

[2023 LiveLaw \(SC\) 881](#)

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
HIMA KOHLI; J., B.V. NAGARATHNA; J.
OCTOBER 11, 2023

In the matter of:

UNION OF INDIA APPLICANT

Medical Termination of Pregnancy Act, 1971 - The pregnant lady is not interested in continuing with the pregnancy. In such a situation whether the child to be born is viable or if the child would be a healthy child are not relevant considerations. What is to be focused upon is, whether, the pregnant lady intends to give birth to a child or not. (Para 6)

Medical Termination of Pregnancy Act, 1971 - A foetus is dependent on the mother and cannot be recognized as an individual personality from that of the mother as its very existence is owed to the mother. It would be incongruous to conclude that the foetus has a separate identity from the mother and in spite of the physical or mental health of a mother being under threat, she will have to continue her pregnancy until the foetus is born which would endanger her delicate health. Such a position is contrary to Article 21 and 15(3) of the Constitution of India which recognize the right to life and liberty and particularly those of a woman. (Para 7)

Medical Termination of Pregnancy Act, 1971 - One cannot also lose sight of the fact that reproduction is unique to women and throughout her life, a woman goes through the process of menstruation, pregnancy, delivery, post-delivery phase and ultimately menopause. Right to reproductive health being a woman's human right would also include the right to an abortion. Otherwise, a woman who is forced into an unwanted pregnancy would experience physical and mental trauma and to endure the pregnancy which may continue in the post-natal period owing to which she would have the burden of bringing up an additional child and consequently, may lose out on other opportunities in life including right to employment and contribution to the income of the family. (Para 7)

(Arising out of impugned final judgment and order dated 09-10-2023 in W.P.(C) No. 1137/2023 passed by the Supreme Court of India)

For Petitioner(s) Dr. Amit Mishra, Adv. Mr. Rahul Sharma, AOR

For Respondent(s) Ms. Aishwarya Bhati, Ld.ASG Ms. Sthavi Asthana, Adv. Ms. Chitragda Rastravara, Adv. Ms. Ameya Vikrama Thanvi, Adv. Ms. Manisha Chava, Adv. Ms. Poornima Singh, Adv. Ms. Shagun Thakur, Adv. Ms. B.L.N. Shivani, Adv. Mr. Abhijeet Singh, Adv. Mr. Rustam Singh Chauhan, Adv. Ms. Shivika Mehra, Adv. Mr. Ashwin Joseph, Adv. Ms. Anupriya Srivastava, Adv. Mr. Nithin Choudhary Pavuluri, Adv. Ms. Rukmini Bobde, Adv. Mr. Pratham Sagar, Adv. Ms. Anuradha Arputham, Adv. Ms. Shreya Jain, Adv. Mr. G.S. Makker, AOR

ORDER

HIMA KOHLI, J.

1. This application has been filed by the respondent no.1 – Union of India praying *inter alia* for recall of the order dated 09th October, 2023, passed in the Writ Petition whereunder the prayer made for issuing directions to the respondent no.1 to permit medical termination of the petitioner's on going pregnancy in a Government hospital, was allowed after hearing

the parties and considering the report submitted by the Medical Board, AIIMS dated 06th October, 2023.

2. The present application is premised on a subsequent email dated 10th October, 2023, addressed by one of the Members of the aforesaid Medical Board constituted on the directions of this Court, who is a Professor in the Department of Obstetrics and Gynecology, at AIIMS¹, addressed to Ms. Bhati, learned Additional Solicitor General stating as follows:

“This is regarding the Supreme Court order dated 9.10.2023, regarding termination of pregnancy of [REDACTED] a. Before proceeding for termination, we would request the following clarifications from the Hon. Supreme Court:

1. As the baby is currently viable (will show signs of life and have a strong possibility of survival), we will need a directive from the Supreme Court on whether a feticide (stopping the fetal heart) can be done before termination. We perform this procedure for a fetus which has abnormal development, but generally not done in a normal fetus.

2. If feticide is not performed, this is not a termination, but a preterm delivery where the baby born will be provided treatment and care. A baby who is born preterm and also of such low birth weight will have a long stay in intensive care unit, with a high possibility of immediate and long term physical and mental disability which will seriously jeopardise the quality of life of the child. In such a scenario, a directive needs to be given as to what is to be done with the baby? If the parents agree to keep the child, this will take a major physical, mental, emotional and financial toll on the couple.

3. If it is to go for adoption, the process needs to be spelt out clearly as to needs to clear that baby who comes into the world will have a better chance at life if the delivery happens after at least 8 weeks.

