

IN THE HIGH COURT OF UTTARAKHAND

AT NAINITAL

THE HON'BLE SRI JUSTICE ALOK KUMAR VERMA

04TH FEBRUARY, 2022

WRIT PETITION NO.201 of 2022 (M/S)

Between:

Ms. X (minor) through her father. ...Petitioner.

and

State of Uttarakhand and Others. ...Respondents.

Counsel for the Petitioner: Mrs. Monika Pant.

Counsel for the State/ Respondents. : Mr. T.S. Fartiyal, learned Additional C.S.C.

Hon'ble Alok Kumar Verma, J.

This writ petition has been filed by the father of the minor petitioner to issue a writ in the nature of mandamus commanding and directing the respondent no.1, State of Uttarakhand, and, the respondent no.2, the Chief Medical Officer, Chamoli, to ensure immediate medical termination of petitioner's pregnancy after taking all precautions as required to be taken medically and legally.

2. The case of the petitioner is that the petitioner, aged about 16 years, is a rape victim. An FIR was lodged on 12.01.2022, at Revenue Police Station, Pokhari/Jilasu, District Chamoli and it has been registered as Case Crime No.01 of 2022, against named accused under Section 376 of IPC and Section 6 of the Protection of Children from Sexual Offences

Act, 2012. The medical examination of the petitioner was conducted on 11.02.2022. She was advised Obstetrical Ultrasound (Sonography) test, which confirmed that she had a Single Live Intrauterine Fetus of 27 weeks 4 days (+) 15 days.

3. Heard Mrs. Monika Pant, the learned counsel appearing for the petitioner and Mr. T.S. Fartiyal, the learned Additional Chief Standing Counsel for the State through video conferencing.

4. Mrs. Monika Pant, the learned counsel appearing for the petitioner, submitted that the petitioner shall suffer mental injury if the pregnancy is continued and there will be multiple problems if the child is born alive.

5. On 24.01.2022, the Co-ordinate Bench had directed the State to constitute a Medical Board and submit its report to the Court. The report of the Medical Board is filed by the learned counsel for the State.

6. According to the report of the Medical Board, the pregnancy was found 28 weeks 5 days. The said report concluded that considering the risk to the mother and fetal viability, it is not advisable to terminate pregnancy at this gestational age.

7. On 02.02.2022, the learned counsel appearing for both the parties agreed that the said report does not disclose whether death risk of the victim is involved in undertaking the medical termination of such pregnancy or not.

8. In facts and circumstances of the case, on 02.02.2022, the Chief Medical Officer, Chamoli was requested to appear before this Court through video

conferencing with his respective team to assist this Court and clarify the report of Medical Board.

9. Today, Mr. Shiv Prasad Kuriyal, Chief Medical Officer, Chamoli along with Dr. Divya Punetha, Senior Gynecologist, Dr. Manav Sexena, Child Specialist and Dr. Alind Pokhariyal, Radiologist are present through video conferencing.

10. The opinion of the members of the Medical Board is that there is a substantial risk to the life of the petitioner, if the medical termination of the pregnancy of the petitioner is conducted. They further submitted that at this stage of the pregnancy, the baby can be born with many anomalies.

11. Section 3 of the Medical Termination of Pregnancy Act, 1971 [as amended by the Medical Termination of Pregnancy (Amendment) Act, 2021], (hereinafter referred to as "the Act") deals with the issue when pregnancies may be terminated by registered medical practitioner.

12. Sub-section (1) of Section 3 of the Act provides, that notwithstanding anything contained in the Indian Penal Code, 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 the Act.

13. Sub-section (2) of Section 3 of the Act provides, that 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 twenty weeks, if such medical practitioner is, or

(b) Where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners are, of the 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 any serious physical or mental abnormality.

Explanation 1- For the purposes of clause (a), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2- For the purposes of clauses (a) and (b), where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

(2A) The norms for the registered medical practitioner whose opinion is required for termination of pregnancy at different gestational age shall be such as may be prescribed by rules made under the Act.

(2B) The provisions of sub-section (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.

(2C) Every State Government or Union territory, as the case may be, shall, by notification in the Official Gazette, constitute a Board to be called a Medical Board for the purposes of the Act to exercise such powers and functions as may be prescribed by rules made under the Act.

(2D) The Medical Board shall consist of the following, namely;

(a) a Gynaecologist;

(b) a Paediatrician;

(c) a Radiologist or Sonologist; and

(d) such other number of members as may be notified in the Official Gazette by the State Government or Union territory, as the case may be.

