over to enable the counsels for the parties to go through the medical report. On 18.04.2017 it was pointed out that counsel for the petitioner has made Vineet Sharma as party respondent as husband of the victim whereas the name of the husband of the victim is Vinod Sharma, in the



circumstances, counsel for the petitioner is permitted to make Dasti service of notice to the respondent nos.7 and 8 through the Officer In-Charge of local police station and the matter was fixed for 20.04.2017, but on 20.04.2017 since the matter could not be listed on the top of the cause list it was taken up on 21.04.2017, when the counsels appearing for respondent nos. 7 and 8 prayed for some accommodation to file counter affidavit, as a result the matter was again adjourned. Today, the matter is taken up since the counter affidavit has already been filed on behalf of respondent nos. 4, 7 and 8. This Court is dismayed to find that in spite of specific direction vide order dated 10.04.2017, the Sr. S.P., Patna has not filed any counter affidavit rather learned AAG-8 submits that Sr. S.P., Patna has transmitted a letter to the effect that investigation is going on and is likely to be concluded within six months, though several witnesses have been examined.

The only question which has to be considered and determined in the present proceeding is whether the victim who is HIV +ve and is carrying a pregnancy of about 24 weeks can be allowed for medical termination of pregnancy under the provisions of Medical Termination of Pregnancy Act, 1971 (hereinafter referred as 'the Act').

Mr. Ansul, learned counsel for the petitioner submits that the victim is mentally abraded and is a destitute. The victim was



located by one of the coordinator of the Shanti Kutir, the Women Rehabilitation Center and was found pregnant, when she was taken to hospital on 26.01.2017, which was confirmed through ultrasound test conducted on 08.02.2017, whereupon it was found that she is carrying pregnancy of 13 weeks and 6 days, but ultimately it was found on 06.03.2016/03.04.2016 that she is HIV +ve also. The Superintendent of Rehabilitation Center on 18.03.2017 represented to the respondent no.2, i.e., the Superintendent, PMCH for termination of pregnancy of the victim, which was of 17 weeks. Learned counsel for the petitioner thus submits that the victim should be permitted to get the pregnancy terminated, since the delay has been caused due to inaction of hospital authorities and now the pregnancy is of 24 weeks, as per the medical report of PMCH, while it is of 21 to 22 weeks as per report of Medical Board. Since the victim conceived due to forceful and undesired sexual intercourse against her will, hence as per Explanation 1 of Sub-section 2 of Section 3 of the Act, such pregnancy has to be presumed to constitute grave injury to the mental health of the victim and hence by virtue of the embargo of non-permissibility of termination of pregnancy after 20 weeks being waived under Section 5 of the Act which permits termination of pregnancy, if it is immediately necessary to save the life of pregnant woman. Such explanation applies to the victim of the present case.

It is further submitted that the victim has been deserted



by her husband who has filed matrimonial suit with a prayer for getting marriage dissolved due to the victim being HIV +ve, as the life span of the victim has been shortened and the quality of life stands substantially eroded, hence it would be difficult for the victim to bring up the child who, in all probabilities, is likely to be infected by HIV. In this regard, reliance has been placed on the provision of Section 10 of Human Immunodeficiency Virus and AIDS (Prevention and Control) Act, 2017 which prescribes that every person who is HIV +ve should take all reasonable precautions to prevent the transmission of HIV to other persons. Section 10 reads as follows:-

“Every person, who is HIV-positive and has been counseled in accordance with the guidelines issued or is aware of the nature of HIV and its transmission, shall take all reasonable precautions to prevent the transmission of HIV to other persons which may include adopting strategies for the reduction of risk or informing in advance his HIV status before any sexual contact with any person or with whom needles are shared with.”

