

Ms X Through Her Legal Guardian vs Government Of Nct Of Delhi & Anr on 19 July, 2022

Author: Yashwant Varma

Bench: Yashwant Varma

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) 10638/2022 & CM APPL. 30847/2022 (Interim Di

MS X THROUGH HER LEGAL GUARDIAN Petit

Through: Ms.Samridhi Jain, Mr.Sangravi

R. Bhonsle, Mr.Nrupal Dinganka

Mr.Pushkara A. Bhonsle, Advs.

versus

GOVERNMENT OF NCT OF DELHI & ANR. Respondents

Through: Ms.Saumya Tandon and Ms.Kavita

Nailwal, Advs. for Ms.Hetu Aror

ASC for R-1.

Mr.Vikrant N. Goyal and Mr.Saur

K., Advs. for R-2.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

% 19.07.2022

1. The minor petitioner, who has approached this Court through her father, her legal guardian, has prayed for permission to undergo a medical termination of pregnancy. A further direction was sought for the constitution of a Medical Board in terms of the provisions of the Medical Termination of Pregnancy Act, 1971. The petitioner, who is stated to be about 17 years old, is a victim of sexual assault. That incident is stated to have occurred in her native village on 25 December 2021. In connection with that incident a First Information Report has also been registered with the Safdarjung Enclave Police Station. As per the petitioner, she is pregnant by 24 weeks The Act and few days.

2. On 09 July 2022 the petitioner is stated to have approached the second respondent hospital for advice and treatment. Upon being apprised of the legal remedies which would have to be pursued, the instant petition came to be preferred before this Court. When the matter was called on 14 July 2022 the Court had passed an order for counsels representing the respondent hospital to obtain requisite instructions. On 18 July 2022 the Court was apprised that the respondent hospital had of its own motion constituted a Board of four members for the medical examination of the petitioner. The Board so constituted had drawn up a report dated 16 July 2022. That report records the age of

the petitioner as about 13 years. It further indicates that as per the clinical examination undertaken and the ultrasound report, the period of gestation is 25 weeks and 6 days. The Board has opined that in case of termination of pregnancy beyond 24 weeks, the Act sanctions termination of pregnancy only in case of substantial foetal abnormalities that may be diagnosed by the Medical Board. In the absence of such a condition obtaining in the present case, the Board has expressed its inability to proceed further.

3. The Court notes that the aforesaid opinion fails to take cognizance of the notable amendments introduced in the Act in terms of Act No.8 of 2021. In terms of the amending Act, sub-section (2) of Section 3 came to be substituted in the following terms:

"(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 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."

4. The Court notes that in terms of the Explanation so introduced where the pregnancy is alleged by a pregnant woman to have occurred on account of rape or sexual assault, the anguish caused by the pregnancy is presumed to constitute a grave injury to the mental health of the pregnant woman. It becomes relevant to note that Section 3(2) deals with situations where pregnancy has not exceeded 20 or 24 weeks. The mental anguish and injury to mental health that may be faced by a pregnant woman in case of rape is statutorily ordained to be presumed.

5. The Court notes that a similar issue fell for consideration before a learned Judge of this Court in Surekha Gautam Khobragade vs. State of NCT of Delhi Through Department of Health and Family Welfare & Anr². It becomes pertinent to bear in mind that Surekha Gautam Khobragade was also dealing with a case where the patient was found to be 26 weeks pregnant. The learned Judge while framing directions for termination of the pregnancy held as under:

"7. Taking the submissions that have been made by the petitioner, her spouse as well as Ms. „X , the minor, and submissions made on behalf of the petitioner by learned counsel for the petitioner, the reliance place on verdicts relied upon on behalf of either side to submit to the effect that even in cases where the pregnancy has exceeded 20 weeks in terms of Section 3 of the Medical Termination of Pregnancy Act, 1971 and Explanation 1 thereto which prescribes to the effect:

"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 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 W.P. (Crl.) 69/2021 mental health of the pregnant woman."

in as much as, the pregnancy is causing and continues to cause to Ms. „X grave anguish which is thus presumed to have been caused to her constituting a grave injury to her mental health in terms of Explanation 1 to Section 3 of the Medical Termination of Pregnancy Act, 1971, in view of the verdicts that have been relied upon on behalf of the petitioner in Murugan Naikar V. Union of India & Ors.; 2017 SCC Online SC 1902, Minor „X (Through Guardian Rajkumar) V. State, (NCT) of, Delhi & Ors., WP.(C) No. 12795/2018, the verdict of the Hon ble High Court of Kerala in W.P.(C)

29209/2020 (A) and the verdict of the Hon ble Supreme Court in K.S. Puttuswamy V. Union of India, 2017 (10) SCC I to contend to the effect that it is the woman s freedom of choice whether to bear a child or to abort her pregnancy which falls thus within the realm of privacy, and that the integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop and that privacy is a postulate of human dignity itself which thus enables an individual to retain the anatomy of the body and the mind and to retain the ability to make decisions on vital matters of concern to life and that the privacy of the individual recognizes an inviolable right to determine how the freedom shall be exercised.

