

ORISSA HIGH COURT :: C U T T A C K

W.P.(C) No.21947 of 2020

A F R

*(In the matter of an application under Articles 226 & 227 of
the Constitution of India.)*

Runa Majhi : Petitioner

-Versus-

The State of Odisha represented through : Opp. Parties
the Secretary, Health and Family Welfare
Department & others

For Petitioner : M/s. S.Ch. Puspalka,
A.K. Tarai,
T. Priyadarshini,
T. Barik

For Opposite party nos.1 to 6 : Sri B.R. Behera,
Additional Standing Counsel

For Opposite party no.7 (victim) : Notice dispensed with.

J U D G M E N T

PRESENT:-

THE HONOURABLE MR. JUSTICE BISWANATH RATH

Date of hearing :14.09.2020 :: Date of Judgment : 23.09.2020

Biswanath Rath, J. This Writ Petition involves an application at the instance of a desperate mother seeking permission for terminating the pregnancy of an unmarried, physically handicapped and mentally retarded daughter a rape victim under the provisions

of The Medical Termination of Pregnancy Act, 1971 (hereinafter in short be mentioned as “the Act, 1971), The Medical Termination of Pregnancy Rules, 2003, (hereinafter in short be mentioned as “the Rules, 2003”) and The Medical Termination of Pregnancy Regulations, 2003 (hereinafter in short be mentioned as “the Regulations, 2003”).

2. Background involved in this case is that mother of victim claims her major unmarried daughter is not only physically handicapped but also mentally retarded and finding unnatural behavior in her such as untimely vomiting, on close scrutiny and soliciting came to know that she has been raped by accused Sili Majhi and she might be conceived for the said reason. On questioning the accused the mother was threatened to her life with dire consequences. On advise of the village gentries petitioner the mother of the victim reported the matter to the local Police Station and a F.I.R. was accordingly registered in Kujanga Police Station on 13.08.2020 vide Kujanga P.S. Case No.200 of 2020 against the accused person U/s.376(2)(1)/294/506 of I.P.C. Thereafter Police placed the victim before the Medical Officer on 13.08.2020 and as per the report of the Medical Officer vide Annexure-2, it appears, the Doctor in his report on 13.08.2020 not only reported that the victim is a physically handicapped and mentally retarded person but she was also carrying for 16 weeks i.e. almost four months. It was also reported there that there was no detection of recent sexual intercourse. Finding the victim physically handicapped and unable to take care of herself and unmarried besides also mentally retarded, being the mother of the victim with an intention to avoid humiliation in the society, further health hazard to the above victim and as a matter of welfare of the victim girl and baby to take birth

by way of this Writ Petition requested this Court for permission for termination of pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971 (herein after in short be mentioned as “the Act, 1971”) and any other relief as deemed fit and proper.

3. With the above background of the case Sri S.C. Puspalka, learned counsel for the petitioner taking this Court to the provisions at Sections 3, 4 & 5 of the Act, 1971, Rule 5 of the Rules, 2003 and the provisions at the Regulation, 2003 and further taking this Court to the citations in the case of ***X v. Union of India*** as reported in **2016 (14) SCC 382** attempted to satisfy a deserving case for termination of pregnancy. Further taking this Court to the F.I.R at Annexure-1 and the medical report at Annexure-2, the report dated 5.09.2020, the report dated 9.09.2020 at Annexure-A/4 and the last reports dated 12.09.2020 vide Annexure-C/4 series, more specifically for the contents therein reading along with the provisions quoted hereinabove, Sri S.C. Puspalka, learned counsel for the petitioner while urging this Court’s interference in the matter also requested that looking to the peculiar circumstance involved herein for granting necessary direction to the competent authority as deem fit and proper and also for granting appropriate relief not only to the victim but also to all such who have also become victim in the process.

