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PUNJAB AND HARYANA HIGH COURT

Before: Avneesh Jhingan, J.

CWP No.12275 of 2020

Decided on: 26.08.2020

(Name of minor victim withheld) through her natural guardians/parents

Petitioner

Versus

State of Haryana and others

Respondents

Present:

Mr. Bhupender Singh, Advocate for the petitioner.

Mr. Gaurav Jindal, Additional A.G., Haryana.

Medical Termination of Pregnancy Act, 1971 (34 of 1971), Section 3, 4, 5 -- Protection of Children from Sexual Offences Act, 2012 (32 of 2012), Section 6 -- Indian Penal Code, 1860 (45 of 1860), Section 376A, 376B, 452, 506 -- Rape case -- 11 year old girl, pregnant -- 22 weeks 2 days +/- 2 weeks pregnancy on 22.8.2020 -- Termination of -- Victim is of tender age, has suffered an ordeal of rape -- She conceived at an age where she does not possess maturity and physical health to be a mother -- To deny the termination on the technicalities would result in forcing her to live with the trauma for rest of her life -- She herself is of age to play and grow, to expect her to be a prospective mother and to take care of a child would neither be proper nor practical -- Conclusion of the Medical Board is clear that termination should be carried out with permission of the Court -- Writ petition allowed, victim is permitted to undergo the medical termination of her pregnancy.

(Para 2, 3, 11-19)

AVNEESH JHINGAN, J. (ORAL) –

1. The matter is taken up for hearing through video conference due to COVID-19 situation.

2. The present writ petition raises a disheartening situation whereby 11 years' old girl through her natural guardians have approached this Court seeking directions to undergo medical termination of the pregnancy being a rape victim. The pregnancy has progressed to 23rd week.

3. It is pleaded that the victim was raped by the respondent No. 5 and she conceived. On the statement made by mother of the victim, FIR No. 45, dated 10.08.2020 under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and Sections 376-A, 376-B, 452 and 506 of the Indian Penal Code, 1860 was registered at Police Station Assandh, District Karnal, Haryana. The parents gained knowledge of pregnancy when the victim complained of stomach pain and she was taken for treatment, the Doctor informed that she is pregnant. Thereafter, on asking, the victim disclosed that she was raped 4-5 months ago. An ultra-sound was conducted on 11.08.2020 and it was reported:-

“Single live intrauterine pregnancy of 21w1d+/-2 wks gestation

(Biometry attached) with regular cardiac activity and normal movement with variable presentation at the time of examination. Placenta is Posterior in upper uterine segment. Amniotic fluid is adequate for gestation. Fetal head, spine, cerebellum, Kidneys, urinary bladder and stomach bubble are normal, heart is four chambered. Umbilical cord shows two umbilical arteries. Cervical length 3.5 cm on TAS.”

4. The District Administration was approached by moving an application. The statement of mother of victim was recorded that she does not want to carry the foetus and wants termination. The application was forwarded to the Director, Kalpana Chawla Government Medical College, Karnal by the Civil Surgeon, Karnal. The medical board opined that the pregnancy falls beyond the period prescribed in the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as 'the Act') and termination shall be undertaken only after permission from the Court. Hence the present petition.

5. Notice of motion was issued on 20.08.2020. Learned State counsel accepted the notice on behalf of the respondents No.1 to 4 and sought time to file a reply/verification report.

6. The accused in FIR has been impleaded as respondent No.5 in the present petition. The office reported that notice to respondent No.5 could not be issued for non-payment of process fee.

7. Considering the nature of the prayer and urgency involved in the matter, as each day's delay would affect the medical procedure for termination, the respondent No.5 is not considered to be a necessary party in the petition.

8. Learned State counsel sent a reply/verification report dated 25.08.2020 through electronic medium, same is printed and taken on record.

9. As per report, the medical board was constituted, the victim was examined on 22.08.2020. The opinion of the board is as under:-

“After taking thorough history and conducting medical examination, the undersigned board is of the opinion:-

1. *That the said child, (name withheld) is 11 years, 7 months and 4 days old as on 25.08.2020 (as per the Birth Certificate issued by Registrar Birth and Death, Municipal Committee, Assandh vide no. 204, dated 17/02/2009 & Aadhaar Card No.2747-7046-5254).*

2. *That she is having pregnancy of duration 22 weeks 2 days +/- 2 weeks and considering the duration of pregnancy, termination of pregnancy in this case at this stage would be in contravention with legal provisions of Medical Termination of Pregnancy Act, 1971.*

3. *That continuance of pregnancy in this case would involve risk to the life of the said pregnant child as well as grave injury to her mental health.*

4. *That termination of pregnancy in this case also involves risk to her life.*

5. *Considering the circumstances in this case, the termination of pregnancy may be carried out with due risk and further action in this regard could be taken after clear cut directions from the Hon'ble High Court, in view of point No.2 mentioned above.”*

10. As per the opinion, the duration of pregnancy is 22 weeks and 2 days. It is opined that in case pregnancy is continued, there is danger to the life of victim and injury to her mental health is imminent. Though it is stated that there is risk involved in termination of pregnancy also, it is concluded that termination be carried out with due risk after directions from the High Court.