Learned counsel for the petitioner has also relied upon the draft of Medical Termination of Pregnancy (Amendment) Bill, 2014, wherein an amendment has been proposed in Section 3 of existing 1971 Act, where the outer limit of permissibility for medical termination has been proposed as 24 weeks. Section 3 of the proposed Amendment Bill reads as follows:-



“In Section 3 of the Principal Act,-

(i) for the words “registered medical practitioners”, wherever they occur, the words “registered health care providers” shall be substituted;

(ii) for sub-section (2), the following sub-section shall be substituted, namely:-

“(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered health care provider,-

(a) on request of a woman, where the length of the pregnancy does not exceed twelve weeks;

(b) (i) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks; or

(ii) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks and the woman falls in one of the categories, as may be prescribed”

It is lastly submitted by learned counsel for the petitioner that the victim is mentally retarded, in spite of that she is anxious about the outcome of the pregnancy and also regarding the social critical response to such pregnancy and the social treatment being meted to such child. In the circumstances, the victim may be allowed to live her shortened life span, being HIV +ve, peacefully. In such termination of pregnancy, the consent of the victim is of paramount importance, whereas in the present case, not only the victim has consented for

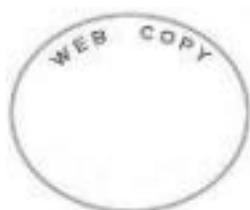


such termination, but also, her father, husband, the Women Rehabilitation Centre and the respondent-State Government, have no objection to such termination of pregnancy.

It is submitted on behalf of Superintendent, Shanti Kutir, Woman Rehabilitation Centre, respondent no.4 that the victim was located by one of the Coordinator, thereafter she was taken to hospital and ultimately it was detected that she is carrying pregnancy of 13 weeks and 6 days and subsequently it was diagnosed that she was found to be HIV +ve and in spite of request being made to the Superintendent, PMCH by respondent no.4 on 18.03.2017, the pregnancy was not terminated on technical ground. This respondent assisted the victim to file the present writ application for getting the required permission for medical termination of pregnancy. A statement has been made in para 17 of the counter affidavit, filed on behalf of respondent no.4, that the NGO is ready to take responsibility in the interest of the victim. Paragraph no.17 of the counter affidavit reads as follows:-

“That the respondent no.4 is interested in the better future and welfare of the petitioner and for this purpose the respondent no.4 is always ready to take the responsibility in the interest of the petitioner.”

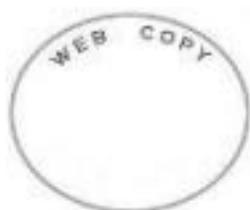
Mr. Kaushal Kumar Jha, learned AAG-8 submits that the alleged NGO is run by the Government under Chief Minister Scheme for Eradication of Beggary. The victim is being provided with all



facilities to survive in rehabilitation center. He further submits that if the court directs, the pregnancy can be terminated by the Board of Doctors. Representing the case of the Superintendent, PMCH, learned AAG-8 submits that pregnancy could not be terminated because the identity of the father of the victim was not established and he refused to swear an affidavit in this regard and subsequently escaped from the scene. However, so far as investigation pertaining to Mahila P.S. Case No. 13 of 2017 is concerned, Sr. S.P., Patna will see that the investigation is taken to its logical conclusion within a time frame.

Counsel for respondent no.7, the father of the victim submits that he does not have any objection for getting the pregnancy of the victim terminated. He, along with the brother and sister of the victim, namely Vikash Kumar and Munni Kumari, were present at PMCH and had filled up the consent form, but the pregnancy could not be terminated. It is further submitted that he is a man of very limited resources, but is ready to take care of the victim.

Counsel for respondent no.8, the husband of the victim submits that respondent no.8 admits his marriage with the victim and birth of two children who are residing with him, but the victim deserted him in March, 2007 and ultimately this respondent filed Matrimonial Suit No. 984 of 2015 before the Principal Judge, Family Court, Patna with a prayer for getting the marriage dissolved. Since he had difficulty in bringing up the children, he performed second



marriage with one Shanti Devi. The victim was traceless for seven years, but the police took her to his house on 23.07.2015, and after the death of the father-in-law of the victim on 12.03.2016, the victim again went traceless on the same day. Subsequently, this respondent submitted an application before the Fulwarisharif Police Station on 20.03.2016. This respondent also supports the prayer of the victim for termination of pregnancy.

