

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO.15599 OF 2021

Sidra Mehboob Shaikh alias Sunita Raja Pramanik ... Petitioner
Vs.
State of Maharashtra and another ... Respondents

Ms Aditi Saxena a/w. Ms Rachita Padwal for Petitioner.
Ms Uma Palsuledesai, AGP for Respondent No.1-State.
Ms Purnima Awasthi for Respondent No.2.

**CORAM : UJJAL BHUYAN &
MADHAV J. JAMDAR, JJ.**

DATE : AUGUST 03, 2021

JUDGMENT and ORDER : (Per Ujjal Bhuyan, J.)

Heard Ms. Aditi Saxena, learned counsel for the petitioner;
Ms.Uma Palsuledesai, learned AGP for respondent No.1-State; and
Ms.Purnima Awasthi, learned counsel for respondent No.2.

2. By filing this petition under Article 226 of the Constitution of India, petitioner seeks a direction and / or permission for medical termination of her pregnancy on the ground that the pregnancy is having adverse impact on her mental health on account of continuing domestic violence.

3. On 22.07.2021, this Court directed Dean of Sir J. J. Group of Hospitals, Mumbai to constitute a medical board for examination of the petitioner particularly her mental capacity to proceed with the pregnancy. It was directed that report of the medical board be placed before the Court on the next date.

4. On 29.07.2021, medical board of Sir J. J. Group of Hospitals, Mumbai submitted medical report dated 27.07.2021. We had recorded in the order dated 29.07.2021 that as per report of the medical board,

petitioner has suffered mental distress due to marital discord. Medical board has opined that petitioner does not suffer from mental illness at present; she is of sound mind; that there is no evidence of mental incapacity to raise the child. Distress due to ongoing marital discord can be overcome through marital counselling which has been recommended.

5. Report of the medical board was furnished to learned counsel for the petitioner and the matter was deferred to today to hear submissions on behalf of the petitioner as well as the respondents.

6. Ms. Saxena, learned counsel for the petitioner has referred to the pleadings as well as documents placed on record and submits that petitioner was subjected to domestic violence by her husband in her matrimonial home. She has referred to medical report dated 13.06.2021 of the H.B.T. Medical College and Dr. R. N. Cooper General Hospital, Mumbai which recorded the assault on petitioner by her husband causing trauma to her face and abdomen. At that time itself petitioner had indicated her willingness to undergo medical termination of her pregnancy which was then in the 17th week. She has also referred to medical report dated 19.06.2021 of the same institution which also recorded history of the petitioner being subjected to assault by her husband and her willingness for undergoing medical termination of her pregnancy.

6.1. Learned counsel for the petitioner submits that in view of such domestic violence petitioner has filed a complaint before the competent magistrate on 18.06.2021 under the provisions of the Protection of Women from Domestic Violence Act, 2005. On a query by the Court, she submits that petitioner is in the process of filing petition for dissolution of marriage by decree of divorce. She has referred to earlier medical reports of Dr. R. N. Cooper Hospital which indicated the state of her mental health upon psychiatric examination. According to her, even if we carefully analyze the medical report dated 27.07.2021, it would be

evident that opinion of the medical board was not a unanimous one as Dr. Bela Verma, Professor & Head of Department of Pediatrics in her individual opinion has recommended medical termination of pregnancy as continuing with the pregnancy and child birth may jeopardize the mental health of the pregnant woman (petitioner).

6.2. Referring to the provisions of section 3(2)(b)(i) of the Medical Termination of Pregnancy Act, 1971 (briefly 'the Act'), she submits that a pregnancy may be terminated if continuance of the same would involve a risk of grave injury to the physical or mental health of the pregnant woman. This provision has to be read in conjunction with sub-section (3) of section 3 which mandates that in determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonable foreseeable environment. According to her, these provisions are required to be read into sub-section (1) of section 5 to make the provisions of the Act meaningful and reflective of the ground realities. Her submission is that the legislative intent is for a liberal and purposive interpretation and not a literal interpretation of the provisions of the statute so as to serve the objective of the Act.

