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IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 17th DAY OF NOVEMBER 2021

BEFORE

THE HON'BLE MR. JUSTICE N.S. SANJAY GOWDA

W.P.No.104344/2021 (GM-RES)

BETWEEN:

KUMARI D.,
(NAME OF THE PETITIONER IS WITHHELD)

THE PETITIONER BEING MINOR
AND THIS MATTER PERTAINS TO
POSCO ACT AND MTP IS PRAYED
THE NAME OF THE PETITIONER IS NOT
DISCLOSED IN ORDER TO MAINTAIN
DIGNITY AND PRIVACY OF THE VICTIM
AND HER FAMILY

... PETITIONER

(BY SRI.SHARAD V MAGADUM, ADV.)

AND:

1. THE STATE OF KARNATAKA,
REPRESENTED BY SECRETARY,
DEPARTMENT OF HEALTH,

: 2 :

MS BUIDLING, BENGALURU-560001.

2. THE DISTRICT HEALTH SURGEON,
DISTRICT CIVIL HOSPITAL,
CHANNAMMA CIRCLE,
BELAGAVI, DIST BELAGAVI 590001.

... RESPONDENTS

(BY SRI.V S KALASURMATH, HCGP)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA PRAYING TO ISSUE WRIT IN THE NATURE OF MANDAMUS DIRECTING THE RESPONDENT No.2 TO MEDICALLY TERMINATE THE PREGNANCY OF PETITIONER MINOR VICTIM FORTHWITH.

THIS PETITION COMING ON FOR ORDERS, THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

1. Kumari D., a minor girl aged 16 years has presented this petition through her mother seeking for a direction to the 2nd respondent to medically terminate the pregnancy forthwith.

2. For the sake of protecting the privacy and confidentiality of the minor girl and her family, both her

name and her mother's name are not being stated and shall not be stated in the records which would be in the public domain.

3. It is the case of the petitioner that she was a victim of a sexual crime which was inflicted on her on 08.02.2021. In respect of this sexual crime, Crime No.142/2021 has been registered by the Sadalaga Police Station for the offences under Sections 376(2)(n), 366(A), 506, 34 of the Indian Penal Code (for short 'IPC') and under Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act'), against two persons who incidentally are a father and son duo.

4. The petitioner states that her case was referred to the Child Welfare Committee established under the Juvenile Justice Act and the said Committee requested the 2nd respondent to medically terminate the pregnancy of the petitioner. The Committee also

informed the 2nd respondent that the mother had also given her consent for termination of pregnancy.

5. However, it appears that the medical practitioner and the 2nd respondent were of the view that the pregnancy could not be terminated as the outer limit of 24 weeks set down in Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter called as 'the 1971 Act') had passed.

6. The petitioner is therefore before this Court contending that she cannot be forced to carry the burden of crime and cannot be compelled to deliver a baby which has been conceived against her will. The petitioner is calling upon this Court to exercise its constitutional power under Article 226 of the Constitution of India and to direct the medical practitioner to terminate the pregnancy. It is submitted that there cannot be a curtailment of the constitutional power of this Court by any statutory limitations. It is

also contended that if the petitioner is forced to deliver the child, it would be a direct infringement on the fundamental guarantee to her under Articles 14 and 21.

7. I have heard the learned counsel for the petitioner and the learned High Court Government Pleader.

8. The 1971 Act was enacted to provide for termination of certain pregnancies by registered Medical Practitioners and the matters connected therewith.

9. In law, the termination of pregnancy is made a criminal offence under the provisions of IPC. However, Section 3 of the 1971 Act, grants an exemption from criminal liability to a registered Medical Practitioner to terminate the pregnancy if it is performed in accordance with the provisions of the 1971 Act. The Act, in effect, decriminalizes the act of terminating the pregnancy if it is performed by a

registered Medical Practitioner, if it is in accordance with the provisions of the 1971 Act.