Respondent no.10, the Director, IGIMS, Patna, submitted the report of Multi Disciplinary Board, dated 15.04.2017, which suggests the pregnancy to be 20 to 24 weeks old, as per the abdominal examination, though, as per ultrasound report dated 11.04.2017, the pregnancy was found to be of 21 weeks but according to Medical recommendations, the earliest USG is to be used for Gestational age calculation. The foetus has been found to be normal. The termination of pregnancy would require major surgical procedure along with the subsequent consequences such as bleeding, sepsis and anesthesia hazards. The Medical Board has suggested in its report for continuation of pregnancy according to NACO guidelines. There is likelihood that foetus may be HIV+ve. But definite diagnosis can only be made when the child attains the age of 18 months. The victim has been diagnosed with psychiatry illness, provisionally schizophrenia with mild mental retardation. The victim was found behaviourally stable and requires long term psychiatry treatment, though, some of



the reports are still awaited. The report of the Medical Board reads as follows:-

Issues	Opinion
1. Examination report of the patient (petitioner) with regard to her physical and mental stage (Physical Medical examination of all system will be desirable: Respiratory, CVS, Neurology etc.	Physical Examination: Pulse-100/min regular, BP-114/80 mmHg, Pallor-Mild, Icterus-NIL, edema-Nil, Cyanosis & clubbing-NIL, JVP-normal, Chest-B/L clear no added sound;CVS-S1 & S2-Normal, no added sound; P/A exam-fundal height corresponds to 22-24wk pregnancy; CNS-Higher mental function intact, no focal neurological deficit. Mentally alert, well oriented with time, place & person. (Annexure I).
2. Stage of Pregnancy.	2 nd trimester of approximately 23 wks (as per Ist USG report of whole abdomen on 08.02.2017 of PMCH. And IGIMS, USG on dated 11.04.2017 shows 21 wks fetus..... (Annexure-II). According to recommendations 1 st i.e., earliest USG is to be used for Gestational age calculation.
3. Overall condition of foetus	Normal single alive intra-uterine foetus (As per Physical examination & USG report)
4. How far the termination of pregnancy will be detrimental to the petitioner.	Termination of Pregnancy at this stage sometimes may need major surgical procedure along with the subsequent consequences such as Bleeding, Sepsis and Anesthesia hazards.
5. How far it will be detrimental, if the petitioner is allowed to complete full	The patient can continue pregnancy according to NACO guidelines. Still



term of pregnancy.	there is likelihood that fetus may be HIV+ve. But definitive diagnosis can only be given when the child is 18 months old.
6. How far it will be detrimental to the petitioner and foetus, particularly in view of the fact that she is mentally abraised and HIV+ve	As per the clinical assessment & documentary evidence, the patient is diagnosed to have Psychiatry illness, provisionally Schizophrenia with Mild Mental Retardation. She is currently on medications and behaviourally stable and will require long term psychiatry treatment.
7. Investigation reports	Reports which are made available before the Board Members are.... Annexure-III. Some investigation reports which are not available at IGIMS like CD4 +T lymphocyte count, Serum HIV RNA level (viral load) and Triple Marker Maternal Blood test advised by concerned members are still awaited, after which progression of HIV and through marker congenital abnormality of foetus can be assessed.

Having heard learned counsel for the parties, in order to determine the question of medical termination of pregnancy of the victim, it is relevant to analyze the three provisions of the Act, i.e., Sections 3 to 5 of the Act. The Medical Termination of Pregnancy Act was first enacted in the year 1971 which had been passed in the United Kingdom. The perusal of Section 3 to 5 of the Act, suggests that abortion is permissible only if the specified conditions are met.