4. It is also to be kept in mind that the consequences of delivery which have happened in the previous two babies can happen at this time also, with a delivery now at this time.

We would be obliged if a directive on these is given by the Hon. Supreme Court to ease out the process.

Warm regards

Dr. K. Aparna Sharma

Professor

Department of Obstetrics and Gynaecology,

All India Institute of Medical Sciences

Ansari Nagar, New Delhi – 110029”

3. It is rather unfortunate that the aforesaid email has been addressed to the learned Additional Solicitor General, on the very next day of the order passed by this Court on 09th October, 2023, on which date, the report dated 6th October, 2023 received from the Medical Board was duly taken note of by this Court. Having regard to the fact that the Professor who has sent the email was a part of the same Medical Board, all that is now being stated and pointed out in the email dated 10th October, 2023, ought to have been made a part of the earlier report, for this Court to have had a correct and clear perspective of the matter, which would have perhaps had a different connotation. The initial report itself was fairly hedged and ambiguous on the aspects that are now being sought to be highlighted in the email.

¹ For short the ‘AIIMS’

4. The above development leaves us with an impression that the observations made in the subsequent email may not have found concurrence with the other four members of the Medical Board and could have been a standalone view. Even if that was so, nothing prevented Professor Sharma from appending her independent opinion with the report submitted to this Court, which was not done in the instant case and to that, we take an exception.

5. When the matter was taken up on the first call, the petitioner and her husband had logged in virtually. The petitioner had stated that she does not wish to proceed further with her pregnancy. Taking the said submission into consideration, the petitioner was directed to file an affidavit clarifying her stand and the matter was deferred for being taken up in the post lunch session.

6. In the post lunch session, the petitioner and her husband are physically present in Court. An affidavit sworn by the petitioner has been handed over by learned counsel and taken on record, wherein she has stated *“I have made a willful and conscious decision to medically terminate my pregnancy. I do not want to keep the baby even if it survives”*.

7. Having regard to the information contained in the email dated 10th October, 2023, addressed by Professor Sharma, Department of Obstetrics and Gynaecology, AIIMS and annexed with the present application, the judicial conscience of one of us (Hima Kohli, J) does not permit the petitioner to terminate the pregnancy. However, my Sister Judge (B.V. Nagarathna, J) holds a different opinion which she has expressed separately.

ORDER

1. In view of the cleavage of opinion between the members of the Bench as expressed separately, the Registry is directed to place the application before Hon'ble the Chief Justice of India for being referred to a larger Bench.
2. It is however clarified that the divergence of opinion is limited to the directions issued in the operative para of the order dated 9th October, 2023. The rest of the order is maintained as it is.

NAGARATHNA, J.

Having heard my learned sister, Hima Kohli, J., I respectfully disagree with her opinion.

This matter was disposed of by a detailed order on 09th October, 2023. Even before the detailed order had been uploaded, a mention was made for seeking recall of the said order before Hon'ble the Chief Justice of India. This is in the absence of any pleading being made by respondent No.1 Union of India. Thereafter this Bench was constituted by Hon'ble the Chief Justice of India. As a result, the directions issued by this Court to the doctors at All India Institute of Medical Sciences (AIIMS) have not been implemented.

2. In the morning session today, after hearing Ms. Aishwarya Bhati, learned Additional Solicitor General and learned counsel for the petitioner, and the party, namely, the petitioner herein, and her husband, through video conference facility, a direction was issued to her to file an affidavit to the effect that she was steadfast in her determination to seek termination of her pregnancy. This was in spite of the petitioner categorically stating that she does not intend to continue her pregnancy. The petitioner has remained determined about her decision not only on 09th October, 2023 but also in the morning session today. Despite that, in view of our direction, the petitioner has filed her affidavit, which reads as follows:

"AFFIDAVIT

1. I am the petitioner in the above mentioned Writ Petition and I am well acquainted with the facts of the case, as such I am competent to swear the present affidavit.

2. I have been informed by my counsel in my vernacular language (Hindi) about the first medical report dated 06.10.2023 issued by AIIMS Hospital, New Delhi after my medical examination done on the same day which mentions about the present growth of baby i.e. 886 gm with gestational age of 25 weeks 5 days and the same has viability & a reasonable chance of survival after medical termination of pregnancy.

3. I have also been informed by my counsel in my vernacular language (Hindi) about a clarification sought by Dr. Aparna K. Sharma, Professor, Deptt. Of Obs.& Gynae, AIIMS Hospital regarding the viability of foetus after termination of my pregnancy, as mentioned in the Annexure A-4 on page 16 of the Miscellaneous Application No. 2157/2023 in Writ Petition No. 1137/2023 dated 10.10.2023 from the doctor of AIIMS Hospital.

