

Via video conferencing

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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 07.01.2022

+ W.P.(C) 15241/2021

SANGEETA THAPA Petitioner
Through Mr. Aditi Negi, Ms. Swati Draik &
Ms. Hage Nanya, Advs.

versus

GOVERNMENT OF NCT OF DELHI & ORS. Respondent
Through Ms. Shobhana Takiar, Adv. for
GNCTD.

**CORAM:
HON'BLE MS. JUSTICE REKHA PALLI**

REKHA PALLI, J (ORAL)

1. The petitioner, a 28 year-old pregnant woman, has approached this Court seeking the following reliefs:-

“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 20 weeks limit.

c. For an order directing any other government hospital in National Capital of Delhi who already has an expert panel of doctors to assess the pregnancy and offer MTP to the petitioner in need of the procedure beyond the prescribed 20 weeks limit.”

2. The petitioner has sought medical termination of her pregnancy on the ground that the foetus is suffering not only from Edward Syndrome (Trisomy 18) but also from non-ossified nasal bone and bilateral pyelectasis. In case the pregnancy is taken to its logical conclusion, then as per medical opinion, the child is not likely to survive beyond one year, and that too with continued medical assistance, which will not only cause severe harm to her physical, but mental health as well.

3. It is the petitioner's case that she had been going for regular check-ups ever since 23.07.2021 i.e. from the 7th week of her pregnancy and all reports were normal till about the 18th week of her pregnancy. It is only on 05.12.2021, when she went for a scheduled check up in the 24th week of her pregnancy that the Ultrasound Report (USG) showed the lateral ventricle size as 1.2 cm, which is more than the normal size, and thus, an anomaly was detected in the foetus for the first time. She was subsequently advised to consult a specialist and get some further tests done.

4. The petitioner thereafter consulted a gynaecologist for further tests, who advised her go for a 'Fetal Echocardiography' (Fetal Echo) since the foetus had crossed the 24 weeks limit. The Fetal Eco tests conducted on 10.12.2021 showed certain other anomalies in the foetus such as non-ossified nasal bone, mild bilateral fetal renal pyelectasis, cisternal magna mild prominent (11 mm), besides there being a cyst in a umbilical cord. After this, following medical advice, the petitioner underwent some further tests of Quantitative Fluorescence-PCR (QF-PCR) and Chromosomal Microarray Cytoscan 750K to get clarity on the formation of chromosomal abnormalities in the foetus. It is after these two tests,

that the petitioner found out that the foetus is suffering from Edward Syndrome (Trisomy 18), which is a chromosomal disorder that occurs due to the presence of an extra chromosome and is a rare condition, the cause whereof is not known.

5. Once this condition of the foetus came to light, the petitioner was referred by her gynaecologist to Lok Nayak Jay Prakash Hospital, (LNJP) a government hospital for further consultation, where she was explained, after analysis of her QF-PCR and Chromosomal Microarray Cytoscan 750K test reports, that the defect in the foetus was a critical one and the chances of survival of the new born children with the condition of Edward Syndrome is even otherwise less than 50% in the first week of birth, whereas 90% of the babies born with the syndrome are likely to die in the first year of birth itself.

6. On 27.12.2021, the petitioner after learning about the aforesaid condition, consulted another senior gynaecologist at LNJP who, after examination of her test reports, once again concurred with the earlier opinion regarding the status of the petitioner's foetus. The petitioner's request for a medical termination of pregnancy however, was not acceded to, as by this time she had already completed 28 weeks of pregnancy.

7. It is at this stage that the petitioner has approached this Court seeking permission to undergo medical termination of her pregnancy under sections 3(2)(b) and 3(2B) of the Medical Termination of Pregnancy Act, 1971 as amended by the Medical Termination of Pregnancy (Amendment) Act, 2021 (hereinafter referred to as "the MTP Act").

8. On 03.01.2022, this Court after noticing the fact that the petitioner was already at an advanced stage of her pregnancy, directed the

respondent no.3/LNJP Hospital to constitute a Medical Board at the earliest and submit its report after examining the petitioner and her medical reports.

9. Pursuant to this order dated 03.01.2022 of this Court, a Medical Board under the Chairmanship of Dr. Sangeeta Gupta, Director Professor, Gynaecology Chairman, Department of Obstetrics and Gynaecology, Maulana Azad Medical College and Hospital, was promptly constituted by respondent no.3. The said Board has, after examining the petitioner and her medical records, submitted its report, the relevant extract whereof reads as under:-

“Ms. Sangeeta Thapa W/o Dinesh Thapa R/o RZD-11, 2nd Floor, Mahavir Enclave, Street no-5 Delhi-110045

Evaluation of the patient was performed by history, examination and available investigation by the Medical Board members. According to history and examination, the patient is about 31 weeks pregnant.