The legislative intent was to provide a qualified right to abortion and does not recognize abortion in a routine manner. Sub-section 2(a)(b) of Section 3 of the Act stipulates that pregnancy up to 12 weeks can be terminated by a medical practitioner whereas when the pregnancy exceeds 12 weeks but does not exceed 20 weeks then it can be terminated by a registered medical practitioner, provided an opinion is formed in good faith by not less than two registered medical practitioners that the continuation of pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health or, there is substantial risk if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

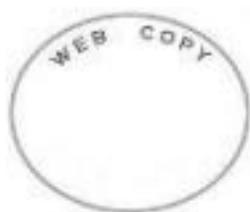
In the present case, the medical report does not suggest that the foetus is suffering from any abnormality. It further does not suggest that the foetus has already been infected with HIV+ve. It only predicts that any definite opinion can be given only when the child attains the age of 18 months. The Medical report further does not suggest that if the victim is allowed to carry the pregnancy to its full course, then she will suffer any risk of life or grave injury to her physical or mental health. Explanation 1 of Subsection 2 of Section 3, provides that such pregnancy which is alleged to have been caused by rape shall be presumed to constitute grave injury to the mental health of the pregnant woman. In the present case, the victim has alleged that



she had been ravished, but her conduct of not disclosing the incident of rape for more than 13 weeks and deciding not to get the pregnancy terminated for more than 20 weeks, as the writ application has been filed after 20 weeks of pregnancy i.e., on 07.04.2017, prima facie, does not suggest that such alleged conception has really caused grave injury to the mental health of the victim. Moreover, the termination, as contemplated under Section 3 of the Act, 1971, is only permissible up to 20 weeks of pregnancy. Definitely the effort for termination was made on behalf of the victim in the 17th week of pregnancy, but the present writ application has been filed before this Court after 20 weeks of her pregnancy.

The explanation to Section 3 of the Act stipulates the termination of pregnancy, when the same is result of rape or failure of birth control method, since both the eventualities have been equated with grave injury to the mental health of the woman. Hence, no reliance can be placed on the Explanations to Section 3 of the Act, as the pregnancy of the victim, was already beyond the period of twenty weeks on the date of filing of this writ application.

Sub-section 3 of Section 3 of the Act stipulates that the actual or reasonable foreseeable environment of the pregnant woman has to be taken into account, while determining, whether the continuance of a pregnancy would involve such risk of injury to the health, as is mentioned in Sub-section 2 of Section 3 of the Act. This provision of



the Act, also does not waive the embargo of a period of twenty weeks of pregnancy as the upper limit for permissibility of termination of pregnancy. Hence, in view of report of Medical Board, this Court finds that the victim's actual reasonable foreseeable environment would be less risky in allowing the continuation of pregnancy to its full term.

Section 4 deals with the place where the pregnancy may be terminated. This Court is not dealing with Section 4 since the dispute in the present case is not with regard to place of termination of pregnancy. Section 5 of the Act permits a registered medical practitioner to proceed with the termination of pregnancy when he/she forms opinion in good faith that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman. There is no such opinion either of the doctors of PMCH or Multi Disciplinary Medical Board, hence, none of the exceptions, either stipulated in Subsection 2 or 3 of Section 3 of the Act and Explanation I and II or Section 5 of the Act is applicable in the present case. The opinion of the Multi Disciplinary Medical Board rather suggests that termination of pregnancy will be more hazardous to the victim.

So far as contention of the counsel for the victim that Section 10 of Human Immunodeficiency Virus and AIDS (Prevention and Control) Act, 2017 prescribes that every person who is HIV +ve should take all reasonable precautions to prevent the transmission of



HIV to other persons, is concerned, that is basically confined to such persons who are HIV +ve, for taking precaution before any sexual contact with any person or with whom the needles are shared with. Hence, this provision is also of no help to the victim.

So far as reliance being placed upon Section 3 of draft of Medical Termination of Pregnancy (Amendment) Bill, 2014, whereby upper limit of getting pregnancy terminated up to 24 weeks has been proposed, is concerned, the said Bill is only a draft Bill and has not taken the shape of law, hence, this is also of no help to the victim.