4. This matter was earlier listed on 4.09.2020. On which date this Court while issuing notice on being satisfied with the prima facie case involved therein directed the State-opposite parties for urgent counter / instruction and posted the matter to 7.09.2020. Hearing of the matter being undertaken Sri B.R. Behera, learned

Additional Standing Counsel along with Sri S. Ghose, learned Additional Standing Counsel brought to the notice of this Court to a further report/ opinion of the Committee formed in terms of regulation 3 of the Regulations, 2003. Taking this Court to the document filed by way of a memo dated 8.09.2020, also taking this Court again to the provisions at Sections 3, 4 & 5 of the Act, 1971 and regulation 3 of the Regulations, 2003 along with the form being prescribed therein and also the previous report appended at Annexure-2 to the Writ Petition, Sri Behera, learned Additional Standing Counsel admitted that for the report vide Annexure-2 the victim girl has been shown to be mentally retarded not only that she was already carrying for four months though at some places it is mentioned as 16 weeks. However, in the premises that the report at Annexure-2 being prepared on examination of the victim on 13.08.2020 and the 2nd report being prepared on 5.09.2020 Sri Behera demonstrated that there appears some doubt with regard to the period of pregnancy by then. A further report being filed in the proceeding dated 8.09.2020 Sri B.R. Behera, learned Additional Standing Counsel taking this Court to the subsequent report dated 5.09.2020 appended through the memo dated 8.09.2020 involving opinion of two Doctors in terms of the provisions in the Act, 1971 suggested, this report confirmed the pregnancy involving the victim and the health condition of mother carrying the pregnancy and the Committee of Doctors opined pregnancy period as 24 weeks more specifically mentioning the pregnancy period is 24 weeks 3 days. However, looking to the gap between the previous report dated 13.08.2020 and the subsequent report dated 5.09.2020 hardly in between 23 days, Sri Behera, learned Additional Standing Counsel submitted that 2nd report in comparison with 1st report creates a doubt on the opinion of the two

Doctors finding pregnancy period 24 weeks 3 days and taking this Court to the dates of reporting Sri Behera, learned Additional Standing Counsel contended that as it appears, the pregnancy period involving the report dated 5.09.2020 appearing to be 16 weeks or 4 months + 3 weeks and 2 days making it to 19 weeks and some days. Sri Behera, learned Additional Standing Counsel fairly suggested for another report to arrive at just conclusion. To which Sri Puspalka, learned counsel for the petitioner had no objection. Being satisfied with the submissions of Sri Behera, learned Additional Standing Counsel and finding abnormal gap in between both the reports and also finding the report of the 2nd Committee is not in conformity with the Form-I prescribed therein this Court by its order dated 8.09.2020 directed for reexamination of the victim involving the conditions therein and also to give a further report focusing on the questions regarding the actual position of the Foetus, the health condition of the pregnant lady as to whether continuance of her pregnancy would involve injury to her physical and mental health as well as the Foetus and also as to whether the pregnant lady is capable of delivering a perfect child along with other requirements in terms of Form-I. For the materials establishing through Annexure-2 that victim is suffering from mental retardness, this Court also in the same order directed, the Doctor Committee while further examining the victim shall also take aid of Psychiatric expert from S.C.B Medical College & Hospital, if necessary, and to submit the report before this Court by 10th of September, 2020. During course of further hearing, as per the direction of this Court report of the further Committee being submitted is taken into account. On going through the further report dated 9.09.2020 of both the Committee as well as the Psychiatric Specialist this Court finds, there is clear opinion

suggesting no possibility of termination of pregnancy as termination will endanger the life of mother with further observation by the Psychiatric Specialist that mother, the pregnant lady for her mental condition cannot take care of child to take birth and she is also completely dependant. Sri Behera, learned Additional Standing Counsel accordingly submitted for denial of termination of pregnancy and passing order as deemed fit.

5. Relying on the further report Sri S.C. Puspalka, learned counsel for the petitioner submitted that for the report of the Committee of Doctors opining no possibility of Termination suitable direction may be made protecting the life of both mother carrying the child and child in womb and looking to the Doctors' opinion that the victim shall be dependant for her mental condition, care of the mother i.e. the petitioner herein should also be taken. It is, involving this, Sri Puspalka, learned counsel for the petitioner taking this Court to the further affidavit of the petitioner more particularly taking this Court to the paragraphs 4 & 7 therein submitted that petitioner has a disastrous financial condition and petitioner cannot take care of both victim and her child involved unless she is provided with appropriate financial and medical support.

