

W. P. No. 408 / 2013

16/01/2013

Ms. Shanno Shagufta Khan, learned counsel for the petitioner.

Mrs. Vinita Phaye, learned counsel for the respondent State.

Mr. Piyush Mathur, learned sr. counsel appearing with Mr. M. S. Dwivedi, Advocate as amicus curiae.

Superintendent District Jail, Indore is present in person.

Arguments heard.

Order passed separately, signed and dated.

(S. C. SHARMA)
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HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE

S.B.: HON'BLE MR. S. C. SHARMA, J

WRIT PETITION NO. 408 / 2013

HALLO BI @ HALIMA W/O AAMIN

Vs.

STATE OF MADHYA PRADESH
& TWO OTHERS

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ORDER

(16/01/2013)

The petitioner before this Court, who is in Jail in respect of a Crime registered at Crime No. 1492 / 2012 for an offence punishable **u/S. 302 of the Indian Penal Code,** has filed this present petition for issuance of an appropriate writ, order or direction directing the respondents to permit the petitioner to terminate her pregnancy.

The contention of the petitioner is that she was forced into prostitution by **one Usman** and on account of forced prostitution, she became pregnant. Petitioner has further stated that an application was submitted to the Jail Authorities for termination of pregnancy and the matter was forwarded to the CJM, Indore for grant of necessary

permission and the CJM in a mechanical manner, on 14/12/12 has rejected the petitioner's application for grant of termination of pregnancy. Notices were issued by this court on 10/1/13 and Mr. Piyush Mathur, learned Senior Counsel was appointed as *amicus curiae* to assist this Court.

Section 3 of The Medical Termination of Pregnancy Act, 1971 provides a medical opinion by a registered medical practitioner and, therefore, the matter was immediately referred to obtain an opinion from the Head of the Department, Gynaecology and Obstetrics, M.G.M. Medical College / M. Y. Hospital, Indore. The petitioner was subjected to medical examination by Dr. Laxmi Maroo, Professor and Head of the Department, Gynaecology and Obstetrics, M.G.M. Medical College, Indore and her report reflects that at the time of medical examination, the petitioner has stated that she is not willing for termination of pregnancy.

Again the matter was listed before this Court on 11/1/13 and as a statement was once again made before this Court by the learned counsel for the petitioner that the

petitioner now wants to terminate the pregnancy, the Superintendent of Jail, Distt. Jail, Indore was directed to produce the petitioner before this Court on 15/1/13.

The petitioner was present before this Court on 15/1/13 and the petitioner in open court categorically stated that she was forced into prostitution, she was sold in the State of Rajasthan and on account of the forced prostitution, she has become pregnant. The petitioner has categorically stated in the open court that she wants to terminate pregnancy and at the relevant point of time the medical examination took place she was nervous and scared of the surrounding environment as well as she was very tense. The observation has been made by the Doctor that she does not want to terminate the pregnancy. This Court, by way of abundant caution has requested respected lady Lawyers of this Court to interact with the petitioner and Ms. Meena Chaphekar and Mrs. Vinita Phaye, Advocates have interacted with the petitioner and have informed this Court that the petitioner wants to terminate the pregnancy. The first medical examination of the petitioner took place on 10/1/13 and the

age of the foetus was assessed at 11 weeks and 4 days and therefore, keeping in view Rule 3, clause (2) sub-clause (ii), a report of two registered medical practitioners / Government Doctors was required.

This Court has again referred the matter for medical opinion and now, today, a fresh report has been received. The report has been submitted on behalf of two Doctors posted at M. Y. Hospital, Indore and both are Gynaecologist. They have opined that the pregnancy can be terminated. The report has been received through Superintendent of Jail, District Jail, Indore and the same is taken on record.

Mrs. Vinita Phaye, learned counsel for the respondent State has also argued before this Court that pregnancy can be terminated keeping in view Section 3 of The Medical Termination of Pregnancy Act, 1971

As statement was made by the petitioner in the open Court that she was subjected to forced sex / rape, she was also directed to submit an affidavit and she has submitted an affidavit dt. 15/1/13. The affidavit reflects that she was

subjected to forced sex. She has stated that she wants to terminate the pregnancy and does not want to give birth to the child. Thus the petitioner has not only filed an affidavit, but had stated in open court that she was subjected to forced sex and wants to terminate the pregnancy. The report as required under The Medical Termination of Pregnancy Act, 1971 is also in favour of the petitioner.

Mr. Piyush Mathur, learned sr. counsel appointed as *amicus curiae*, has argued before this Court that as the petitioner is alleging pregnancy on account of forced sex / rape and there is no report in respect of the so-called rape and it will result in further complications in the matter. The arguments canvassed by the learned sr. counsel does deserve consideration. That will be dealt with in the later paragraphs.

Heard learned counsel for the parties at length and perused the record. The matter is being disposed of at the admission stage itself with the consent of the parties.