Counsel for the petitioner has relied upon the case of Meera Santosh Pal Vs. Union of India reported in AIR 2017 SC 461, wherein 24 weeks pregnancy was permitted to be terminated medically since the foetus was diagnosed with Anencephaly, a defect, that leaves foetal skull bones unformed. Such termination of pregnancy was permitted since such foetus was unable to survive extra-uterine life, but in the present case the foetus has been found to be normal, hence this case is also of no help to the victim. The petitioner has relied upon another judgment in the case of X Vs. Union of India and Others, reported in AIR 2016 SC 3525, where 24 weeks pregnancy was permitted to be terminated. In the said case there was no evidence of skull valut above orbit and the foetus was not compatible with extra-uterine life and accordingly the medical opinion suggested for termination of pregnancy, hence, this is also not applicable to the case



of the victim. The petitioner has also relied upon a judgment reported in AIR 2017 SC 1055, where 22 weeks pregnancy was permitted to be terminated since the foetus was suffering from bilateral renal agenesis and anhydramnios, meaning thereby that the foetus had no kidneys and hence the foetus was found to be incompatible with extra-uterine life and accordingly, the medical opinion suggested for such termination. Hence, this case is also of no help. Learned counsel for the petitioner has lastly relied upon the unreported judgment of the Delhi High Court, in case of X Vs. Govt. of NCT of Delhi and Anr, where 19 weeks of pregnancy was directed to be terminated since the victim was found HIV +ve and the victim conceived pregnancy due to forceful and undesirable sexual intercourse against her will, as she was recovered from a brothel. Hence, in the said case there was no embargo of upper limit of termination of pregnancy and such, this case is also of no help to the victim.

The Apex Court in the case of Sheetal Shankar Salvi & Another Vs. Union of India, vide judgment dated 27.03.2017 has declined the termination of 27 weeks of pregnancy, in spite of serious disease found in the foetus, since there was no likelihood that the baby may be born alive and may survive for variable period of time. In the said case, apart from the medical ground, the victim was anxious about the outcome of pregnancy but that ground was not considered to be a permissible ground for getting the pregnancy terminated. The



Apex Court in the case of Suchita Srivastava and Anr. Vs. Chandigarh Administration, reported in (2009) 9 SCC 1, has dealt with the situation where the victim being mentally retarded wanted to carry the pregnancy to its full term. The report of the Medical Board constituted by the order of Punjab & Haryana High Court, suggested for not getting the pregnancy terminated, but in the best interest of the victim, the Punjab High Court directed for termination of pregnancy, which was challenged before the Supreme Court where it has been held that Indian Law allows for termination of pregnancy only if the specified conditions are met, in following words in Para 20 “.....A plain reading of above quoted provision make it clear that the Indian Law allows for abortion only if the specified conditions are met”. The Court further held that the Woman’s right to make reproductive choices is also a dimension of ‘personal liberty’ as enshrined under Article 21 of the Constitution of India, hence the reproductive choices can be exercised to procreate as well as to abstain from procreating. However, in a case of pregnant women there is also a ‘compelling State interest’ in protecting the life of the prospective child.

In the present case at hand, as per the Medical Board opinion, the foetus is not suffering from any disease and hence the Court at this juncture should set aside its emotions and predilections, to decide the issue in the best of interest of the victim as well as the prospective life (foetus). Paragraph no.21 and 22 of Suchita Srivastava (supra)



judgment, reads as follows:-

“21. When the MTP Act was first enacted in 1971 it was largely modelled on the Abortion Act on 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified ‘right to abortion’ and the termination of pregnancy has never been recognized as a normal recourse for expecting mothers.

22. There is no doubt that a woman’s right to make reproductive choices is also a dimension of ‘personal liberty’ as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman’s right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman’s right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilization procedures. Taken to their logical conclusion, reproductive rights include a woman’s entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a ‘compelling State interest’ in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the



applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.”

So far as mental retardation of the victim is concerned, from the report of Medical Board, it appears that the mental retardation of the victim is of a very mild nature, whereas in the case of Suchita Srivastava (supra) also, the victim was suffering from ‘mild mental retardation’, with regard to which it was held that it does not mean that she is entirely incapable of making decisions for herself. Even the Apex Court was of the opinion that the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority and keeping in mind the willingness of the victim to carry on the pregnancy, the Apex Court had set aside the judgment and order dated 09.06.2009 and 17.07.2009 of Punjab & Haryana High Court. Though, the High Court in Suchita Srivastava’s case (supra) has invoked the doctrine of Parens Patriae while exercising its writ jurisdiction to go beyond the literal interpretation of the statute and adopted a purposive approach and by arriving at a conclusion that the termination of pregnancy would serve the best interests of the victim. The Apex Court while dealing with the doctrine of Parens Patriae has recorded that the said doctrine has been evolved in common law and is applied in situations where the state must make decisions in order to protect the interests of