6. Taking into account the totality involved herein, this Court finds, there remains no dispute that the victim is not only physically handicapped but also mentally retarded and unmarried one and completely a dependant one. Further, victim is also a victim of rape and sufferer of an unwanted pregnancy. Since the application is filed by the mother of the victim, for which at every stage Doctor knowing fully well the mental condition of the victim

took consent of the mother but however, for the period of pregnancy involved there while submitting the 2nd report on 5.09.2020, 3rd report dated 9.09.2020 Doctors team clearly suggesting no scope for termination of pregnancy. There is a 4th report dated 12.09.2020 specifically attending to the health condition of the child in womb and also suggesting that the child in womb is growing with all active parts intact and there is no danger in the Foetus growth in womb. On perusal of report on Foetus, this Court finds, the report suggests as follows:-

“Her Hematology and serological investigation reports are within normal limits.

Ultrasound report revealed a single live fetus at 24 weeks (+/-) 2 weeks of gestation with no gross congenital anomaly. The fetal parts including brain, spine, heart, limbs, facial structure, kidneys, urinary bladder and stomach appear normal at present.”

7. Considering the facts involving the case, conditions of the victim through the reports indicated hereinabove this Court observes, it is relevant to take care of certain provisions of The Act, 1971 as well as the Regulation, 2003, which reads as follows:

Section-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.

(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 ⁴ [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 Sec.4, and so much of the provisions of sub-section (2) of Sec. 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 the 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 a 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.

Regulation 3 of the Medical Termination of Pregnancy Regulations, 2003:

3. Form of certifying opinion or opinions. - (1) Where one registered medical practitioner forms or not less than two registered medical practitioners form such opinion as is referred to in sub-section (2) of section 3 or 5, he or she shall certify such opinion in Form I.

(2) Every registered medical practitioner who terminates any pregnancy shall, within three hours from the termination of the pregnancy certify such termination in Form I."

8. On reading of the provisions quoted hereinabove this Court finds, for the provisions at Sub-section (2)(b) of Section 3 of the Act, 1971 termination of pregnancy can be allowed, if the length of pregnancy exceeds 12 weeks but does not exceed 20 weeks but subject to however under the opinion of the two registered Medical practitioners on the issues prescribed therein and also taking care of the provisions at the Explanation 'I' therein. The provision at Section 4(a) quoted hereinabove has a clear permission for pregnancy of a women even attaining the age of 18 years, if mentally ill, shall be terminated with the consent of her guardian in writing.

Now coming to the **Statement of Objects and Reasons** of the Act, 1971, this Court here finds the provisions at clause '3' of the **Statement of Objects and Reasons** of the Act, 1971:

"3. There is thus avoidable wastage of the mother's health, strength and sometimes, life. The proposed measure which seeks to liberalise certain existing provisions relating to termination of pregnancy has been conceived (1) as a health measure – when there is danger to the life or risk to physical or mental health of the woman; (2) on humanitarian grounds – such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc., and (3) eugenic grounds – where there is substantial risk that the child, if born, would suffer from deformities and diseases."

The statutory provision taken note hereinabove, makes it clear that the Parliamentarians in their wisdom and after taking into consideration many aspects have constructively under subject item 'I' of the clause '3' of the Statement of Objects and Reasons kept a space for termination of pregnancy in case of mental health of a women. Similarly under the item therein have also kept space for termination of pregnancy on humanitarian grounds, when pregnancy arises from sex crime like rape or intercourse with a lunatic woman. However, reading the whole provisions this Court

finds, when the pregnancy exceeds 20 weeks the termination is wholly dependant on the opinion of the Committee of Doctors.

9. It is, in this context of the matter on perusal of the report dated 5.09.2020, this Court noticed, the report was strictly not in terms of Form-I of Clause-3 of the Regulation, 2003 and accordingly directed for further report on its listing on 11.09.2020. On 11.09.2020, pursuant to the direction of this Court dtd.08.09.2020 a further report dtd.09.09.2020 was submitted by a team of Doctors with involvement of Psychiatric Specialist vide Annexure-A/4, where the two Doctors examined the victim in terms of request U/R.3 Form I, which reads as follows:-

“Patient is having ongoing pregnancy of 24 weeks duration with the existing medical neurological and psychiatric-morbidities Termination of Preg. at this stage may result in life threatening complications, even with the best available treatment.

Under such condition, Pregnancy may be allowed to continue with Antenatal Care at higher centre and confinement to be planned at a tertiary care centre.”