4. I have been informed by my counsel in my vernacular language (Hindi) that the baby may be born preterm and also of such low weight that it may require intensive care facility and there is high possibility of immediate and long term physical and mental disability which will seriously jeopardise the quality of the child. After being informed about all above stated possibilities, I have made willful and conscious decision to medically terminate my pregnancy and don't want to keep the baby even if survives. The government can take care of the baby in case it survives & even can give it in adoption or whatever deems suitable to them. I will never raise any objection or made any claim over the baby in the future.

5. That I've been taken this decision to terminate my pregnancy out of my free will, choice and without pressure from anyone, after having understood all facts and surrounding circumstances about my case.

6. That the contents mentioned in paragraph from 1 to 5 are true and correct to the best of my knowledge and belief.

3. The contents of the affidavit are categorical, clear and express the strong determination of the petitioner herein to medically terminate her pregnancy and to also not keep the baby even if it survives; that the Government can take care of the baby in case it survives and even can give it in adoption or whatever deemed suitable to them and she would have no objection or any claim over the baby in the future. She has further expressed that she has taken the decision to terminate her pregnancy out of her own free will, choice and without pressure from anyone, after having understood all facts and surrounding circumstances about her case.

4. Having regard to the concrete determination made by the petitioner, I find that her decision must be respected. This is not a case where the question of a viable baby being born or unborn is to be considered, when the interest of the petitioner mother of two children and expecting the third in a years' time from giving birth to the second child has to be given preference. The socioeconomic condition in which the petitioner is placed and the fact that she has already two children, the second child being only one year of age and the fact that she has reiterated that her delicate mental condition and health and the medicines that she has been taking for the same, do not support her to continue with her pregnancy must be considered by the Court. I find that her decision must be respected by this Court. Courts cannot substitute their view in the matter with that of the decision of the petitioner.

5. In this context, it would be necessary to reiterate the three Judge Bench Judgment of this Court in ***X vs. Health & Family Welfare Department, 2022 SCC OnLine SC 1321***, authored by Dr. Justice D.Y. Chandrachud, presently the Chief Justice of India, of which paragraphs 99, 101 and 102 read as under:

99. The ambit of reproductive rights is not restricted to the right of women to have or not have children. It also includes the constellation of freedoms and entitlements that enable a woman to decide freely on all matters relating to her sexual and reproductive health. Reproductive rights include the right to access education and information about contraception and sexual health, the right to decide whether and what type of contraceptives to use, the right to choose whether and when to have children, the right to choose the number of children, the right to access safe and legal abortions, and the right to reproductive healthcare. Women must also have the autonomy to make decisions concerning these rights, free from coercion or violence.

X X X

101. To this, we may add that a woman is often enmeshed in complex notions of family, community, religion, and caste. Such external societal factors affect the way a woman exercises autonomy and control over her body, particularly in matters relating to reproductive decisions. Societal factors often find reinforcement by way of legal barriers restricting a woman's right to access abortion. The decision to have or not to have an abortion is borne out of complicated life circumstances, which only the woman can choose on her own terms without external interference or influence. Reproductive autonomy requires that every pregnant woman has the intrinsic right to choose to undergo or not to undergo abortion without any consent or authorization from a third party.

102. The right to reproductive autonomy is closely linked with the right to bodily autonomy. As the term itself suggests, bodily autonomy is the right to take decisions about one's body. The consequences of an unwanted pregnancy on a woman's body as well as her mind cannot be understated. The foetus relies on the pregnant woman's body for sustenance and nourishment until it is born. The biological process of pregnancy transforms the woman's body to permit this. The woman may experience swelling, body ache, contractions, morning sickness, and restricted mobility, to name a few of a host of side effects. Further, complications may arise which pose a

risk to the life of the woman. A mere description of the side effects of a pregnancy cannot possibly do justice to the visceral image of forcing a woman to continue with an unwanted pregnancy. Therefore, the decision to carry the pregnancy to its full term or terminate it is firmly rooted in the right to bodily autonomy and decisional autonomy of the pregnant woman.

(underlining by me)

6. Unwanted pregnancy as a result of failure in a family planning method, even during the period of Lactational Amenorrhea as in the instant case or as a result of sexual assault results in the same consequence. The pregnant lady is not interested in continuing with the pregnancy. In such a situation whether the child to be born is viable or if the child would be a healthy child are not relevant considerations. What is to be focused upon is, whether, the pregnant lady intends to give birth to a child or not. This is what has been emphasized by this Court in the aforesaid three Judge Bench decision which is binding on this Bench.

