

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
JODHPUR**

S.B. Civil Writ Petition No. 4149/2020

Muskan

----Petitioner

Versus

State Of Rajasthan

----Respondent

For Petitioner(s) :
For Respondent(s) : Mr. Pankaj Sharma, AAG
Mr. Budhha Ram, SI, Police Station,
Ratanada alongwith petitioner is
present in person.

JUSTICE DINESH MEHTA

Judgment

09/04/2020

- (1) By way of the instant writ petition, petitioner has sought appropriate directions for termination of her pregnancy.
- (2) It has been averred in the petition that petitioner is/was resident of Nagpur; her mother passed away when she was 5 years of age; whereafter her father raised her.
- (3) According to the petitioner, she worked as a domestic help for meeting the financial needs of the family, when her father left for heavenly abode.
- (4) After death of her father, petitioner's one relative, brought her to Pali (Rajasthan) and handed her over to Jannat Bano, who runs a brothel in Pali.
- (5) It has been averred in the petition that petitioner landed in brothel without her consent and was forced to work as a sex worker. Her efforts to come out of the vicious life went in vain.

(6) Petitioner could however manage to flee from the brothel house and reached Police Station, Pali to lodge an FIR (FIR No.135 dated 31.3.2020) against concerned persons, including Jannat Bano, who had illegally confined her and compelled her to practice prostitution.

(7) The petitioner has averred that consequent to her coitus with one of the hundreds unknown, she has been impregnated.

(8) It has been indicated in the petition that with a conception of about 20 weeks when she approached medical practitioner for termination of her pregnancy, they flatly refused, citing that the pregnancy was of more than 20 weeks.

(9) Yesterday (on 8.4.2020) when the matter came up for consideration, this Court ordered for petitioner's medical examination and required the State to furnish medical report.

(10) Mr. Pankaj Sharma, learned AAG placed for perusal of the Court, a medical report dated 8.4.2020, prepared by three doctors, including two gynecologists. The report so produced reveals that the age of foetus is 17 weeks and 3 days and states that no additional risk (except the usual risk associated with second trimester MTP procedures) is involved in termination.

(11) The medical report is taken on record. The concise and crisp report aforesaid is reproduced here inextenso:

"After careful examination and going through relevant investigations (copies of which are enclosed herewith). Muskaan D/o Lt. Raju aged 20 years has normal parameters in routine blood and other investigations. She is negative for venereal diseases. Age of foetus in USG report appears to be 17 weeks and 3 days. In view of above observations we the members of medical board are of opinion that medical termination of pregnancy of Muskaan D/o Lt. Raju aged 20 years can be performed with calculated general risk associated with second trimester MTP procedures. However,

the mortality rate is 4-5 times higher than that of first trimester MTP and is about 5 per 100,000 procedures.”

(12) Before advertng to the facts of the case at hand, it would be imperative to bear in mind, the statutory provisions governing termination of pregnancy. Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as the Act of 1971) which provides the situation when termination of pregnancy is permissible, is being reproduced hereinfra for ready reference:

“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 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.

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 mental health of the pregnant woman.

Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken to the pregnant woman's actual or reasonable foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman."

(13) Having regard to the peculiarity of facts and the averments made in the petition and with a view to ward off possibility of pressure or coercion, this Court deemed it expedient to record petitioner's statement. It was further thought appropriate to ensure that petitioner wants termination of her pregnancy on her own will or volition. The petitioner was thus, summoned and produced by the SI, Police Station Ratanada, before the Court.

(14) The petitioner present in person, while reiterating facts mentioned in the petition stated that she has been forced in fornication by Jannat Bano against her wishes. She also adds that a year ago she had conceived and the termination of pregnancy was facilitated and financed by Jannat Bano. The petitioner states that this time, she has not even permitted the petitioner to get rid of her pregnancy-she wants the petitioner to deliver the baby so that he/she can either be used or sold for money. The petitioner during her deposition also asserts that she wants to get rid of the sex racket and lead a respectable life. She apprehends that the baby in her womb, if allowed to born will bring not only disrepute to her, but will also hinder her marital prospects and the same will emerge as a road block in her path.

(15) This Court is not unmindful of the judgment dated 17.10.2019, rendered in case of 'S' Vs. State of Rajasthan (S.B. Civil Writ Petition No.14827/2019), in which instead of permitting termination of pregnancy, the petitioner therein was asked to deliver the baby, with the corresponding direction to hand-over custody of the baby to be born to an NGO.