From all the above, this Court taking into account the restrictions in the Act, 1971 and suggestions of the Doctors finds, termination of pregnancy of the victim will put the life of the victim in danger. However, there was nothing available on the life of child in womb. It further reveals, the Director-cum-Medical Superintendent, Mental Health Institute, S.C.B M.C.H, Cuttack, in his report vide Annexure-B/4 dated 09.09.2020 suggested as follows:-

“With reference to the subject mentioned above, the patient Ms.Sasmita Majhi, 22 years, HF, D/o.Babuli Majhi, At-Fatepur, Po/Ps-Kujanga, Dist.-Jagatsinghpur (OPD Regd. No.-11171/ 09.09.2020) was observed & evaluated on OPD basis on 09.09.2020. She was found to have Profound Intellectual Impairment (Profound Mental Retardation). The patient was already old diagnosed case of severe mental retardation as per disability certificate issued in 2010. The condition is of such a

nature that she cannot take care of herself & is totally dependent.”

This report clearly suggested that victim was already an old diagnosed case of severe mental retardation and is totally dependant. However, since above reports did not disclose anything on the condition of child in womb despite being asked, this Court by order dtd.11.09.2020 directed the team of Doctors to report on the health condition of the child so as to arrive at just conclusion. During final hearing on his appearance, Sri Behera, learned Additional Standing Counsel produced a report dated 12.09.2020 vide Annexure-C/4 series particularly involving the health condition of the child and the report suggests as follows:-

“Her Hematology and serological investigation reports are within normal limits.

Ultrasound report revealed a single live fetus at 24 weeks (+/-) 2 weeks of gestation with no gross congenital anomaly. The fetal parts including brain, spine, heart, limbs, facial structure, kidneys, urinary bladder and stomach appear normal at present.

The patient needs regular antenatal checkup, treatment and delivery in a tertiary care Centre preferably at S.C.B, M.C.H, Cuttack.”

10. It is at this stage, this Court taking into account the additional affidavit of the petitioner dated 13.09.02020 finds, the mother being the guardian of victim a mentally retarded, physically handicapped and pregnant on rape taking this Court to her financial condition expresses her inability to take up such a higher responsibility but however agrees to take such responsibility provided there is direction on financial assistance, medical assistance aspect as well as extension of co-operation of the S.C.B, Medical College & Hospital, the C.D.M.O and the District Administration to both victim mother and child to take birth at least till the S.C.B, Medical College & Hospital gives a clearance for shifting of victim and her child to the petitioner’s residence besides the District Administration also taking care of the petitioner.

11. Before passing any observation this Court looking to the pregnancy of the victim as an outcome of rape finds, since the victim was produced for Medical examination on 13.08.2020, had there been proper care taking resort to the provisions of the Act, 1971 since it was hardly 16 weeks by then, the unwanted pregnancy could have been avoided. For the negligence of the Public Authority, may not be intentional and carelessness, the victim so also the child to come are to suffer immensely including mental torture and also social stigma throughout their life.

12. Looking to the law of land on refusal of termination of unwanted pregnancy dispute, this Court finds, the Hon'ble apex Court in the case of ***Suchita Srivastava v. Chandigarh Admn., (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570 at page 13*** has directed as follows:

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 "the MTP Act") which reads as follows:

"3. When pregnancies may be terminated by registered medical practitioners.—(1) Notwithstanding anything contained in the Penal Code, 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 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.”

A plain reading of the abovequoted 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 abovementioned 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 Section 3 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.

56. With regard to the facts that led to the present proceeding, the question of whether or not the victim was capable of consenting to the sexual activity that resulted in her pregnancy will be addressed in the criminal proceedings before a trial court. An FIR has already been filed in the said matter and two security guards from Nari Niketan are being investigated for their role in the alleged rape.

57. The substantive questions posed before us were whether the victim's pregnancy could be terminated even though she had expressed her willingness to bear a child and whether her “best interests” would be served by such termination. As explained in the forementioned discussion, our conclusion is that the victim's pregnancy cannot be terminated without her consent and proceeding with the same would not have served her “best interests”.

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.

59. Lastly, we have urged the need to look beyond social prejudices in order to objectively decide whether a person who is in a condition of mild mental retardation can perform parental responsibilities.

