

Pinki Kumari vs Government Of Nct Of Delhi & Ors on 25 January, 2022

Author: V. Kameswar Rao

Bench: V. Kameswar Rao

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ W.P.(C) 1105/2022

PINKI KUMARI

Through:

Ms. Surabhi Shukla,

versus

GOVERNMENT OF NCT OF DELHI & ORS. Respondents

Through: Ms. Shobhana Takiar, ASC

Mr. V.S.R. Krishna, Adv.

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

% 25.01.2022 This matter is being heard through Video-Conferencing.

1. The petitioner along with her husband Amit Kumar has joined the proceedings and has reiterated the prayers made in the writ petition, which I reproduce as under:-

□ In light of the facts and circumstances of this case, the Petitioner prays before this Hon'ble Court as under:

a. For a writ of mandamus or any other writ, order, directing the Respondents to allow the Petitioner to undergo Medical Termination of the Pregnancy. b. For an order directing the Respondent No. 3 for setting up an expert panel of doctors to assess the pregnancy and offer MTP to the petitioner in need of the procedure beyond the prescribed 24 weeks limit. c. For any other order/ direction that this Hon'ble Court may deem fit.

2. It is the case of the petitioner that when she on December 14, 2021 got USG-II scan done from Apex Imaging & Diagnostic Centre, opposite Guru Teg Bahadur Hospital, it gave an impression that the foetus suffers from □ Anencephaly along with spinal deformities . Thereafter another ultrasound was done for reassurance on December 15, 2021 and December 31, 2021 which suggested that the foetus, then of more than 21 weeks, had severe cranial neural tube defect (Anencephaly) and that the foetal skull bone was not visible. According to the petitioner, the consequence of the above cited deformity is that the foetus affected by anencephaly mostly are stillborn or die at birth.

Thereafter, the petitioner along with her husband decided to undergo a medical termination of pregnancy. Unfortunately, an ensuing strike by doctors in General Hospital, Shahdara, Delhi, where the petitioner was undergoing treatment caused unnecessary delay for the petitioner. Since the strike continued for more than 10 days, they decided to go to other hospitals but they were refused service on ground of unavailability of services. Finally, they went to GTB Hospital, where the petitioner was admitted to undergo the medical termination of pregnancy on December 07, 2021 after conducting routine tests on December 05, 2021 - December 06, 2021. While the petitioner was admitted in GTB Hospital and was under medication for abortion, she completed her 24th week of gestation period. Therefore, despite already being administered heavy doses of medications including labour inducing medicines, she was refused the service of termination of pregnancy by GTB Hospital, citing the need of a court order to continue with the abortion. Since then, the petitioner has developed severe pain in her abdomen and is barely able to walk. She is under immense mental trauma and anxiety with impending risk to the foetus and her own life with every passing day. However, since the petitioner had already reached 24 weeks and since the medical boards as established under Section 3(2B) of the Medical Termination of Pregnancy (Amendment) Act, 2021 has not been notified yet, the petitioner had no other remedy but to approach this Court for appropriate directions.

3. When the matter was listed on January 18, 2022, after hearing the learned counsel for the petitioner, respondents and calling upon Mr. V.S.R. Krishna, Advocate who appears for All India Institute of Medical Sciences, this Court deemed it appropriate to request the Director of AIIMS to form a Medical Board of experts to examine the petitioner and the medical records and to submit a report thereafter. Pursuant to the order, the Medical Board so constituted has submitted its report, which is on the record of this Court. A perusal of the report shows the opinion of the Medical Board as under:-

□No.F.2-4/Medical Board/2022-Estt.(H.) Dated: 24.01.2022 Subject: Report of the medical board constituted at AIIMS for medical examination of petitioner Ms. Pinki Kumari W/o Mr. Amit Kumar for report regarding the necessity and feasibility of the medical termination of the petitioner's pregnancy in compliance of order dated 18.01.2022 of Hon'ble Mr. Justice Kameswar Rao, High Court of Delhi vide W.P. (C) No. 1105/2022 titled Pinki Kumari Versus Govt. of NOT of Delhi &Ors.

***** With reference to the Hon'ble Court order dated 18.01.2022 of Hon'ble Mr. Justice Kameswar Rao, High Court of Delhi vide W.P.(C) No. 1105/2022 titled Pinki Kumari Versus Govt. of NC T of Delhi & Ors., regarding subject noted above. The Medical Superintendent, AIIMS is pleased to constitute a Medical Board consisting of the following members:-

1. Dr. Vatsala Dadhwal - Chairperson Professor, Deptt. of Obs. & Gynae
2. Dr. Neerja Gupta - Member Addl. Professor, Deptt. of Pediatrics
3. Dr. Manisha Jana - Member Addl. Professor, Deptt. of Radio-diagnosis

4. Dr. Richa Vatsa - Member Assoc. Professor, Deptt. of Obs. & Gynae

5. Dr. Megha Richhariya - Member Secy.

Department of Hospital Administration

6. Dr. Prashant Nag - Observer Department of Hospital Administration Ms. 'Pinki Kumari' was examined on 24.01.2022 and her medical records were evaluated by the panel of experts in the board.