6.3. Learned counsel for the petitioner has referred to and placed reliance on a number of judgments of the Supreme Court as well as of this Court in support of her submissions which will be adverted to in the course of the judgment.

7. *Per contra* Ms. Palsuledesai, learned AGP has relied upon the report of the medical board dated 27.07.2021 and submits that medical opinion is quite clear and unambiguous. As per the medical opinion, petitioner does not suffer from mental illness. All that she suffers is an emotional distress due to marital discord which can be overcome with the aid of marital counselling. For that reason, medical termination of pregnancy is not required.

7.1. Learned AGP has referred to explanation 2 to section 3 of the Act and submits that the legislature has clearly indicated as to what would constitute grave injury to the mental health of the pregnant woman. The said provision has to be construed strictly. Dwelling upon the language of the said provision she submits that if there is 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. Legislature has not indicated that a domestic dispute or a case of domestic violence may be presumed to constitute grave injury to the mental health of the married pregnant woman enabling her to have a right to terminate her pregnancy. In this connection, she has emphasized on the concept of *dominant state interest* which should be taken into consideration by the Court while considering a prayer by a pregnant woman for termination of pregnancy on the ground that continuation thereof would be prejudicial to her mental health as she suffers from domestic violence. According to her, termination of pregnancy can be allowed only if all the conditions mentioned in the Act are met. Termination of pregnancy because of marital discord or domestic violence is not a ground mentioned in the Act. She, therefore, submits that leave may not be granted to the petitioner for undergoing medical termination of the pregnancy and that the writ petition should be dismissed.

8. Ms. Awasthi, learned counsel for respondent No.2 supports the submissions made by Ms. Palsuledesai. On a query by the Court she submits that though the Medical Termination of Pregnancy (Amendment) Act, 2021 has been published in the Gazette of India, the same has not yet been notified by the central government and accordingly it has not yet come into force. However, she fairly submits that various Courts have taken note of the amendments brought in by the Amendment Act.

9. Submissions made by learned counsel for the parties have received the due consideration of the Court.

10. The Medical Termination of Pregnancy Act, 1971 (already referred to as 'the Act') has been enacted to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. As per the statement of objects and reasons, provisions regarding termination of pregnancy in the Indian Penal Code have virtually become *otiose*. Abortion was considered or looked at primarily from the prism of an offence. With expansion and improvement of health services, doctors were often confronted with gravely ill or dying pregnant women requiring operation. Therefore to liberalise existing provisions relating to termination of pregnancy, the aforesaid Act was conceived as a health measure to mitigate the following:

- where there is danger to the life or risk to physical or mental health of the woman;
- on humanitarian grounds, such as, when pregnancy arises from a sex crime; and
- on eugenic grounds where there is substantial risk that the child, if born, would suffer from deformities and diseases.

11. Section 3 of the Act deals with situations when pregnancies may be terminated by the registered medical practitioners. Section 3 is extracted hereunder:

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

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

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

12. On the other hand, section 4 deals with the place where pregnancy may be terminated.

13. Section 5 of the Act enumerates the situations when sections 3 and 4 would not apply. Section 5 is reproduced hereunder:

“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."

14. At this stage, we may mention that Parliament has enacted the Medical Termination of Pregnancy (Amendment) Act, 2021. As per section 3 of the Amendment Act, sub-section (2) is being substituted in the following manner:-

"(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 twenty weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical

practitioners are,

of the 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 any serious physical or mental abnormality.

Explanation 1.—For the purposes of clause (a), where any pregnancy occurs as a result of 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, the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.—For the purposes of clauses (a) and (b), where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

(2A) The norms for the registered medical practitioner whose opinion is required for termination of pregnancy at different gestational age shall be such as may be prescribed by rules made under this Act.