60. The findings recorded by the expert body which had examined the victim indicate that the continuation of the pregnancy does not pose any grave risk to the physical or mental health of the victim and that there is no indication that the prospective child is likely to suffer from a congenital disorder. However, concerns have been expressed about the victim's mental capacity to cope with the demands of carrying the pregnancy to its full term, the act of delivering a child and subsequent childcare. In this regard, we direct that the best medical facilities be made available so as to ensure proper care and supervision during the period of pregnancy as well as for post-natal care.

Similarly in the Hon'ble Apex Court in the case of ***Z v. State of Bihar, (2018) 11 SCC 572*** held as follows:

47. In the case at hand, we have noted, termination of pregnancy could have been risky to the life of the appellant as per the report of the Medical Board at AIIMS which was constituted as per the direction of this Court on 3-5-2017 [*Z v. State of Bihar, (2017) 14 SCC 525 : (2017) 14 SCC 526 : (2017) 4 SCC (Cri) 916 : (2017) 4 SCC (Cri) 917*]. This situation could have been avoided had the decision been taken at the appropriate time by the Government Hospital at Patna. For the negligence and carelessness of the hospital, the appellant has been constrained to suffer. The mental torture on certain occasions has more grievous impact than the physical torture.

56. In the instant case, it is luminescent that the appellant has suffered grave injury to her mental health. The said injury is in continuance. It is a sad thing that despite the prompt attempt made by this Court to get her examined so that she need not undergo the anguish of bearing a child because she is a victim of rape, it could not be so done as the medical report clearly stated that there was risk to the life of the victim. Therefore, we are inclined to think that the continuance of the injury creates a dent in the mind and the appellant is compelled to suffer the same. One may have courage or cultivate courage to face a situation, but the shock of rape is bound to chain and enslave her with the trauma she has faced and cataclysm that she has to go through. Her condition cannot be reversed. The situation as is unredeemable. But a pregnant one, she has to be compensated so that she lives her life with dignity and the authorities of the State who were negligent would understand that truancy has no space in a situation of the present kind. What is needed is promptitude.

57. This Court had earlier directed that she should be paid compensation under the Victims Compensation Scheme as framed under Section 357-A of the Code of Criminal Procedure. She has been paid Rs 3,00,000 as she has been a victim of rape. It may be clearly stated that grant of compensation for the

negligence and the suffering for which the authorities of the State are responsible is different as it comes within the public law remedy and it has a different compartment. Keeping in view the mental injury that the victim has to suffer, we are disposed to think that the appellant should get a sum of Rs 10,00,000 (Rupees ten lakhs only) as compensation from the State and the same shall be kept in a fixed deposit in her name so that she may enjoy the interest. We have so directed as we want that money to be properly kept and appropriately utilised. It may also be required for child's future. That apart, it is directed that the child to be born shall be given proper treatment and nutrition by the State and if any medical aid is necessary, it shall also be provided. If there will be any future grievance, liberty is granted to the appellant to approach the High Court under Article 226 of the Constitution of India after the birth of the child.

13. Sri Puspalak, learned counsel for the petitioner, during course of hearing relied on decision such as ***A. Vrs. Union of India*** : (2018) 14 SCC 75, ***Mamata vrs. Union of India*** : (2018) 14 SCC 289, ***Sarmishtha Chakraborty vrs. Union of India*** : 2018) 13 SCC 339, ***Mrs. X vrs. Union of India*** : (2017) 3 SCC 458 & ***X vrs. Union of India*** : 2016 (14) SCC 382. This Court considering all these decisions finds, the cases involving the above decisions had the medical support for termination, which is not the situation in the case at hand, as such none of these cases comes to rescue of the petitioner.

14. Taking into account the factual position stated hereinabove and settled legal position, this Court while declining termination of pregnancy for the complications involved herein is obliged to observe that the pregnancy on the victim is forced one and it being contrary to her choice. The victim has been forced not only to carry an unwanted pregnancy but is also forced to give birth to the child against her will. No doubt she will carry a stigma and humiliation for the rest part of life for the offspring born as a result of ghastly recurrence of rape committed on her along with stigma and

humiliation on the child and in case it is a female child, looking to the complex society, it is still worse. Situation involved here compelled this Court to give a comprehensive thought to give absolute protection not only to the victim but also to the child to give birth so also to support the mother of the victim a wife of a poor labourer, who has come forwarded to take care of the victim. This Court also observes, in the event the mother faces any difficulty, may redress on such aspect to the District Administration, who shall be duty bound to take care of the request as far as practicable.