14. Sub-section (3) of Section 3 of the Act provides, that in determining whether the continuance of 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 reasonably foreseeable environment.

15. Sub-section (4) (a) of Section 3 of the Act provides, that 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.

16. Sub-section (4)(b) of Section 3 of the Act provides, that save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

17. Under Explanation 2 to Section 3(2) of the Act, there is a presumption. Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

18. Mrs. Monika Pant, the learned counsel appearing for the petitioner, submitted that the Hon'ble Supreme Court, in **A. vs. Union of India, (2018) 14 SCC 75**, has permitted termination in a case where the gestational age was 25-26 weeks, and, in **Sarmishtha Chakraborty and Another vs. Union of India, (2018) 13 SCC 339**, the Hon'ble Supreme Court permitted termination of the pregnancy when the gestational age was 26 weeks.

19. In **Murugan Nayakkar vs. Union of India, 2007 SCC OnLine SC 1092**, the Hon'ble Supreme Court has allowed medical termination of pregnancy beyond the statutory outer limit prescribed in the Act considering the fact that the victim was 13 years old and in trauma, even though the Board stated that termination will have equal danger for the mother.

20. There is a right to termination pregnancy on ground of rape. A rape victim has a right to make a

choice to carry. She has also right not to carry pregnancy subject to the conditions as enumerated under the provisions of the Act.

21. In **Suchita Srivastav and Another vs. Chandigarh Administration, (2009) 9 SCC 1** and in **Meera Santosh Pal vs. Union of India, (2017) 3 SCC 462**, the Hon'ble Supreme Court held 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.

22. Right to life means something more than survival or animal existence. It would include the right to live with human dignity. The father of the minor petitioner has expressed that the petitioner is not in a position to continue the pregnancy and if the petitioner is not permitted to terminate her pregnancy, there is possible grave injury to her physical and mental health.

23. In **Meera Santosh Pal (Supra)**, the pregnancy was into the 24th weeks. The Hon'ble Supreme Court permitted the petitioner to terminate the pregnancy and observed that the overriding consideration is that she has a right to take all such steps as necessary to preserve her own life against the avoidable danger to it.

24. Mrs. Monika Pant, the learned counsel appearing for the petitioner, submitted that during the procedure of the termination, if it is found that there is any risk to the life of the petitioner, then discretion can be applied to cancel the procedure for medical termination of pregnancy.

25. Mr. T.S. Fartiyal, the learned Additional Chief Standing Counsel for the State, does not oppose the said submissions of the learned counsel for the petitioner.

26. In these circumstances, if the petitioner is compelled to continue with her pregnancy, it would infringe her life to live with human dignity, guaranteed under Article 21 of the Constitution of India. Therefore, in the present facts and circumstances, this Court considers it appropriate in the interest of justice to permit the petitioner to undergo medical termination of her pregnancy under the provisions of the Act with the following directions :-

(i) The medical termination of pregnancy of the petitioner should be carried out by a senior most Gynecologist under the guidance of the Medical Board, constituted in compliance of the order dated 24.01.2022 of this Court, within 48 hours from the production of a copy of this order before the Chief Medical Officer, Chamoli.

(ii) During the procedure of medical termination, if they find that any risk to the life of the petitioner, they have discretion to cancel the said procedure.

(iii) The Medical Board shall maintain complete record of the procedure of the termination of the pregnancy of the petitioner. The Medical Board shall collect the tissue and blood sample of the foetus for conducting DNA and other tests.

(iv) If baby is born alive, the Chief Medical Officer, Chamoli, the respondent no.2, and, Child Welfare Committee, Chamoli will do the needful in accordance with law.

27. The State is directed to constitute a Medical Board in accordance with the provisions of the Act.

28. Let a copy of this order be provided to the learned counsel for both the parties today itself, as per rules to do the needful.

29. The learned counsel appearing for the State is further directed to inform the Chief Medical Officer, Chamoli forthwith.

30. The registry is directed to supply the copy of this order to the Chief Medical Officer, Chamoli forthwith.

31. The learned counsel for the petitioner submitted that the petitioner with her guardian will appear before the Chief Medical Officer, Chamoli at about 10.00 a.m. tomorrow i.e. on 05.02.2022.

32. The present writ petition is disposed of accordingly.

ALOK KUMAR VERMA, J.
(Vacation Judge)

Dt: 04th February, 2022

JKJ/Pant