

\$~29

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P. (C) 7080/2019

PRIYANKA SHUKLA Petitioner
Through: Ms. Sneha Mukherjee, Adv.

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr. Vikas Mahajan, CGSC with
Mr. Aakash Varma & Mr. Prajesh V.S.,
Advs. for UOI
Mr. V.S.R. Krishna, Adv. with Dr. K.
Aparna Sharma, Obstetrician-Gynaecologist
for AIIMS
Dr. Jawahar Raja, ASC with Ms. Kritika
Padode & Mr. Bhandari, Advs. for R-2

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE C.HARI SHANKAR

ORDER (ORAL)

%

10.07.2019

1. This Writ Petition has been preferred with the following prayers:

“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 a writ of declaration or any other appropriate writ, order or direction quashing section 3(2)(b) of The Medical Termination of Pregnancy Act, 1971 to the limited extent that it stipulates a ceiling of 20 weeks for

an abortion to be done under section 3, as ultra vires Article 14 and 21 of the Constitution of India;

c. For a writ of declaration or any other appropriate writ, order or direction quashing section 5(1) of the Act to the limited extent that it restricts abortions under section 5 to a restricted field where it is immediately necessary to save the life of the pregnant woman;

d. For a declaration to the effect that the expression "save the life of the pregnant woman" in Section 5 of the MTP Act includes "the protection of the mental and physical health of the pregnant woman" and also incorporates situations where serious abnormalities in the fetus are detected after the 20th week of pregnancy.

e. For a declaration that the rational ceiling for abortions being done under section 3 of the Act is 24 weeks and even later in view of the material placed on record by the Petitioners;

f. For an order directing Respondent No. 1 to produce the report of MTP Committee which included the Health Secretary, Mr. Naresh Dayal, former Director-General of the Indian Council of Medical Research and Dr. N. K.Ganguly as its members as stated in para 9 of the petition.

g. For an order directing the Respondent No. 1 to provide necessary directions to the hospital for setting up an expert panel of doctors to assess the pregnancy and offer MTP to the petitioner and other women in need of the procedure beyond the prescribed 20 weeks limit.

h. For any other order/ direction that this Hon'ble Court may deem fit."

2. The petitioner, who is presently in the 25th week of her pregnancy seeks, by means of this writ petition, to assail the vires of

Section 3(2)(b) and Section 5(1) of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to “the MTP Act”). The vires of Section 3(2)(b) is sought to be assailed to the extent it stipulates a ceiling of 20 weeks, as the *terminus ad quem*, beyond which abortion, of a foetus, is statutorily impermissible, and Section 5(1) to the extent it does not permit relaxation, of the rigour of Section 3, even in cases where there is manifest threat to the life of the foetus, were the pregnancy to be allowed to continue.

3. The petitioner is 27 years of age. She is, already, as noted hereinabove, in the 25th week of her pregnancy. The foetus being carried by her was diagnosed with severe oligohydromnios and bilateral multicystic dysplastic kidneys which were incompatible with life. She, in the circumstances, seeks to have the foetus aborted, but is statutorily restrained from doing so, owing to the combined effect of Sections 3(2)(b) and 5(1) of the MTP Act, the vires, of which she seeks, therefore, to call in question. Sections 3(2)(b) and 5 (1) of the MTP Act, read thus:

“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,—

(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 to her 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.

5. Sections 3 and 4 when not to apply.—(1) The provisions of section 4, and so much of the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.”

4. The petitioner submits that there is an absolute proscription in, Section 3(2)(b) of the MTP Act (*supra*), from termination of pregnancy, in cases where gestation has crossed 20 weeks. Where the pregnancy is of less than 12 weeks, it may be terminated by a registered medical practitioner, if the medical practitioner is of the opinion that the continuance of the pregnancy would involve risk of the life of mother, or grave injury to her physical or mental health, or in that, were pregnancy to be allowed to continue to term, of the child suffering from physical or mental abnormalities as would cause her, or his to be seriously handicapped. A similar despanction is available where the pregnancy has crossed 12 weeks, but has not exceeded 20 weeks, the only difference being that the opinion in such a case has to be of two registered medical practitioners.

5. Where a registered medical practitioner is of the opinion that the termination of the pregnancy is immediately necessary to save the life of the pregnant woman, sub-section (1) of Section 5 of the MTP Act relaxes the rigour of Section 4.

6. Thus, submitss the petitioner, the MTP Act, clearly, does not permit termination of pregnancy in cases where the pregnancy has crossed 20 weeks' gestation.

7. Pleading that the condition of the foetus, carried by her, as presently diagnosed, is incompatible with life, the petitioner has approached this Court, essentially seeking permission to allow her to have her pregnancy terminated at this stage, though it has crossed 20 weeks.

8. In order to satisfy ourselves regarding the exact condition of the foetus being carried by the petitioner, and of the petitioner herself, we had requested, *vide* our order dated 04th July 2019, the Director of the All India Institute of Medical Science (AIIMS), to constitute a team of doctors to examine the petitioner and render an opinion in that regard. The Director of the AIIMS has with, commendable promptitude, immediately constituted a team of six doctors of the AIIMS headed by Dr. Garima Kachhawa, Assistant Professor of Obsterics and Gynaecology, which has examined the petitioner and tendered the following opinion:

“1. Foetus has congenital anomaly (Bilateral Muticystic Kidney disease with Oligohydrannios with Pulmonary Hypoplasia) and is incompatible with life.