10. Section 3(2) (a) of the 1971 Act states that the pregnancy may be terminated by a registered medical practitioner if the length of pregnancy does not exceed 20 weeks if the medical practitioner is of the opinion, formed in a good faith, that such continuation of the pregnancy would involve a risk to the life of the pregnant women or cause grave injury to her physical or mental health or by the continuance of the pregnancy there is a substantial risk that the child if born, would suffer from any physical or mental abnormality .

11. Section 3(2) (b) of the Act states the pregnancy can be terminated if the length of pregnancy has exceeded 20 weeks, but, has not exceeded 24 weeks, in cases of the prescribed category of women, if not less than two medical practitioners form an opinion,

in good faith, that such continuation of the pregnancy would involve a risk to the life of the pregnant women or cause grave injury to her physical or mental health or by the continuance of the pregnancy there is a substantial risk that the child if born, would suffer from any physical or mental abnormality.

12. Two explanations have been provided to clear any ambiguity that may arise under Section 3 of the 1971 Act.

13. The **first explanation** is in relation to the termination of pregnancy, where the length of pregnancy does not exceed 20 weeks. In such cases, if pregnancy has occurred as a result of a failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, it is made clear that a presumption may be drawn that the anguish caused by

such pregnancy constitutes a grave injury to the mental health of the pregnant woman.

14. The **second explanation** is in relation to both sub-clauses (a) and (b) of Section 3 i.e., pregnancies in respect of the pregnancy up to 20 weeks and pregnancies beyond 20 weeks but which does not exceed 24 weeks. It is explained therein that where any pregnancy is alleged by the pregnant women to have been caused by rape, it shall be presumed that the anguish caused by pregnancy constitutes a grave injury to the mental health of the pregnant woman.

15. The significant factor to be noticed in these two explanations is the kind of presumption that the law prescribes over the cases in which pregnancies have occurred due to an alleged rape. Unlike the 1st explanation, which states that a presumption may be drawn, the 2nd explanation mandates that a presumption shall be drawn that the anguish caused by

the pregnancy constitutes a grave injury to the mental health of the pregnant woman. This statutory and irrebuttable presumption would apply, both, in cases, where the length of pregnancy is not only up to 20 weeks but and also in cases where it exceeds 20 weeks but does not exceed 24 weeks.

16. It is thus clear that the law creates a statutory presumption of grave injury to the mental health of the pregnant woman if she alleges that the pregnancy was caused due to an alleged rape.

17. However, since the 1971 Act does not provide for termination of pregnancy after 24 weeks by medical practitioners even if it is alleged by the pregnant woman to have been caused by rape, the 2nd respondent has therefore refused to terminate the pregnancy.

18. However, the question that does arise for consideration is whether the petitioner can approach this Court and call upon this Court to invoke its constitutional power and order for termination of her pregnancy which is alleged to have been caused by rape.

19. A three-Judge Bench of the Hon'ble Supreme Court in the case of ***Suchita Srivastava and Ors. Vs. Chandigarh Administration*** reported in **(2009)9 SCC 1** has held as under:

"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."

20. It is therefore clear that the right of a woman to exercise her reproductive choice is a dimension of "personal liberty" as understood under Article 21 of the Constitution of India and she has a sacrosanct right to have her bodily integrity protected. The act of forcing a woman to bear with an unwanted intrusion on her body and endure the consequences of that intrusion would be a clear transgression of her inviolable fundamental right of "personal liberty" guaranteed under Article 21 of the Constitution.

21. In the instant case, the petitioner, who is aged just about 16 years is being forced to continue with her pregnancy which has been caused because of a crime perpetrated on her. It is to be borne in mind that a minor may not even know that she has become pregnant by the rape inflicted on her and may have become aware of the pregnancy only at a late stage due to visible physical changes on her body. In fact, the

visible changes may also not manifest itself within 20 weeks and even if it does manifest itself, a minor girl may not understand it or may be scared of revealing her state of affairs due to plain fear or possibility of certain social repercussions or also being held responsible for her status.