USG done on 10/12/2021 (Pranam Diagnostics) is suggestive of congenital malformations in fetus. As advised by the treating doctor the patient underwent Amniocentesis on 11/12/2021 from Dr. S. Bajaj's Centre for fetal medicine. The QFPCR analysis and chromosomal microarray cystoscan 750K of amniotic fluid from Life Cell International Private Limited shows that the foetus is affected with Edward Syndrome (Trisomy 18). As per literature (copy of the same attached for reference, page no. 20), 80% of children die in the first year, 10 year survival is 10 %. Survivors have significant neurodevelopmental delay.

Patient and her husband have been explained about the implications of termination of pregnancy in view of advanced gestation, which include the following risks to the mother:

- *Excessive bleeding.*
- *Rupture uterus, leading to significant morbidity and sometimes mortality.*
- *Failure of medical methods for termination of pregnancy.*
- *Possible need of surgical procedures which are associated with inherent risks and complications related to surgery and anesthesia.*

The baby may be born alive at this gestation. The responsibility of taking care of the baby lies with the patient and her husband.”

10. A perusal of the aforesaid report clearly shows that the petitioner's foetus is found to be suffering from Edward Syndrome (Trisomy 18). The report also opined that 80% of children born with his syndrome die in the first year itself, and the ones who survive also do not live for more than ten years, and that too with neurodevelopmental delay. By relying on this report, learned counsel for the petitioner submits that Trisomy 18 pregnancies have a high risk of fetal loss and stillbirths, with the major causes of death being central apnea, cardiac failure due to cardiac malformations, respiratory insufficiency due to hypoventilation, aspiration, or upper airway obstruction and, likely, the combination of these and other factors. Furthermore, in older children with Trisomy 18, significant developmental delay is always present, ranging from a marked to profound degree of psychomotor and intellectual disability, and in most cases, expressive language and ability to independently walk are not achieved.

11. She further submits that forcing the petitioner to go through this pregnancy despite her knowing fully well that the child she gives birth to will most likely not survive beyond the first year, will take an immense

toll on her mental wellbeing, and thus defeat the very purpose of the MTP Act. She contends that the MTP Act allows women to terminate their pregnancies even after 24 weeks gestation period, if it is found that the continuance of the same is likely to cause grave injury to her physical or mental health.

12. Learned counsel for the respondent is not in a position to dispute the fact that as per medical opinion the foetus suffers from such substantial medical abnormalities, that even if the petitioner is compelled to give birth, the child is not likely to survive beyond the first year. She, however, opposes the petition by contending that now that the petitioner has reached an advanced stage of her pregnancy, no permission for termination thereof ought to be granted, especially since as per medical opinion, there are certain inherent risks the petitioner herself faces if she is allowed to terminate her pregnancy at this stage.

13. 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.”

16. At this stage a reference may also be made to the decision in ***Priyanka Shukla v. Union of India, (2019) SCC OnLine Del 9098*** wherein the Division Bench held as under:

“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, Sec 5 relaxes the rigor of Sec 3(2) in a case where the termination of 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 fetus is, as in the present case, incompatible with life, the rigor of Sec 3 (2) deserves to be relaxed and the right to terminate the pregnancy cannot be denied merely because gestation has continued beyond 20 weeks.”

17. In the present case I am of the considered view that, if the petitioner is forced to continue with the pregnancy, she will not only constantly live with the fear that the odds of giving birth to a stillborn are very high, but that even if the infant is born alive, she will be raising the child with heavy pain knowing that she could lose the child forever within a few months. Not to mention that the child will be born with such substantial abnormalities that living a normal life may never be an option, thus causing grave hardship to the child as well as putting the petitioner

through extreme amounts of mental, emotional, and even financial distress. It is thus a clear case where, leaving aside the lifelong anguish and trauma which may be caused to the petitioner, the foetus itself suffers from such abnormalities that it clearly falls under the ambit of section 3(2B) of the MTP Act.

18. No doubt, there are certain risks to the petitioner herself in undergoing the termination of her pregnancy at this stage but when considered in the light of the medical opinion which clearly suggests that the foetus is suffering from a rare chromosomal disorder, the compelling reason for the petitioner to seek permission to end her pregnancy are not difficult to fathom. The petitioner is also present in person and submits that she has been explained the risks involved in the procedure.

19. I thus have no hesitation in holding that this is a fit case where the petitioner should be granted permission to undergo medical termination of her pregnancy at a medical facility of her choice. However, the same shall be done at her own risk and consequences.

20. The writ petition is, accordingly, disposed of in the aforesaid terms.

(REKHA PALLI)
JUDGE

JANUARY 7, 2022

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