(2B) The provisions of sub-section (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board.

(2C) Every State Government or Union territory, as the case may be, shall, by notification in the Official Gazette, constitute a Board to be called a Medical Board for the purposes of this Act to exercise such powers and functions as may be prescribed by rules made under this Act.

(2D) The Medical Board shall consist of the following, namely:—

- (a) a Gynaecologist;
- (b) a Paediatrician;
- (c) a Radiologist or Sonologist; and
- (d) such other number of members as may be notified in the Official Gazette by the State Government or Union territory, as the case

may be.”

14.1. So as per the amended provision under clause (a) of sub-section (2) of section 3, the length of pregnancy allowed to be terminated has been extended to 20 weeks and as per clause (b) of sub-section (2) the length of pregnancy has been extended to 24 weeks.

14.2. Before proceeding further we may also mention that section 2(b) defines ‘mentally ill person’ to mean a person who is in need of treatment by reason of any mental disorder other than mental retardation.

14.3. From a reading of sub-section (2)(b)(i) of section 3 we find that a pregnancy may be terminated by a registered medical practitioner within the stipulated period if 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. Sub-section (3) says that in determining whether 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. Pausing here for a moment, we are of the view that while examining the expression ‘mental health’ of a pregnant woman it is also necessary to take note of such woman’s actual or reasonable foreseeable environment. In other words, while construing grave injury to the mental health of the pregnant woman what is also required to be taken into consideration is the actual or reasonable foreseeable environment surrounding the pregnant woman. While examining the same, certainly social and economic factors which may confront the pregnant woman presently or in the near future are important and relevant considerations.

14.4. That apart though section 2(b) defines ‘mentally ill person’ what finds mention in section 3(2)(b)(i) is ‘mental health’ which expression is not defined in the Act. As noticed above, ‘mentally ill person’ has been defined to mean a person who is in need of treatment by reason of any

mental disorder other than mental retardation. In other words, a person who suffers from any mental disorder other than mental retardation and who is in need of treatment would be construed to be a mentally ill person. But what then do we mean when we say mental health? As already mentioned, under the Act 'mental health' is not a defined expression. We, therefore, would have to look into its meaning as is understood in common parlance. World Health Organization (WHO) has defined 'mental health' as a state of well being in which every individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make contribution to his or her community. In other words, mental health is more than not having any symptoms of mental illness; its being able to deal robustly with life's challenges. Many individuals with poor mental health may not be formally diagnosed with any mental illness. Mental state of a person is a continuum with good mental health being at one end and diagnosable mental illness at the opposite end. Therefore, mental health and mental illness, although sound similar, are not the same.

14.5. *C.E.S.C. Limited Vs. Subhash Chandra Bose, (1992) 1 SCC 441* was a case relating to labour law. The question which came up for consideration before the Supreme Court was whether the right of the principal employer to reject or accept work on completion, on scrutinizing compliance with the job requirements, as accomplished by a contractor, the immediate employer, through his employees, is in itself an effective and meaningful 'supervision' as envisaged under section 2(9) of the Employees' State Insurance Act, 1948. Justice K. Ramaswamy in his dissenting opinion dwelt on the term 'health' and observed that the term 'health' implies more than an absence of sickness. In the context of that case, he observed that medical care and health facilities not only protect against sickness but also ensures stable manpower for economic development. He proceeded to hold that medical facilities are part of social security which would yield

immediate return in the increased production or at any rate reduce absenteeism on grounds of sickness etc. But what is of relevance to us is the description of health as a state of complete physical, mental and social well being and not merely the absence of disease or infirmity. Maintenance of health is a most imperative constitutional goal whose realisation requires interaction of many social and economic factors.