In the present case, it is an undisputed fact that the petitioner is lodged in District Jail, Indore for an offence u/S. 302 of the Indian Penal Code. The allegation is, as

informed by the learned counsel for the petitioner, that she has allegedly committed murder of one Usman, and the matter is still under investigation. The petitioner was brave enough to state in open court before everyone that she was forced into prostitution and on account of forced prostitution she is pregnant. The petitioner has also informed this Court that she was sold in the State of Rajasthan and everyday she was subjected to forced sex / rape.

In the present case, the petitioner wants to abort the child and has challenged the order passed by the CJM, rejecting her prayer to abort the child. Section 3 provides for medical opinion of a registered medical practitioner and as the length of pregnancy is about 12 weeks, the matter was referred to M.Y. Hospital, Indore for obtaining medical opinion of two Doctors. Two lady Doctors including the Head of the Department, Gynaecology and Obstetrics, M.G.M. Medical College / M. Y. Hospital, Indore has categorically stated that pregnancy of the petitioner can be terminated vide report dt. 16/1/13, meaning thereby the medical opinion to abort the child is in her favour.

The Indian Penal Code was enacted in the year 1860 and abortion was a crime punishable by imprisonment upto 7 years and also with a fine. The Exception provided was in order to save life of the women. Large number of women died attempting illegal abortions and finally the Government of India constituted a Committee known as “Abortion Committee” and the Committee submitted its report in December 1966. Based upon the report of the Abortion Study Committee and after inviting objections and suggestions, The Medical Termination of Pregnancy Act, 1971 was enacted in 1971. The Medical Termination of Pregnancy Act, 1971 provides for abortion, in case of woman whose physical / mental health are endangered by the pregnancy, woman facing birth of a potentially handicapped or malform child, rape, pregnancy in unmarried girls under the age of 18, with the consent of guardian, pregnancies in lunatics, with the consent of a guardian, pregnancies which are result of failure in sterilization. This Act provides for termination of pregnancy in case of rape which is in fact, forced sex with the victim who was led into

prostitution by use of force and, therefore, in the peculiar facts and circumstances of the case, keeping in view, the statement of the petitioner, the Act of 1971 does permit abortion in the peculiar facts and circumstances of the present case also. The Act of 1971 provides for a legal method of abortion in respect of cases mentioned in the Act.

It is really shocking that in our country every year almost 11 million abortions takes place and 20000 women die every year due to abortion related complications. Most abortion related maternal deaths are attributable to illegal abortions and, therefore, The Medical Termination of Pregnancy Act, 1971 has authorised a procedures for abortion in respect of cases mentioned in the Act. It certainly provides for a safeguard to women to abort a child keeping in view the statutory provisions as contained under the Act. Pre-natal Test for determining the sex of the foetus, is a crime under the Indian laws and a punishment is also provided under various statutory provisions for termination of pregnancy and for determining the sex of foetus. However, the present case is having a distinguishing feature, the sex of the child

has not been determined, foetus is on account of the forced prostitution, as alleged by the petitioner, and, therefore, case of the petitioner in respect of the abortion, is squarely covered under the Exceptions where permission can be granted for abortion as per the statutory provisions as contained under The Medical Termination of Pregnancy Act, 1971.

As already stated earlier, The Medical Termination of Pregnancy Act, 1971 was enacted by the Parliament in 22nd year of the Republic of India and it came into force on 1/4/1972. Earlier under the Indian Penal Code abortion was made a crime for which mother as well as the abortionist could be punished except where it had to be induced in order to save life of the mother. Provisions relating to abortion under the Indian Penal Code were enacted about a Century ago, keeping in view the then British Law on the subject.

The Medical Termination of Pregnancy Act, 1971 provides for termination of pregnancy on health grounds and in those cases where there is a danger to life or risk to physical or mental health of a woman and also on

humanitarian ground where the pregnancy arises from sex crimes like rape or intercourse with lunatic woman etc.,

Section 3 of The Medical Termination of Pregnancy

Act, 1971 reads as under :

"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 subsection (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 a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of 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."

Section 3 provides for Opinion from a registered Medical Practitioner where the length of pregnancy does not exceed 12 weeks and where the length of pregnancy exceed 12 weeks, from two medical practitioners and permission can be granted where pregnancy is alleged by the pregnant woman to have been caused by rape and the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of a pregnant woman. The Statement of Objects & Reasons for enacting the Act of 1971 was to help a victim of a sex crime like rape or

intercourse with a lunatic woman also.

In the present case, the petitioner who was present in the court was brave enough to state before everyone that she was forcibly forced into prostitution. She was sold for prostitution and every day she was subjected to forced prostitution / rape. Forced prostitution, in the considered opinion of this court, virtually amounts to rape and, therefore, this Court is of the considered opinion, that the petitioner's case falls under Exception I of Section 3, clause (ii) of the Act of 1971.

We cannot force a victim of violent rape / forced sex to give birth to a child of a rapist. The anguish and the humiliation which the petitioner is suffering daily, will certainly cause a grave injury to her mental health. Not only this, the child will also suffer mental anguish in case the lady gives birth to a child.

The apex court in the case of Suchita Srivastava and another Vs. Chandigarh Administration reported in (2009) 9 SCC 1, in para, 20 to 27, 31 and 58 has held as under:

20. In this regard we must stress upon the language of Section 3 of the

Medical Termination of Pregnancy Act, 1971 [Hereinafter also referred to as 'MTP Act'] which reads as follows :-

"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 a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of 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."