8. On behalf of the State the verdict of the Hon ble High Court of Orrisa in Gopal Patnaik @ Gopal Krishna Patnaik V. State of Orrisa W.P.(Crl.) No. 68/2020, a verdict dated 15.12.2020 was fairly shared with the Court to contend to similar effect. However, as pointed out on behalf of the State in the said verdict it had been categorically observed to the effect:

"In view of the above , we dispose of the writ application as well as the interim application, with the direction to the Medical Board Committee already constituted under the Chairmanship of the DMET to carry out the medical termination of pregnancy of the victim girl. But if during the procedure it is found that there is any danger to the life or well being of the victim girl , they have the discretion to cancel the same. However, we hope and trust that our orders shall be given effect to without any further delay.", with it having thus been submitted on behalf of the State that the said aspect of the very life of Ms. „X may also be taken into account and consideration and be protected.

9. On behalf of the petitioner reliance has also been placed on the verdict of the Hon ble Division Bench of this Court in W.P.(C) 115/2021 a verdict dated 11.1.2021, in Kalpana Singh V.Govt. of NCT of Delhi & Ors., whereby a pregnancy at the stage of 27 weeks and 5 days where the fetus suffered from Anencephaly + was allowed to be terminated.

10. On a consideration of the submissions that have been made on behalf of either side and on a consideration of the catena of verdicts relied upon on behalf of either side, it is considered appropriate to grant permission for medical termination of the pregnancy of the minor Ms. „X , i.e. the daughter of the petitioner herein in relation to a Zero FIR dated 09.01.2021 registered at PS Meharuali South under Section 376 of the Indian Penal Code, 1860 to be conducted by the Medical Board of the doctors at AIIMS, which may be conducted expeditiously with however the stipulation that in the event the Board of Doctors which necessarily has to comprise the Head of Department (Obstetrics and Gynaecology) of the AIIMS, finds that during the procedure of the termination of pregnancy being conducted on Ms. „X there is any risk to the life of Ms. „X , the victim girl, they would have the discretion to cancel the procedure for medical termination of pregnancy.

11. Furthermore, in terms of the verdict of the Hon ble Supreme Court in "Venkata Lakshmi VS. State of Karnataka" Civil Appeal No.15378/2017, for the effective adjudication of the criminal trial in relation to zero FIR dated 09.01.2021, PS Mehrauli South under Section 376 of the Indian Penal

Code, 1860, the terminus foetus is directed to be preserved by the AIIMS for the purpose of the DNA Testing with reference to the said trial case subject to the orders of the learned Trial Court."

6. While dealing with the prayers addressed on this petition, the Court has borne in mind the following salient facts. Undisputedly, the petitioner is a victim of rape. She is stated to be about 13 to 17 years old. The assault on her person and the defilement of her body would have undoubtedly left scars which would take years to heal. Her misery and suffering would stand compounded even more if she were forced to bear the mantle of motherhood at such a tender age. The Court shudders to even imagine the state of despondency that would descend over her life. The mental and physical trauma that she would have to undergo if she were forced to carry the foetus and take on the onerous duties of motherhood is unimaginable. This Court is of the firm opinion that if the petitioner was forced to go through with the pregnancy despite the same having been caused on account of the incident of sexual assault, it would permanently scar her psyche and cause grave and irreparable injury to her mental health. The Court cannot visualize a more egregious invasion of her right to life as guaranteed by Article 21 of the Constitution.

7. It becomes pertinent to note that the Act deals with pregnancies which may extend upto 24 weeks. The decisions of the Court in Surekha Gautum Khobragade and Pratibha Gaur Vs. Government of NCT3 have however recognised the power of the Court in exceptional situations to invoke its extraordinary powers conferred by the Constitution where the provisions of the Act when strictly construed may not sanction a termination of pregnancy. If any case could be said to fall in that category, it is this.

8. The writ petition is accordingly allowed. The respondent hospital is consequently directed to constitute a Medical Board which may attend to the petitioner and oversee the termination of pregnancy. For the aforesaid purpose, let the petitioner appear before the Board which was constituted by the respondent hospital along with her legal guardian or any other member of her family on 21 July 2022 so that appropriate steps may be taken in accordance with law. The Court further provides that if during the procedure for termination the Board and the attending doctors find that there arises a risk to the life of the petitioner, they would have the discretion to cancel the procedure for termination of pregnancy.

9. The Court further directs the respondent hospital to preserve the terminal foetus for the purposes of DNA testing which would be required with reference to the criminal case which stands registered. The preservation of the terminal foetus and the DNA that may be drawn therefrom shall abide by orders that may be passed by the competent criminal court.

10. The report of the Medical Board which was handed over by learned counsel for the perusal of the Court shall be placed in sealed cover and kept in the custody of the concerned Deputy Registrar to be handed over to learned counsel representing the respondent hospital upon obtaining due discharge.

11. Pending application also stands disposed of.

YASHWANT VARMA, J.

JULY 19, 2022 rsk 2021 SCC OnLine Del 5573