22. It should also be kept in mind that a minor who has been raped and has become pregnant due to it, will be forced not only to be a victim of the crime but would also be compelled to bear with the burden of the crime inflicted on her by forcing her to deliver a child, the conception of which, was not due to the exercise of her reproductive choice. In fact, the fate of the child if delivered, may also be perilous and detrimental to its own interest given the social stigma that would hover around it.

23. Thus, in cases of rape inflicted on minor girls, though there are certain statutory limitations prescribed

under the 1971 Act, they would essentially be applicable only to medical practitioners. In such cases, the requirement to terminate the pregnancy medically would have to be considered and examined in an altogether different light by the Constitutional Courts.

24. It cannot be in dispute that the statutory limitations imposed in a statute cannot be an impediment or a restriction on the exercise of Constitutional power of the High Courts. The exercise of this constitutional power would obviously be exercised rarely, sparingly and in exceptional circumstances and would obviously rest on the facts of each case.

25. In fact, this is the view enunciated by the constitution bench of the Apex Court in the case of ***State of West Bengal Vs The Committee for Protection of Democratic Rights, West Bengal and ors*** reported in ***(2010) 3 SCC 571***, wherein at paragraph 44 (v), it has been held as follows:

"(v) Restriction on the Parliament by the Constitution and restriction on the Executive by the Parliament under an enactment, do not amount to restriction on the power of the Judiciary under Article 32 and 226 of the Constitution."

26. It may also be pertinent to state here that the 1971 Act does not create an absolute bar for termination of pregnancies that have traversed even beyond the period of 24 weeks stipulated in Section 3(2) (b) of the Act. In fact, Section 3 (2B) of the Act excludes the applicability of the time of the length of pregnancies by the medical practitioner, if the termination is necessitated by the diagnosis of any substantial foetal abnormalities diagnosed by a Board. Thus, if the medical practitioner is of the view that there is a substantial abnormality in the foetus, on a diagnosis made by the Board, a pregnancy can be terminated irrespective of the length of pregnancy. The Board contemplated under this provision is required to comprise of a Gynecologist, a Pediatrician, a Radiologist

or a Sonologist and such other number of members as may be notified.

27. Another indicator that there is no absolute bar for termination of the pregnancies even in respect of pregnancies that are more than 24 weeks is the existence of Section 5 in the Act. As per the said Section, the provisions relating to the requirement of conducting termination of pregnancies only at specified places under Section 4 and the requirement of needing the opinion of at least two medical practitioners under Section 3(2) would not be necessary if the medical practitioner is of the opinion, which is formed in good faith, that the termination is immediately necessary so as to save the life of the pregnant women.

28. Thus, essentially, the 1971 Act seeks to provide for termination of pregnancy only under specified conditions keeping in mind the injury that would be caused to the pregnant woman and the

unborn child if the pregnancy is continued. The Act, in fact, allows termination of pregnancy by a medical practitioner, without reference to the length of the pregnancy or without reference to the pre-conditions requisite for conducting them, if the continuance of the pregnancy constitutes a risk to the very survival of the pregnant woman.

29. In this case, the petitioner is just 16 years of age and her capability to deliver a child and foster it in the social milieu that she exists will have to be kept in mind while considering her request for terminating the pregnancy. In the facts and circumstances of this case, in my view, the capability of the petitioner to bear and rear the child, would be in serious doubt given the fact that she is just 16 years old, and her parents are not possessed of means. The consequences of continuing the pregnancy on the future life of the 16 year old

would be quite severe and detrimental to a dignified life as contemplated under Article 21 of the Constitution.

30. However, in order to ascertain and be satisfied as to whether the continuation of pregnancy did constitute grave mental injury to the petitioner, an interim order was passed on 16.11.2021 directing 2nd respondent to constitute a Medical Board comprising of a Gynecologist, a Pediatrician and a Radiologist or Sonologist and directed the said Board to subject the petitioner to a medical examination.