14.6. Therefore, mental health is more than just the absence of mental disorders or illness. Mental health is a state of well being in which an individual realizes his or her own potential, can cope with the normal stresses of life, can work productively and is able to contribute to his or her community. When we say that a person is in good mental health it would mean that he is mentally equipoised or is at a mental equilibrium. Thus, from the above analysis we can safely say that the expression 'mental health' is a wider concept encompassing within its fold the expression 'mental illness'. In that context we may say that the Legislature has consciously used the expression 'mental health' in section 3(2)(b)(i) in contradistinction to the expression 'mental illness' or 'mentally ill person'.

14.7. Sub-section (1) of section 5 does not provide for any time-limit for termination of pregnancy. It says that provisions of sub-section (2) of section 3 in so far it relates to length of pregnancy and opinion of not less than two registered medical practitioners shall not apply to the termination of 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.

15. At this stage, we would like to take note of the submission of learned AGP according to whom provisions of the Act are required to be strictly construed. Since she has referred to explanation 2 to section 3, let us briefly analyze the same. But before that let us advert to

explanation 1 as per which in a case where 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. Rape is an instance of extreme sexual violence on a woman. Domestic violence is also violence committed on a woman though the degree may be lesser. As per explanation 2 to section 3 where any pregnancy occurs as a result of failure of any device or method used by any 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. Like explanation 1, explanation 2 is also indicative. It indicates that even in a case of failed contraception, the anguish it may cause for the unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman. If contraception failure leading to pregnancy can be presumed to constitute grave injury to the mental health of the pregnant woman, can it be said that a pregnant woman suffering from domestic violence would not face grave injury to her mental health if pregnancy is allowed to continue in the face of continuing domestic violence with a grim foreseeable future?

16. In *XYZ Vs. Union of India*, **2019 (3) Bom.C.R. 400**, a Division Bench of this Court held that the provisions of the Act has to be given a purposive interpretation. Division Bench has opined that for the purposes of section 3(2) of the Act, the expression 'grave injury to the mental health' is used in a liberal sense by the legislature itself. Further, for determining whether continuance of pregnancy would involve risk of injury to mental health of the pregnant woman, account may be taken of the pregnant woman's actual or reasonable foreseeable environment. In fact, the aspect of a pregnant woman's actual or reasonable foreseeable environment has greater nexus to the aspect of mental health as compared to physical health. Division Bench proceeded to hold that this legislative liberality when it comes to expanding the concept of grave

injury to mental health cannot evaporate no sooner the ceiling of 20 weeks prescribed in section 3(2)(b) of the Act is exceeded. If the expression 'life' in section 5(1) of the Act is not to be confined to mere physical existence or survival, then permission will have to be granted under section 5(1) of the Act for medical termination of pregnancy which may have exceeded 20 weeks if the continuance of such pregnancy would involve grave injury to the mental health of the pregnant woman.

17. WHO has defined reproductive rights as those rights which are based on the recognition of the basic right of all individuals and couples particularly the women to decide freely and responsibly the number, spacing and timing of their children; to have the information and the means to do so and includes the right to attain the highest standard of sexual and reproductive health. Reproductive rights also include the right of the woman to take a decision concerning reproduction free of discrimination, coercion and violence. Coercion and violence need not always be physical. It can be deduced from surrounding circumstances. Thus reproductive rights are legal rights associated with accompanying freedoms relating to reproduction and reproductive health. Women's reproductive rights may include the right to legal and safe abortion, the right to birth control, freedom from coerced sterilization and contraception, the right to access good quality reproductive health care and the right and access to education in order to make free and informed reproductive choice. Therefore, the core issue is the control a woman has or exercises over her own body and reproductive choice. Control over reproduction is a basic need and a basic right of all women. Linked as it is to women's health and social status, it is from the perspective of poor women or women of rural areas that this right can be best understood.

18. In *Suchita Srivastava Vs. State*, (2009) 9 SCC 1, Supreme Court expressed the view that the right of a woman to have reproductive choice is an inseparable part of her personal liberty as envisaged under

Article 21 of the Constitution of India. She has a sacrosanct right to her bodily integrity.