15. Looking to the factual background, this Court finds, the F.I.R. involved here was registered on 13.8.2020. First Doctor report came on 13.8.2020. Since both the Investigating Agencies and Doctors were undertaking an exercise under the Act, 1971, nothing prevented the Public Authority at least to ask the mother of victim for involvement of mental condition of the victim and pregnancy of an unmarried victim of rape, regarding their option for termination as there was nearly 16 weeks of an unwanted pregnancy at the relevant time, taking into account that the petitioner is not only financially unsound but also belongs to a rustic area and being not aware of complication in the matter of termination after twelve weeks. It appears, there is no proper co-ordination between the I.I.C., the C.D.M.O, the District Legal Services Authority, the POCSO Authority and the Magistrates involved in such disputes. Even there is also some loss of time at the hand of village gentries.

Before concluding, this Court likes to reproduce the observation of the Hon'ble apex Court in para-61 in the case of **Z v. State of Bihar**, as reported in (2018) 11 SCC 572.

“The legislative intention of the 1971 Act and the decision in *Suchita Srivastava* prominently emphasize on personal autonomy of a pregnant woman to terminate the pregnancy in terms of Section 3 of the Act. Recently, Parliament has passed the Mental Healthcare Act, 2017 which has received the assent of the President on 7-4-2017. The said Act shall come into force on the date of notification in the Official Gazette by the Central Government or on the date of completion of the period of nine months from 7-4-2017. We are referring to the same only to highlight the legislative concern in this regard. It has to be borne in mind that element of time is extremely significant in a case of pregnancy as every day matters and, therefore, the hospitals should be absolutely careful and treating physicians should be well advised to conduct themselves with accentuated sensitivity so that the rights of a woman are not hindered. The fundamental consent relating to bodily integrity, personal autonomy and sovereignty over her body have to be given requisite respect while taking the decision and the concept of consent by a guardian in the case of major should not be over-emphasised.”

16. Thus while declining the relief of termination of pregnancy under the compelling reasons and granting relief, vide paragraph-17(I) and issuing necessary direction to the State Government as a matter of future guideline involving case of this nature vide paragraph-17(II), this Court directs the Chief Secretary, who in turn shall bring the judgment to the notice of the Secretary to Government in Health Department, Secretary to Government in Women & Child Care Department, Secretary to Government in Home Department, Chairperson of the State Women Commission, Director, Medical Education and Technology and Superintendents of all the three Premier Medical College & Hospital of the State for their cooperation and coordination in the effective implementation of General Directions herein above.

Similarly, the Registry of this Court is also directed to supply copy of this judgment to all the District Judges, who in turn shall bring the same to the notice of the Sessions Court(s) dealing with sexual offences, the Presiding Officer, POCSO Court, the

Principal Magistrate of Juvenile Justice Board under its jurisdiction. Registry shall also supply a copy of this judgment to the Member Secretary of State Legal Services Authority for bringing it to the notice of the Chairman and the Secretary of District Legal Services Authority for their doing the needful.

17. It is, in the above circumstances, this Court segregates its conclusion in two segments, which are as follows:-

(I) SPECIFIC DIRECTION INVOLVING THE CASE AT HAND :

(A) Considering that the victim is suffering on account of rape committed on her and the suffering for which the authorities of the State are responsible, this Court directs the State of Odisha to pay as an immediate measure, by way of exgratia grant, a sum of Rs.5,00,000/- (Rupees Five lakh) within seven days of receipt of copy of the judgment, to the victim to be kept in long term Fixed Deposit in any Nationalized Bank in the name of victim to be renewed from time to time with operation of such account by the mother of the victim. Annual interest on such Fixed Deposit will be credited to the passbook so maintained with authorization to the mother of the victim herein, to utilize the same towards her daughter's expenditure till survival of the victim, whereafter the child will be entitled to this amount.