those persons who are unable to take care of themselves. For exercising such jurisdiction, two distinct standards are commonly used. These two standards are the 'best interests' test and the 'substituted judgment' test. The 'best interests' test requires the court to ascertain the course of action which would serve the best interests of the person in question. In such a situation, the court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim.

In the present case also, in the 'best interest' of the victim and the foetus, this Court finds no reason to exercise the jurisdiction under Article 226 of the Constitution of India for directing the pregnancy to be terminated in its 23-24 week, particularly such termination of pregnancy, as per the Medical Board report would be hazardous to the life of the victim. However, keeping in view the fact that the victim was leading a life of destitute and she has been almost deserted by her husband, her father, her brother and her sister, as none of them in their counter affidavit have stated that they are ready to take her to their house, this Court feels that she will be safe if she is allowed to remain in rehabilitation centre, Shanti Kutir so long she desires.

Mr. Kaushal Kumar Jha, learned AAG-8 submits that the rehabilitation center is run by the Government and the Government is ready to provide all medical facilities, as well as



amenities of day to day life to the victim.

In the circumstances, it is expected from the Superintendent, PMCH to get the victim medically examined every month or so and provide all medicines or other medical facilities required for carrying the pregnancy to its full term and bringing up the child after its birth, till the child attains the age of five years. The Superintendent, PMCH would ensure to provide the victim with necessary medical cover in light of the direction made above.

This Court is hopeful that the NGO will take care of the victim and provide all the facilities for the post-natal care.

In the circumstances, in the interest of justice and in the interest of victim and foetus/prospective child, this Court is not inclined to permit the medical termination of pregnancy of the victim.

Accordingly, in the interest of justice and the actual or reasonable foreseeable environment of the victim, the present writ application is disposed of with aforesaid observation and following directions:-

(i) Respondent no.4 will get the bank account of the victim opened within a period of one week, if she does not have one.

(ii) Respondent nos.7 and 8, the father and the husband of the victim will deposit Rs. 1,000 and Rs. 1,500/-, respectively, per month in the account of the victim from May, 2017.

(iii) If respondent nos. 7 and 8 make default in payment



on three consecutive occasions, of the installment of the aforesaid amount, then any of the concerned parties would be at liberty to file an application before this Court and respondent nos. 7 and 8 will be answerable to this Court, in this regard.

(iv) Respondent nos. 7 and 8 will provide their mobile number to the respondent no.4 and shall visit the victim every month.

(v) Respondent no.4 shall allow the relatives and husband of the victim to meet her.

(vi) One copy of the report of the Medical Board will be kept with the records of the present case and one copy of the conclusive medical report will be transmitted to respondent no.4 by the Director of IGIMS, Patna.

(vii) The Director, IGIMS, Patna will transmit the awaited medical report of the victim, as mentioned in Clause -7 of the report of the Medical Board, to respondent no.4.

However, before parting with this order, it is made clear that no observation made hereinabove by this Court shall be construed to convey that the mental retardness or the alleged rape of the victim stands proved. Moreover, this order will not preclude the husband or the father of the victim, to take her to their house and maintain her in a dignified manner, provided they regularly report about her well being, not only to the local police station but also to respondent no.4.



It is expected from the Sr. S.P., Patna to conclude the investigation of the case within a period of three months.

Let the copy of the order be handed over to Mr. Ansul, learned counsel for the petitioner and Mr. Kaushal Kumar Jha, learned A.A.G-8 for its communication to the Superintendent of PMCH, Director, IGIMS and Sr. S.P., Patna as well as to the counsels for respondent nos. 3,4, 7 and 8.

(Dinesh Kumar Singh, J)

Amrendra/-

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	27/04/2017
Transmission Date	N/A