19. Supreme Court in *X Vs. Union of India*, (2016) 14 SCC 382 considered the aforesaid provision and observed that the said provision deals with termination of pregnancies of different durations and the procedure contemplated thereof. Supreme Court in the said case, on perusal of Section 5, observed that termination of pregnancy which is necessary to save the life of the pregnant woman is permissible.

20. In that case, Supreme Court considered the report of the medical board which recorded a finding that the risk to the petitioner of continuation of her pregnancy of 24 weeks could gravely endanger her physical and mental health. In the light of the above, Supreme Court was satisfied that it was permissible to allow the petitioner to terminate her pregnancy which was in the 24th week in terms of section 5 of the Act. In view thereof liberty was granted to the petitioner to terminate her pregnancy if she was so advised.

21. In *Sarmishtha Chakraborty Vs. Union of India*, (2018) 13 SCC 339, Supreme Court was again confronted with the prayer made by the petitioners, husband and wife, for constituting medical board to assess the pregnancy of the wife and directing termination of the pregnancy, after the pregnancy had crossed the outer limit of 20 weeks. In that case, Supreme Court considered the report of the medical board which revealed that the mother i.e. petitioner wife would suffer mental injury if the pregnancy was continued and there would be multiple problems if the child was born alive. Medical board had arrived at the conclusion that in a special case of that nature, pregnancy should be allowed to be terminated even after 20 weeks. In the fact situation of that case, Supreme Court directed medical termination of pregnancy of the petitioner wife.

22. This issue cropped up again before the Supreme Court in *A Vs. Union of India*, (2018) 4 SCC 75. In that case also, petitioner sought for a direction to allow her to undergo medical termination of her pregnancy beyond 20 weeks as she apprehended danger to her life when she discovered that her fetus was diagnosed with severe defects which were untreatable and certain to cause the infant's death during or shortly after birth, which was also likely to endanger the mother's life. After evaluation of the report submitted by the medical board which stated that petitioner was in her 25th / 26th week of pregnancy, Supreme Court permitted the petitioner to undergo medical termination of her pregnancy.

23. In *High Court on its Own Motion Vs. State of Maharashtra*, 2017 Cri.L.J. 218, a Division Bench of this Court held that a woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. Unwanted pregnancy would undoubtedly affect her mental health as there are social, financial and other aspects immediately attached to the pregnancy. The above decision came on the backdrop of jail visit by a judicial officer where she found one inmate giving a requisition for obtaining permission to terminate her pregnancy on the ground that it would be very difficult for her to maintain and take care of her five-month old child if she gives birth to another child. It was in that context, the Division Bench held as follows:-

“13. A woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. To be pregnant is a natural phenomenon for which woman and man both are responsible. Wanted pregnancy is shared equally, however, when it is an accident or unwanted, then the man may not be there to share the burden but it may only be the woman on whom the burden falls. Under such circumstances, a question arises why only a woman should suffer. There are social, financial and other aspects immediately attached to the pregnancy of the woman and if pregnancy is unwanted, it can have serious repercussions. It undoubtedly affects her mental health. The law makers have taken care of helpless plight of a woman and have enacted Section 3(2)(b)(i) by incorporating the words "grave injury to her mental health". It is mandatory on the

registered medical practitioner while forming opinion of necessity of termination of pregnancy to take into account whether it is injurious to her physical or mental health. While doing so, the woman's actual or reasonable foreseeable environment may be taken into account.

14. A woman's decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child. These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.”

23.1. Proceeding further, the Division Bench observed that pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. How she wants to deal with such pregnancy is a decision she alone can make. The right to control the body, fertility and motherhood should be left to the woman alone. In so far the provision of section 3(2)(b)(i) is concerned, the Division Bench held that the said provision is an extension of the human right of a woman which needs to be protected. The right of exercise of reproductive choice though restricted by the Act, also recognizes and protects her right to say no to the pregnancy if her mental or physical health is at stake.