(B) Similarly a further sum of Rs.3,00,000/- (Rupees Three lakh) in case of male child and in the event the victim gives birth to a girl child then looking to the suffering of the girl child throughout her life, for the peculiar circumstance involved herein, a sum of Rs.5,00,000/- (Rupees Five lakh) to

at least make sure that the girl child does not suffer throughout her life, amount as appropriate, shall also be released by way of ex-gratia grant in favour of child within at least ten days of such birth. Here also the amount will be kept in Fixed Deposit in any nationalized Bank by opening a Savings Bank Account in the name of the child. This Account will also be run in the name of minor child to be operated by the maternal Grandmother with scope for renewal of the Fixed Deposit from time to time at least till the child becomes major. Interest so yielded through the F.D. shall be accounted to the SB Account Passbook in the name of minor and to be operated by maternal grandmother only and utilized for the purpose of meeting expenditure on child. The child will ultimately be the owner of such amount once he/she becomes major.

(C) Amount granted by way of ex gratia under Item Nos.1 and 2 shall however be in addition to grant of any payment to the victim and the child on application of The Victim Compensation Scheme under the provisions of Section 357-A of the Code of Criminal Procedure decided by trial Court or any other authority competent to do so.

(D) Considering the mental condition of the victim and financial condition of the family, utmost care of the victim is to be taken in continuation of her pregnancy. The best medical facility be made available so as to ensure proper care and supervision during the period of pregnancy as well as postnatal care with the supervision of Doctors in the S.C.B Medical College & Hospital, Cuttack with assistance of team of Doctors at the District Medical Level. Keeping in view the

report dated 12.09.2020 the delivery of the victim shall take place only in the S.C.B. Medical College & Hospital, Cuttack.

(E) Looking to the mental retardness along with physical handicapness in the victim, there may be periodical check up of the victim by a Psychiatric Expert and other related doctors required on requisition of the CDMO. The Superintendent, SCB Medical College and Hospital, Cuttack will ensure such assistance.

(F) The entire transport, medical and medicinal expenses including accommodation of the victim and her mother, if necessary during treatment, shall be the responsibility of the District Administration.

(G) The entire education of the child will be the responsibility of the State.

(H) In the event any grievance arises involving providing any other assistance to the victim and/or the child, it shall be open to the petitioner to first approach the Collector of the District on the basis of direction herein and in case of failure in responding to the genuine asking, it will be open to the victim's mother and child on attaining his/her majority to approach the High Court of Orissa in filing appropriate application.

(I) Looking to the condition of victim, this Court also observes, the child to be born shall be given proper treatment and nutrition by the State and if any medical aid is necessary it shall also be provided to him/her by the State at least till the child is sufficiently grown up.

(J) Looking to the family of the victim runs on the sole income of the husband of the petitioner being a labourer, to

see that the petitioner while maintaining her family will also be able to look after the victim and in future the child to take birth, this Court directs the District Collector to depute a competent officer to the residence of the petitioner to assess the capacity of subsistence in her and based on detailed assessment of their survivability, the Collector shall take decision on providing further assistance through any of the Central Scheme available for the purpose, if any, by completing the entire exercise within four weeks from the date of judgment.

(K) To protect the future of child and to see there is no mismanagement of fund provided both to the victim and the child by direction of this Court, this Court further directs that the Secretary, District Legal Services Authority shall have supervision on the spending by the mother against the account involving both the victim as well as the child so long as the victim survives and the child becomes major. The Secretary is also authorized, in the event he finds any irregularity in the spending of funds or mismanagement of funds involved by the mother, the petitioner herein, involving both the accounts, may seek leave of the High Court for any other mode of operation.

II) General Directions :

i). Once an incident of rape; be it on minor, minor and mentally retarded, minor and physically handicapped, unmarried major, married major, mentally retarded major and physically handicapped major is made to Police within eight weeks period, the Police and

the C.D.M.O will take consent of the guardian-mother in case of minor, minor and mentally retarded, minor and physically handicapped as to whether they are interested to continue with pregnancy or interested in termination? In case of major and physically handicapped, consent of such victim and in case major but mentally retarded, consent of mother of such victim shall be taken within same time as to whether the victim should continue with pregnancy or interested in termination. This Court here clarifies, in case there is no interest shown for continuing with pregnancy, immediately after the 1st report of Committee the local Chief District Medical Officer should undertake the exercise of termination but in terms of the Medical Termination of Pregnancy Act, 1971. In case interest for termination is not shown then Police authority along with Chief District Medical Officer is to take care of both mother and child in womb involving pre-birth care and post-birth care for at least till a period of one year after birth takes place. Further in case of unmarried major and married major, procedure indicated hereinabove shall also be followed but however with consent of major girl. In case of termination of pregnancy, the C.D.M.O shall take DNA sample of child to ensure its handing over to Investigating Agency, so as to be forwarded to the concerned Court for requirement, if any, there in the criminal trial.