31. This order directing the constitution of a Medical Board was passed keeping in view the qualifications prescribed for the members of the Board in Section 3(2B) of the 1971 Act (which was inserted by the Amending Act 8 of 2021).

32. Pursuant to the said order, a Medical Board was constituted by the 2nd respondent comprising of the following Specialists:

1. District Surgeon
2. Medical Superintendent
3. Gynecologists : Dr.Vasant Kabbur,
Dr.Sunita Kittali
4. Pediatrician : Dr.Shaillesh Patil
5. Radiologist : Dr.Eranna Palled
6. Psychiatrist : Dr.Chandrashekhar T R

33. The Board after conducting a medical examination of the petitioner, has rendered the following opinion:

"Gynecologist:

Pt.by Name xxxxxxxxxx Age:16 year, IP No.202119743. Admitted on 09.11.2021 at 01.12.56pm. The patient is a Case of Sexual Assault with previous MLC dated 22.10.2021 with 5 months of Gestation admitted with pain abdomen. Patient has come for MTP with consent given by Mother. Further investigation were done, on ultrasound it was 25 weeks + 3 days life pregnancy. As it has crossed 24 weeks as per law it needs to be terminated after obtaining legal permission by Court. The anticipated complications during procedure may be as follows:

- *If tired medically it may fail*
- *Require surgical intervention*
- *Excessive per vaginal bleeding and its consequences*
- *Infection and its consequences*

- *Psychological problem*

If the procedure is not carried out it may affect her mental health. She may deliver vaginally at term.

Continuing pregnancy may cause serious grave injuries to mother physically & mental health as it is high risk pregnancy (teenage pregnancy)

Radiologist:

As of the opinion as per ultrasound report it is single live intrauterine gestation of 25 weeks 3 days with no gross congenital anomalies at present.

Pediatricians:

Since it's a high-risk pregnancy (teenage mother) it may have grave consequences on the fetus.

Psychiatrist:

If the patient continues her pregnancy she can develop anxiety, by extending anxiety can lead to depression definitely it affects the mental health of the patient. After delivery again social problems like unmarried delivery, & social isolation problems. All above things affect the mental health of the patient.

Opinion of the medical board is as follows:

The victim needs termination as continuing pregnancy endangers the mother physically & mental health with risk as explained by Gynecologist & Psychiatrist."

34. Thus, in the considered opinion of the Medical Board, the pregnancy of the petitioner needs to be terminated as continuing pregnancy would endanger the physical and mental health of the petitioner. The

Medical Board has also stated that the length of pregnancy as on 17.11.2021 was 25 weeks and 3 days, which would be beyond the period of 24 weeks by 1 week 3 days.

35. The Pediatrician, who was a part of the Medical Board, has opined that it would be a case of high-risk pregnancy as the petitioner was a teenage mother and it would also pose a grave risk on the fetus. The Psychiatrist has noted that if the pregnancy is continued, the petitioner will develop anxiety and the extending anxiety could lead to a definite depression which would in turn have a bearing on the mental health of the petitioner. He has also specifically observed that social problems arising out of the petitioner's status would also have an affect on the mental health of the petitioner.

36. In my view, having regard to the circumstances explained above and the specific opinion

rendered by the Medical Board, the petitioner has made out a case for issuance of a direction to terminate the pregnancy.

37. In the result, the writ petition is disposed off directing the 2nd respondent to ensure the medical termination of pregnancy of the petitioner-Kumari 'D', (the name of the petitioner is mentioned as 'D' for the sake of confidential) in accordance with the provisions of Medical Termination of Pregnancy Act, 1971 forthwith having regard to the opinion rendered by the Medical Board.

A copy of the operative portion of this order be furnished to the learned HCGP forthwith.

Sd/-
JUDGE

KGK