A plain reading of the above-quoted provision makes it clear that Indian law allows for abortion only if the specified conditions are met.

21. When the MTP Act was first enacted in 1971 it was largely

modelled on the Abortion Act of 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified 'right to abortion' and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers.

22. There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have

been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

23. A perusal of the above mentioned provision makes it clear that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a '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' [as per Section 3(2)(i)] or when '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' [as per Section 3(2)(ii)]. While the satisfaction of one medical practitioner is required for terminating a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period.

24. The explanations to this provision have also contemplated the termination of pregnancy when the same is the result of a rape or a failure of birth-control methods since both of these eventualities have been equated with a 'grave injury to the mental health' of a woman.

25. In all such circumstances, the consent of the pregnant woman is an

essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in Section 3(4)(b) of the MTP Act, 1971.

26. The exceptions to this rule of consent have been laid down in Section 3(4)(a) of the Act. Section 3(4)(a) lays down that when the pregnant woman is below eighteen years of age or is a 'mentally ill' person, the pregnancy can be terminated if the guardian of the pregnant woman gives consent for the same. The only other exception is found in Section 5(1) of the MTP Act which permits a registered medical practitioner to proceed with a termination of pregnancy when he/she is of an opinion formed in good faith that the same is 'immediately necessary to save the life of the pregnant woman'. Clearly, none of these exceptions are applicable to the present case.

27. In the facts before us, the State could claim that it is the guardian of the pregnant victim since she is an orphan and has been placed in government-run welfare institutions. However, the State's claim to guardianship cannot be mechanically extended in order to make decisions about the termination of her pregnancy. An ossification test has revealed that the physical age of the victim is around 19-20 years. This conclusively shows that she is not a minor. Furthermore, her condition has been described as that of 'mild mental retardation' which

is clearly different from the condition of a 'mentally ill person' as contemplated by Section 3(4)(a) of the MTP Act.

31. As mentioned earlier, in the facts before us the victim has not given consent for the termination of pregnancy. We cannot permit a dilution of this requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim. We must also be mindful of the fact that any dilution of the requirement of consent contemplated by Section 3(4)(b) of the MTP Act is liable to be misused in a society where sex-selective abortion is a pervasive social evil.

58. In our considered opinion, the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority. Since none of the other statutory conditions have been met in this case, it is amply clear that we cannot permit a dilution of the requirement of consent for proceeding with a termination of pregnancy. We have also reasoned that proceeding with an abortion at such a late stage (19-20 weeks of gestation period) poses significant risks to the physical health of the victim.

In the present case, the petitioner understands what pregnancy is. She has consented for abortion. The medical

opinion is in her favour. She does not want to raise the child of a rapist and, therefore, the relief prayed for in the relief clause is granted to the petitioner directing the respondents to carry out the process of abortion immediately. The present case also reflects a very sorry stage of affairs in the society and the situation is quite alarming. The petitioner, a mother of 3 children, was forced into prostitution by someone as alleged and for months together, as stated by her, she was raped, she was sold and now she wants to abort the child. She appears to be a shattered lady and now she is in Jail for allegedly committing murder of a person who has forced her into prostitution.

This Court has not expressed any opinion in the matter of the criminal case which has been registered against the petitioner, but at the same time, as the law provides for free legal aid / assistance to such persons, the respondents are directed to ensure that the petitioner is provided all possible legal – aid to defend herself irrespective of the charge of murder which she is facing. It is needless to mention that any observation made by this court in the present case will

not prejudice any case and will not come in way of the trial court in any matter whether it is pending against the petitioner or whether it has been filed at the behest of the petitioner against any other individual.

Mr. Piyush Mathur, learned senior counsel, who has been appointed as *amicus curiae*, at this stage, has argued before this Court that the DNA Sample of the foetus be preserved as the petitioner is alleging forced sex / rape and he is not aware of the fact whether any report of rape or forced sex has been lodged against someone by the petitioner or not and, therefore, the DNA samples be preserved in the case of the foetus. The suggestion made by the learned *amicus curiae* appears to be reasonable and, therefore, the authorities are directed that after conducting the abortion, they will do the needful for keeping the DNA samples of the foetus and shall also keep the same in a seal cover as per the prescribed procedure.

In the result, the writ petition is allowed. The petitioner is granted permission to abort the child keeping in view the statutory provisions as contained under The Medical

Termination of Pregnancy Act, 1971. The Superintendent of District Jail, Indore is directed to admit the petitioner in M.Y. Hospital, Indore for terminating the pregnancy. It is needless to mention that the petitioner shall be provided with all medical assistance and care after the pregnancy is terminated, she will again be provided with all medical assistance by the respondent State. It is needless to mention that the Superintendent of District Jail, Indore after the pregnancy is terminated shall file status report to the Principal Registrar of this Court and for a further period 6 months, he will file a monthly status report in respect of health of the petitioner.

With the aforesaid the writ petition is allowed. No order as to costs.

(S. C. SHARMA)
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