11. To clarify further, during the course of hearing, the State counsel was requested to re-verify as to the degree of risk involved in continuing the pregnancy and in termination. He produced the opinion dated 26.08.2020 of Dr. Richa Kansal, Professor & Head, Department of Obst. & Gynae, Kalpana Chawla Government Medical College, Karnal, who was one of the members of the board constituted. Her opinion is as under:-

"I am of the opinion that there is risk in both continuation as well as termination of pregnancy. However, the risk is more grave in continuation of pregnancy in comparison to termination of pregnancy in this case at this stage."

The relevant provisions of the Act are reproduced below:-

2. **Definitions.**—In this Act, unless the context otherwise requires,—

(a) "guardian" means a person having the care of the person of a minor or a [mentally ill person];

XX XX XX

(c) "minor" means a person who, under the provisions of the Indian Majority Act, 1875 (9 of 1875), is to be deemed not to have attained his majority;

XX XX XX

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 II.—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 of the pregnant woman's actual or reasonably 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.

4. Place where pregnancy may be terminated.—No termination of pregnancy shall be made in accordance with this Act at any place other than—

- (a) a hospital established or maintained by Government, or
- (b) a place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee:

Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to time.

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.

[(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

(3) Whoever terminates any pregnancy in a place other than that mentioned in Section 4, shall be punishable with rigorous imprisonment

for a term which shall not be less than two years but which may extend to seven years.

(4) Any person being owner of a place which is not approved under clause (b) of Section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

Explanation 1.—For the purposes of this section, the expression “owner” in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act.

Explanation 2.—For the purposes of this section, so much of the provisions of clause (d) of Section 2 as relate to the possession, by registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply.”

12. Section 3(2) of the Act subject to conditions stipulated in Section 4 provides that pregnancy may be terminated by a registered medical practitioner, if the pregnancy does not exceed 12 weeks or where it exceeds 12 weeks but not 20 weeks the termination would be subject to at least two registered medical practitioners opining in good faith that the continuance of pregnancy would involve a risk to the life of pregnant woman would cause grave injury to her physical and mental health, or if the opinion is that if the child is born, there is substantial risk that the child would suffer from physical and mental abnormalities.

13. Section 3(4) (a) of the Act provides that where the woman has not attained age of 18 years or is mentally ill, the termination of pregnancy will be carried out only with the consent in writing of her guardians. In other cases, consent of the pregnant woman is must.

14. Section 4 lays down place where pregnancy can be terminated.

15. Section 5 of the Act provides an exception to Section 3 and Section 4, with regard to period of pregnancy and opinion of the two registered medical practitioners formed in good faith in cases where termination is necessary to save the life of pregnant woman.

16. The victim is of tender age, has suffered an ordeal of rape. She conceived at an age where she does not possess maturity and physical health to be a mother. To deny the termination on the technicalities would result in forcing her to live with the trauma for rest of her life. She herself is of age to play and grow, to expect her to be a prospective mother and to take care of a child would neither be proper nor practical.

17. Section 5 of the Act contemplates situations like in hand. As per medical board, there is risk in continuation of pregnancy as well as in termination but the opinion was of terminating the pregnancy. The conclusion of the Board is clear that termination should be carried out with permission of the Court. The opinion of Dr. Richa Kansal produced today i.e. 26/08/2020 clarifies beyond doubt that the risk is more in continuation of pregnancy as compared to termination of pregnancy.

18. The Supreme Court in case of **Murugan Nayakkar v. Union of India**

and others, Writ Petition (Civil) No. 749/2017, in somewhat similar circumstances, permitted the termination of pregnancy and held as under:-

“Considering the age of the petitioner, the trauma she has suffered because of the sexual abuse and the agony she is going through at present and above all the report of the Medical Board constituted by this Court, we think it appropriate that termination of pregnancy should be allowed.”

19. In view of the above, the writ petition is allowed. The victim is permitted to undergo the medical termination of her pregnancy. She may present herself within three days in Kalpana Chawla Government Medical College, Karnal, Haryana, the hospital shall admit her to carry out the procedure for medical termination of pregnancy under supervision of the Head of the Department or the senior most Doctor of the department concerned. It is expected that the authorities shall extend all the facilities to the petitioner as may be required. There is no doubt that confidentiality to the extent possible will be maintained by the hospital.

20. In order to meet the eventualities which may occur later, it is directed that sample of the foetus for DNA testing be taken and kept preserved by the authorities.

21. The writ petition is accordingly disposed of.

22. Copy of this order be handed over to learned counsel for the petitioner and learned State counsel under the signatures of Bench Secretary of this Court.

Petition allowed.