ii. To maintain secrecy of her pregnancy and termination, the State will ensure, if necessary, to handover such mother to remain in custody of Woman Rehabilitation Centre until her delivery and convalescence.

iii. In case victim and her mother wish to live in their own residence, they may do so but will be provided all medical help by the State Authority at the cost of the State.

iv. In required cases, the State will also permit the girl's mother to either live with her or regular visit to give moral and emotional support and all medical support will be extended by the State through such Institution.

v. In case of involvement of child through physically handicapped and/or mentally retarded woman subject to medical assessment that such mother is unable to take care of the child born provided there is no elder member coming forward to take care of such child, keeping in view the welfare of the child he or she may be taken care under the Juvenile Justice care mechanism involving agency engaged for such purpose and for about at least 12 months such child will not be given in adoption. This is, however, if there is nobody in the family to take care of such child in course of time.

vi. In the entire process, all concerned will ensure that secrecy of pregnancy, anonymity of the petitioner and the child to be born is maintained.

vii. In cases it shall equally be the responsibility of the applicant society to ensure that the child does not know about his/her mother and of course about the incident.

viii. There should be immediate grant of exgratia-cum-compensation subject to further grant of victim compensation involving the criminal trial.

ix. Considering such incidence occurring for failure of Law and Order Authority in case of requirement of high level treatment of rape victim or the child born in such process, the victim and/or the child will be provided the highest level of treatment at the cost of the State including the attendants journey, accommodation and fooding cost, if any.

x. Report of the Doctor or team of Doctor, as the case may be, obtained with all promptitude and any delay at the level of State

Authority shall lead to fixation of accountability and responsibility against all such involved.

xi. When a pregnant mother is required for examination by a Medical Board for the purpose of termination, it must include apart from Obstetrics and Gynecology also (i) Paediatrics, (ii) Psychiatry/Psychology, (iii) Radiology/Sonography, (iv) from field of Medicine with inclusion of tests involving foetus also Mental Health Care Act, 2017.

xii. Constitution and establishment as expeditiously as possible Medical Boards under the provisions of MTP Act, 1971, in each Districts to fasten examination and effective action involving such cases.

xii. District Level Committees to ensure that there are sufficient approved places in terms of Section 4(b) of the MTP Act, 1971 in each districts of the State of Odisha. Chief District Medical Officers involved undertake periodic instruction of such approved places following rule 6 of the MTP Rules, 2003 and take immediate measure to remove difficulties if any. State in its appropriate Departments will have the obligation to co-operate in such matters.

xiii. If a woman reports with a pregnancy resulting from an assault, she is to be given the report of undergoing an abortion and protocols for the Medical Termination of Pregnancy Act are to be followed. Further with preservation of products of conception (POC) be sent to proper custody as evidence and other required purpose under the direction of the Court of competent authority including DNA Test, if any.

xiv. There should also be strict following of User Handbook on Protection of Children from Sexual Offences Act, 2012.

18. This Court for the nature of the case involved herein and the assistance of both the learned counsel does not fail to record its appreciation of assistance to this Court by Sri Subash Chandra Puspalka, learned counsel for the petitioner and also Sri Bidesh Ranjan Behera, learned Additional Standing Counsel for the State and also appreciate the commitment of Sri Jyoti Prakash Pattnaik, learned Additional Government Advocate in his short appearance during course of hearing that looking to the amount of suffering of the victim, State is prepared to be abided by any direction given by this Court.

19. The Writ Petition succeeds in part, but however no cost.

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(Biswanath Rath, J.)

Orissa High Court, Cuttack.
The 23rd day of September, 2020/ **A. Jena, Sr. Steno**