OPINION: The Medical board after reviewing the records is of the following opinion:

The petitioner Ms. Pinki Kumari is a 25-year-old lady. This is her first pregnancy, and she is currently at 27 weeks 1 day of gestation by LMP.

Ultrasound done at AIIMS (24/01/2022) shows anencephaly, open neural tube defect and kyphoscoliosis in the fetus, which is incompatible with life. By ultrasound the fetus 24 weeks gestation.

Mother does not have any medical co-morbidities. In view of above. Medical Termination of Pregnancy (MTP) can be offered.

4. A perusal of the report show that the foetus suffers from anencephaly, open neural tube defect and kyphoscoliosis in the foetus, which is incompatible with life. The report also suggest foetus is currently at 27 weeks 1 day of gestation by LMP. It also suggests by ultrasound that the foetus is in its 24th week of gestation. In its concluding remark, the Medical Board suggests that medical termination of pregnancy can be offered.

5. The report was also shared with learned counsel for the respondent Nos.1, 2 and 3 and Ms. Surabhi Shukla, learned counsel for the petitioner. The learned counsel for the petitioner also, in view of the report of the Medical Board, reiterates the prayers made in the petition. According to her, the Medical Termination Pregnancy Act, 1971 ('MTP Act', for short) allows women to terminate their pregnancy even after 24 weeks of gestation, if it is found that continuance of the same is likely to cause grave injury to their physical or mental health.

6. Ms. Takiar appearing for respondents 1 to 3 also states in view of the report submitted by the Medical Board and the fact that the foetus is of 24 / 27 weeks, beyond the permissible limit under the MTP Act, the prayer as made in the petition can be granted.

7. At this stage, I may reproduce the position of law as noted by the Coordinate Bench of this Court in the case of Sangeeta Thapa v. Government of NCT of Delhi & Ors., W.P.(C) No. 15241/2021, wherein in paragraphs 13, 14 and 15, it was held as under:-

□3. Before I deal with the rival submissions of the parties, it would be also apposite to note the relevant provisions of the MTP Act, being sections 3(2)(b)(i), 3(2)(b)(ii) and 3(2B) of the MTP Act, which read as under: -

□3. When Pregnancies may be terminated by registered medical practitioners.

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

(a)...

(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. (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

14. It is evident that the Legislature was conscious that a pregnant woman should have a right to seek medical termination of pregnancy not only when the foetus is diagnosed with substantial abnormalities by the Medical Board, but also when forcibly continuing the pregnancy is likely to cause grave injury to her mental health. A plain reading of sections 3(2)(b)(i), 3(2)(b)(ii) and 3(2B) of the MTP Act together clearly indicates that medical termination of pregnancies can in certain situations be allowed even where duration of the pregnancy exceeds 24 weeks.

15. The aforesaid provisions were recently considered by a Coordinate Bench of this Court in *Pratibha Gaur v. Government of NCT of Delhi & Ors.* [W.P.C.14862/2021] wherein a woman was granted the relief of terminating her pregnancy much after 28 weeks had passed, after observing

that if she was forced to continue with the pregnancy, despite knowing that the child will be born with certain congenital defects, her mental wellbeing would be gravely prejudiced. The Court held as under:

□ It is explicitly clear from a plain reading of the provisions of Section 3(2)(b)(i) of MTP Act, as amended, that grave injury to „mental health“ of a pregnant woman is a legal ground available to the woman to seek medical termination of pregnancy, with the caveat that the maximum period permissible under the Act, for termination, is 24 weeks. The Bench also relied on a decision of the Hon ble Bombay High Court in XYZ v. Union of India, (2019) 3 Bom CR 400, referred to in Sidra Mehboob Shaikh v. State of Maharashtra & Anr., (2021) 3 RCR (Cri) 872, the relevant extract wherof reads as under:

□ 27. In XYZ v. Union of India, (2019) 3 Bom CR 400, a Division Bench of this Court held that the provisions of the Act has to be given a purposive interpretation. Division Bench has opined that for the purposes of section 3(2) of the Act, the expression „grave injury to the mental health,, is used in a liberal sense by the legislature itself. Further, 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. In fact, the aspect of a pregnant woman's actual or reasonable foreseeable environment has greater nexus to the aspect of mental health as compared to physical health. Division Bench proceeded to hold that this legislative liberality when it comes to expanding the concept of grave injury to mental health cannot evaporate no sooner the ceiling of 20 weeks prescribed in section 3(2)(b) of the Act is exceeded. If the expression life,, in section 5(1) of the Act is not to be confined to mere physical existence or survival, then permission will have to be granted under section 5(1) of the Act for medical termination of pregnancy which may have exceeded 20 weeks if the continuance of such pregnancy would involve grave injury to the mental health of the pregnant woman.