(16) Hon'ble the Apex Court, in the case of ***Sarmishtha Chakraborty v. Union of India, (2018) 13 SCC 339***, has held in unexceptionable terms that approach of the Court in MTP Cases has to be fact-specific; each case depends on its own facts and no straight jacket rule can be laid down.

(17) The most significant and striking difference in facts of the present case vis-a-vis the facts involved in case of 'S' (supra) is that in case of 'S', the foetus was of 25 weeks, beyond legally permissible limits set for termination; whereas in the present case, age of foetus is reported to be 17 weeks and 3 days. As such termination is permissible, subject of course to fulfillment of twin conditions embodied in sub-section (2) of Section 3 of the Act.

(18) If the factual backdrop of the case and background of the petitioner herein are examined, it is clear that the petitioner, a hapless girl, who is literally orphan, has been thrust into the prostitution, apparently against her will.

(19) In the opinion of this Court, medical termination of pregnancy is permissible for the purpose of protecting the victim, from the trauma of being ravished, coupled with the fact that the baby to be born will remain with her and continue to remind her of the agony she has suffered during her confinement in the brothel.

She may continue to have a feeling of repulsion or revenge for the person(s) who have thrown her in the disgraceful profession.

(20) The baby, whose paternity is not known, in turn, would continue to cause mental agony to her. In the present facts, abortion is imperative, so that the petitioner can settle in life and the baby does not emerge as a snag in her possible peaceful life.

In the extant facts, termination is rather necessary to sever the maternal tie between the petitioner and her baby to be born.

(21) The petitioner's prayer has to be examined from the perspective of the child in womb too, who is also a living organ.

(22) The prospective child in the womb has no say in the present proceedings, this Court has, therefore, to substitute itself as parent – the *parens patriae* and do a balancing exercise. In considered opinion of this Court, if the child in womb is allowed to be born, his/her mental agony will be no less. He/she will always be reminded of petitioner's past and the fact that his/her paternity is not known, will continue to throb his/her heart and hammer his/her mind and soul. If the foetus in womb is permitted to bloom as a child and allowed to be born, his/her life will offer more miseries than the one time shock he/she will suffer on account of his/her premature death consequent to medical termination of petitioner's pregnancy. Such child would be left at the mercy of people like Jannat Banno.

(23) There remains no doubt that the petitioner, who has been forced in whorism against her wishes, has been impregnated by an unknown person, consequent to her forced promiscuous physical relations. In the present facts, the conception is no less than a pregnancy to have been caused by rape. Petitioner's mental agony is comparable to a victim of rape. The case at

hands is, thus covered under Explanation-I appended with sub-section (2) of Section 3 of the Act of 1971.

(24) The age of foetus is 17 weeks and three days and petitioner has expressed her unwavering resolve to abort. There is thus, no legal impediment, as noticed above.

(25) Mr. Pankaj Sharma, learned AAG conceded that the facts involved in the present case, more particularly the fact that an FIR alleging rape is pending investigation, petitioner's pregnancy be terminated.

(26) In view of what has been discussed and noticed hereinabove, the writ petition is allowed.

(27) The Superintendent of Umaid Hospital, Jodhpur is directed to ensure/carry out medical termination of petitioner's pregnancy by at least two Medical Practitioners, within a period of three days from today.

(28) The umbilical chord and DNA of foetus shall be preserved by Superintendent of Umaid Hospital, Jodhpur or Dr. SN Medical College, Jodhpur for a period of seven years.

(29) The SHO, Police Station, Ratanada, Jodhpur shall ensure the effective compliance of the order instant, including petitioner's commutation for the same.

(30) The present petition has been allowed, having regard to the peculiarity of the facts involved herein. The same may not be treated to be precedent laying down an absolute law, that every woman engaged in prostitution has an inviolable right to get her pregnancy terminated, without fulfillment of the conditions stipulated in sub-section (2) of Section 3 of the Act of 1971. The scope of Explanation-I, which has been expanded in the present case, treating petitioner's mental agony to be equal to that of a

victim of rape, is peculiar to this case. In a case of similar nature, it is required to be examined independently by a competent Court.

(31) It is also made clear that the facts noticed and observations made herein are only with a view to consider petitioner's request of medical termination of her pregnancy. Any observation made or finding recorded will not have any bearing upon any other litigation, including adjudication in furtherance of the FIR No.135 dated 31.3.2020 lodged by the petitioner.

(DINESH MEHTA),J

18-CPGoyal/-



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