2. The parents were counselled regarding the risks of termination at this gestation.
3. They were also counselled regarding the possibility of baby showing signs of life at the time of birth.”

9. As we desired to be convinced regarding the possible danger, to the life of the petitioner, were her prayer to be granted, we requested Mr. V.S.R. Krishna, learned counsel appearing for the AIIMS to ensure, if possible, that one of the members of the committee which tendered the above opinion, appeared before us to clarify the above position. We are happy to record that Dr. K. Aparna Sharma, Assistant Professor of Obsteric and Gynaecology has appeared, at less than 24 hours notice, before us today. To a query from the Bench, Dr. K. Aparna Sharma has clarified that the condition of the foetus, which is approximately 6.5 months, is incompatible with it's life and that is impossible for the child, were the pregnancy to be carried to term remain alive after birth. To a specific query as to the possible danger to the petitioner in case pregnancy were to be permitted to be terminated at this stage, Dr. K. Aparna Sharma states that there is a very slim chance of the petitioner possibly having to undergo surgery for the purposes of terminating her pregnancy, though, in all probability it may not be required. Were surgery required, Dr. K. Aparna Sharma submits that the normal risks, attending surgery would exist, regarding which the petitioner has already been made aware.

10. Ms. Sneha Mukherjee, learned counsel appearing for the petitioner, categorically states that her client has been made fully

aware of the situation, including the condition of her foetus and the possible risk in case termination of pregnancy is to be allowed at this stage, and that her client is willing to undertake the risk of termination of her pregnancy, but would not desire to allow the pregnancy to continue, given the condition of the foetus.

11. The issue in controversy, is, legally, not *res integra*. In *Tapasya Umesh Pisal v. Union of India & Ors, (2018) 12 SCC 57*, Tapasya Umesh Pisal, the petitioner, who was 24 years of age approached the Supreme Court, under Article 32 of the Constitution of India, seeking permission to undergo medical termination of her pregnancy, which had progressed to 24 weeks, as her foetus has been diagnosed with tricuspid and pulmonary atresia, a cardiac anomaly. The Supreme Court constituted a Medical Board to examine the situation. The Board reported that the treatment of the abnormality in the foetus would require foetal surgery which carried the risk of high mortality, and that even if the surgery were to be successful, such children would remain physically incapacitated and had a limited life span. The Supreme Court observed that, except for the time period i.e. the duration for which the pregnancy had continued, the case would fall within Section 3(2)(b) of the MTP Act. In the circumstances, the Supreme Court held thus:

“8. In these circumstances, it is difficult for us to refuse the permission to the petitioner to undergo medical termination of pregnancy. It is certain that the foetus if allowed to born, would have a limited life span with serious handicaps which cannot be avoided. It appears that the baby will certainly not grow into an adult.”

12. In *Mrs. X and Ors. v. Union of India and Ors.*, (2017) 3 SCC 458 the pregnancy of the petitioner had continued upto 22 weeks, when the foetus had diagnosed as suffering from bilateral renal agenesis and anhydramnios. The Medical Board reported that there was risk of intrauterine fetal death/still birth and no chance of long term post natal survival, and that there was no curative treatment available for bilateral renal agenesis. The Supreme Court observed thus:

“8. We have already vide order dated 16-1-2017 [*Meera Santosh Pal v. Union of India*, (2017) 3 SCC 462] upheld the right of a mother to preserve her life in view of foreseeable danger in case the pregnancy is allowed to run its full course. This Court in that case relied upon *Suchita Srivastava v. Chandigarh Admn.* [*Suchita Srivastava v. Chandigarh Admn.*, (2009) 9 SCC 1: (2009) 3 SCC (Civ) 570], where a Bench of three Judges held: (SCC p. 15, para 22)

“22. ... a woman's right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution.”

In these circumstances we find that the right of 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 petitioner 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. It may be noted that Section 5 of the Act enables termination of pregnancy where an opinion is formed by not less than two medical practitioners in a case where opinion is for the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

9. Though the current pregnancy of the petitioner is about 24 weeks and endangers the life and the death of the foetus outside the womb is inevitable, we consider it appropriate to permit the petitioner to undergo termination of her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971. We order accordingly.”

13. Similarly in *Sarmishtha Chakraborty v. Union of India*, (2018) 13 SCC 339, though the pregnancy had continued for 25 weeks, the report of the Medical Board constituted to examine the case confirmed that, if the pregnancy were allowed to be continued, the mother was under threat of severe injury and the child, even though born alive, would complex cardiac corrective surgery stage by stage after birth, in which, at every stage, there was high morbidity as well as mortality. Following its decisions cited *supra*, the Supreme Court allowed the prayer of the petitioner, before it, for medical termination of her pregnancy.

14. Without needlessly multiplying authorities, it may be noted that these decisions rely on earlier decisions of the Supreme Court, which are to the same effect.

15. 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.

17. Respectfully following the judgments cited hereinabove, and in the facts and circumstances of the case including *inter alia*, the report of the Medical Board constituted by the Director, AIIMS, and the opinion of Dr. K. Aparna Sharma, as provided to us in Court, we are of the view that the prayer of the petitioner deserves to be allowed.

18. Accordingly, the petitioner is permitted to have her pregnancy terminated, without any further delay.

19. The writ petition stands allowed in the above terms.

20. We express our appreciation for the assistance rendered to the Court by the Director, AIIMS, as well as the Medical Board constituted by him, who approached the matter with the urgency it deserved.

Dasti.

CHIEF JUSTICE

C.HARI SHANKAR, J

JULY 10, 2019

ns