8. My attention has been drawn by learned counsel for the petitioner to the judgment of the Supreme Court in the case of Meera Santosh Pal and others v. Union of India & Ors., (2017) 3 SCC 462, wherein the Supreme Court was also concerned with a similar diagnosis, i.e., foetus was diagnosed with anencephaly, a defect that leaves foetal skull bones unformed and is both untreatable and certain to cause the infant's death during or shortly after birth. The relevant paragraphs of the judgment are reproduced herein:-

□ 1. Petitioner No.1 - Meera Santosh Pal, is 22 years old, has approached this Court under Article 32 of the Constitution of India seeking directions to the respondents to allow her to undergo medical termination of her pregnancy. She apprehended danger to her life, having discovered that her fetus was diagnosed with Anencephaly, a defect that leaves foetal skull bones unformed and is both untreatable and certain to cause

the infant's death during or shortly after birth. This condition is also known to endanger the mother's life.

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4. By its report dated 12.1.2017, the Medical Board has examined petitioner no.1 with specific reference to their special expertise for general, medical, radiological, psychiatric and anaesthetic evaluation. An obstetric evaluation was done by two Obstetricians. Ultrasonography was performed at KEM Hospital on 12.1.2017 by the Additional Professor, Radiology.

The said Board has further reported that obstetric examination shows 24 weeks pregnancy, external ballotement present, fetal parts not well felt with mild polyhydramnios. On internal examination, the cervix is posterior and OS is closed. Ultrasonography diagnosis has revealed a single live fetus with anencephaly with mild polyhydramnios with hypotelorism.

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6. Upon evaluation of petitioner no.1, the aforesaid Medical Board has concluded that her current pregnancy is of about 24 weeks. The condition of the fetus is not compatible with extra- uterine life. In other words, the fetus would not be able to survive outside the uterus.

7. Importantly, it is reported that the continuation of pregnancy can gravely endanger the physical and mental health of petitioner no.1 and the risk of her termination of pregnancy is within acceptable limits with institutional back up.

8. This Court, as at present being advised, would not enter into the medico-legal aspect of the identity of the fetus but consider it appropriate to decide the matter from the standpoint of the right of petitioner no.1 to preserve her life in view of the foreseeable danger to it, in case she allows the current pregnancy to run its full course. The medical evidence clearly suggests that there is no point in allowing the pregnancy to run its full course since the fetus would not be able to survive outside the uterus without a skull.

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10. 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 sterilisation 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..... The crucial consideration in the present case is whether the right to bodily integrity calls for a permission to allow her to terminate her pregnancy. The report of the Medical Board clearly warrants the inference that the continuance of the

pregnancy involves the risk to the life of the pregnant woman and a possible grave injury to her physical or mental health as required by Section 3 (2)(i) of the Medical Termination of Pregnancy Act, 1971. Though, the pregnancy is into the 24th week, having regard to the danger to the life and the certain inability of the foetus to survive extra uterine life, we consider it appropriate to permit the petitioner to terminate the pregnancy. 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.

11. In these circumstances given the danger to her life, there is no doubt that she has a right to protect and preserve her life and particularly since she has made an informed choice. The exercise of her right seems to be within the limits of reproductive autonomy.

12. In the circumstances, we consider it appropriate in the interests of justice and particularly, to permit petitioner no.1 to undergo medical termination of her pregnancy under the provisions of Medical Termination of Pregnancy Act, 1971. The learned Solicitor General Mr. Ranjit Kumar who took notice on the last date of hearing has not opposed the petitioners prayer on any ground, legal or medical. We order accordingly.

9. The Supreme Court has also in the case reported as A v. Union of India, (2018) 14 SCC 75 where the foetus was diagnosed with anencephaly had allowed termination of pregnancy by holding in paragraphs 4 to 8 as under:-

□4. The aforesaid Medical Board/Committee has examined the petitioner and stated that as on 30-8-2017, she was into her 25th to 26th week of pregnancy. She was accompanied by her husband and they are aware of the anomaly in foetus and chances of survival of the baby if born alive. The salient features of the said report are as under:

4.1. The antenatal ultrasonography of the petitioner reveals that a single live intrauterine foetus of 26 weeks +/- 7 to 10 days. There is complete absence of foetal brain and skull vault suggestive of anencephaly. 4.2. The Cardiothoracic Surgeon has reported that the foetus has anencephaly and polyhydramnios. He further stated that this anomaly is not compatible with life. 4.3. The Paediatrician has reported that the survival rate post delivery is less than 10 to 20%. He further stated that majority of those who may survive, have serious form of morbidity and succumb within 24 to 48 hours of birth.