7. It may not be out of place to note that a foetus is dependent on the mother and cannot be recognized as an individual personality from that of the mother as its very existence is owed to the mother. It would be incongruous to conclude that the foetus has a separate identity from the mother and in spite of the physical or mental health of a mother being under threat, she will have to continue her pregnancy until the foetus is born which would endanger her delicate health. Such a position is contrary to Article 21 and 15(3) of the Constitution of India which recognize the right to life and liberty and particularly those of a woman.

One cannot also lose sight of the fact that reproduction is unique to women and throughout her life, a woman goes through the process of menstruation, pregnancy, delivery, post-delivery phase and ultimately menopause. As stated above, right to reproductive health being a woman's human right would also include the right to an abortion. Otherwise, a woman who is forced into an unwanted pregnancy would experience physical and mental trauma and to endure the pregnancy which may continue in the post-natal period owing to which she would have the burden of bringing up an additional child and consequently, may lose out on other opportunities in life including right to employment and contribution to the income of the family.

8. It is necessary to observe here that this Court in exercise of its jurisdiction under Article 32 of the Constitution must focus on the fundamental right of the petitioner and affirm the said right in light of the prayers that are sought by her in view of her status, position and including her precarious mental health. The petitioner being conscious of her delicate mental health (postpartum depression after the birth of the second child) for which she is under medication as per the documents produced by the petitioner herself along with the memorandum of writ petition, has made her realise that she would not be in a position to continue her pregnancy till the delivery of the baby and to continue to rear the said baby on its birth. She has thought of not only her health condition but also the socioeconomic condition in which she and her family are placed and has realized that an addition to the family would be a burden to the family.

This is not to say that in every case where there is an unwanted pregnancy, this Court or the High Courts ought to exercise its jurisdiction and order for termination. It would depend on the facts of each case.

But in this case, when the petitioner has determined to terminate her pregnancy and has completely detached herself from the fact that she would be giving birth to her child shortly, she cannot be made worse off by this Court by declining to grant her the relief she has sought and thereby forcing her to continue with an unwanted pregnancy.

9. As far as the reason for recalling the order is concerned, the order dated 09th October, 2023 has recorded the medical opinion. The report dated 06th October, 2023 forwarded by the Medical Board, AIIMS has stated, *inter alia*, as under:

“The chances of post partum psychosis of which the couple is worried of, are present even at this gestation following delivery.

The mother is a previous 2 LSCS and the chance of complications due to hysterotomy are there at this gestation.”

The aforesaid view of the medical experts nowhere indicates the apprehension expressed subsequently by the e-mail dated 10th October, 2023 by only one of the doctors sent to learned ASG Ms. Aishwarya Bhati which has triggered the mentioning of the matter before the Hon'ble Chief Justice of India and reconstitution of this Bench to reconsider the order dated 09th October, 2023. It was expected that the doctors at AIIMS would understand the import of the order of this Court and accordingly act on it and not seek clarification from this Court on medical procedures. The contents of the e-mail sent on 10th October, 2023 was known to the doctors even on 06th October, 2023 when the report was submitted by the Medical Board, AIIMS. Moreover, the e-mail sent by learned ASG on 10th October, 2023 is only by one of the doctors. It is not known as to whether the said mail was sent on behalf of the entire Medical Board or not.

It ought to be borne in mind that in case of pregnancies over 24 weeks, an experienced Obstetrician or an expert in Gynecology must ensure that the procedure contemplated is clearly mentioned in the recommendation or report of the Board and the same is also explained to the Court and to the pregnant woman seeking termination. If despite the said counselling, a pregnant woman is, as in the instant case, determined to terminate the pregnancy, then primacy must be given to her decision by all concerned including courts of law. In the instant case, it is also significant to note that her previous two pregnancies were through Cesarean section and not normal deliveries. The said aspect also has to be borne in mind.

10. In the circumstances, I find that the order dated 09th October, 2023, which is a well-considered order, authored by my learned sister, Hima Kohli J., does not require to be recalled.

Hence, the application filed by Union of India seeking recall of order dated 09th October, 2023 in this petition is rejected and dismissed.

Having regard to the delicate position in which the petitioner is placed, the Registry is directed to seek orders of the Hon'ble the Chief Justice of India for constitution of another Bench lest passage of time in the legal process would be detrimental to the health of the petitioner herein.