4.4. The Medical Board/Committee has reported that there is no treatment for anencephaly and there are possibilities of maternal complications like polyhydramnios.

5. We have been informed that the foetus is without a skull and would, therefore, not be in a position to survive. It is also submitted that the petitioner understands that her foetus is abnormal and the risk of foetal mortality is high. She also has the support of her husband in her decision-making.

6. Upon evaluation of the petitioner, the aforesaid Medical Board has concluded that her current pregnancy is of 25 to 26 weeks. The condition of the foetus is not compatible with life.

The medical evidence clearly suggests that there is no point in allowing the pregnancy to run its full course since the foetus would not be able to survive outside the uterus without a skull. Importantly, it is reported that the continuation of pregnancy can pose severe mental injury to the petitioner and no additional risk to the petitioner's life is involved if she is allowed to undergo termination of her pregnancy.

7. In the circumstances, we consider it appropriate in the interests of justice and particularly, to permit the petitioner to undergo medical termination of her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971. Mr Ranjit Kumar, learned Solicitor General appearing for the respondents, has not opposed the petitioner's prayer on any ground, legal or medical. We order accordingly.

8. The termination of pregnancy of the petitioner will be performed by the doctors of the hospital where she has undergone medical check-up. Further, termination of her pregnancy would be supervised by the above-stated Medical Board who shall maintain complete record of the procedure which is to be performed on the petitioner for termination of her pregnancy.

10. A Coordinate Bench of this Court has recently considered the provisions of the MTP Act in similar facts being Pratibha Gaur v. Government of NCT of Delhi & Ors., W.P.(C) 14862/2021 wherein a woman was granted the relief of terminating the pregnancy much after 24 weeks had passed after observing that if she was forced to continue with the pregnancy despite knowing that the child will be born with certain congenital defects, her mental well-being would be gravely prejudiced.

11. I may also refer to the judgment of the Division Bench of this Court in Priyanka Shukla v. Union of India & Ors., (2019) SCC Online Del 9098, wherein in paragraphs 15 and 16, the Division Bench held as under:-

□5. Apart from the fact that the issue is covered by the decisions cited hereinabove, we are also of the opinion, that in holding as we do, we are not really infracting Section 3 or Section 5 of the MTP Act (supra). Section 3(2)(b) permits termination of pregnancy, inter alia, where there is substantial risk of serious physical or mental abnormalities, were the child to be allowed to be born. Seen in isolation, it thus places a gap of 20 weeks gestation for this to be permissible. At the same time, Section 5 relaxes the rigour of Section 3(2) in a case where the termination of the pregnancy is immediately necessary to save the life of the pregnant woman. We are of the opinion that these provisions have to be construed as part of one cumulative dispensation and not isolated from each other. Seen thus, we are convinced that, even in a case where the condition of the foetus is, as in the present case, incompatible with life, the rigour of Section 3(2) deserves to be relaxed, and the right to terminate

the pregnancy cannot be denied merely because gestation has continued beyond 20 weeks.

16. Law, needless to say, cannot be construed in a manner incompatible with life.

12. From the position of law, as noted above, it is clear that the legislature was conscious that a pregnant woman should have a right to seek medical termination of pregnancy not only when the foetus is diagnosed with substantial abnormality by the Medical Board but also when forcibly continuing the pregnancy is likely to cause grave injury to her mental health.

A plain reading of Sections 3(2)(b)(i), 3(2)(b)(ii) and 3(2)(B) of the MTP Act together clearly indicates medical termination of pregnancies can, in certain situations be allowed even where duration of the pregnancy exceeds 24 weeks.

13. In the present case, I am of the considered view that in light of the opinion given by the Medical Board, continuing the pregnancy shall be of great hardship to the petitioner and exert upon her extreme amount of mental, emotional and even financial distress. No doubt, there are certain risks to the petitioner herself in undergoing medical termination of pregnancy at this stage but upon consideration and noting the medical opinion given as reflected above, the compelling reasons for petitioner to seek permission to end her pregnancy can be understood.

14. I am informed, the petitioner, who is present in person along with her husband have been informed of and understood the risks involved in the procedure. This Court is of the view that this is a fit case where the petitioner can be granted permission to undergo medical termination of her pregnancy. Accordingly, the petitioner is permitted to have her pregnancy terminated without any further delay. The same shall be from a medical facility of her choice as I have been informed that GTB Hospital has been converted into a COVID Hospital. The procedure shall be supervised by experienced Doctors and the complete record thereof shall be maintained.

15. The petition is disposed of. No costs.

V. KAMESWAR RAO, J JANUARY 25, 2022/ak