24. This judgment was also referred to and discussed at length in the later judgment of this Court in **XYZ Vs. Union of India** (*supra*). This Court held that the principle of narrow or literal construction cannot be adopted when it comes to interpretation of section 3(2) and section 5 of the Act. Rather, the principle of liberal or purposive interpretation is to be adopted. On such interpretation, Supreme Court has consistently permitted medical termination of pregnancies which had exceeded the

ceiling of 20 weeks where continuance of pregnancy involved grave injury to the mental health of the pregnant woman or where there was substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. On the question of compelling state interest, the Division Bench in paragraph 91 clarified that the issue of compelling state interest can perhaps arise in a case where circumstances set out in clauses (i) and (ii) of section 3(2) of the Act do not exist and yet the pregnant mother seeks medical termination of pregnancy whether within or beyond the ceiling limit. Division Bench further noted that the Act lays great emphasis on the grave injury to not just the physical but also to the mental health of the pregnant woman. The expression 'grave injury to her mental health' has to be liberally construed and while so construing account may be taken of the pregnant woman's actual or reasonable and foreseeable environment. Referring to section 3(3) of the Act this Court held that the expression 'pregnant woman's actual or reasonable foreseeable environment' is particularly relevant when it comes to dealing with cases of women from rural areas or rural background. Provisions of the Act have to be so construed so as not to impose any unreasonable or disproportionate burden on pregnant women who on account of circumstances set out in clauses (i) and (ii) of section 3(2)(b) of the Act seek medical termination of pregnancy even though the ceiling prescribed may have crossed. This Court held that in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India, it can permit petitioners to undergo medical termination of their pregnancies in contingencies set out in clauses (i) and (ii) of section 3(2) (b) of the Act even though the length of such pregnancies may have exceeded 20 weeks in certain circumstances and contingencies certainly include grave injury to mental health. The grant or refusal of such permission will be governed by varied factors, including but not restricted to the opinion of the medical board.

25. In *Shaikh Ayesha Khatoon Vs. Union of India* reported in **(2018) 3**

Bom.C.R. 399, a Division Bench of this Court took the view that the freedom of a pregnant woman of making a choice of reproduction which is an integral part of personal liberty, whether to continue with the pregnancy or otherwise cannot be taken away. Noting that the legislature has widened the scope of termination of pregnancy by including injury to mental health of the pregnant woman, it was held that if continuance of pregnancy is harmful to the mental health of a pregnant woman, then that is a good and legal ground to allow termination of pregnancy if all the conditions incorporated in legal provisions are met. Provisions of section 5 of the Act would have to be interpreted in a manner that advances the cause of justice.

26. In a recent judgment of this Court in *Siddhi Vishwanath Shelar Vs. State of Maharashtra* decided on 02.06.2020, petitioner had approached this Court seeking permission to undergo medical termination of pregnancy contending that it would be extremely difficult for her to carry the pregnancy to its full term along with the stigma of being an unwed mother. It was also contended that it would be difficult for her to maintain the child on account of her poor financial background and lack of mental support, besides not being mentally ready to be a mother at that stage. While granting the prayer of the petitioner in that case, this Court held that compelling state interest though is quite a weighty consideration, the same cannot be stretched to extreme extent when continuance of pregnancy beyond 20 weeks would involve a grave injury to the mother's physical or mental health. Scheme of the Act places the interest of the mother on a higher pedestal than the interest of the prospective child. It has been held as under:-

“90. In so far as the aspect of ‘compelling State interest’ is concerned, again, no doubt, this is quite a weighty consideration. But such consideration cannot be stretched to some extreme extent by insisting that the State has compelling interest even in saving a pregnancy where the potentiality of human life is almost extinct or where the child, if born, were to suffer from such physical or mental abnormalities as to be seriously handicapped. Similarly, there can also be no compelling State interest, in insisting

upon continuance pregnancy beyond 20 weeks where it would involve a grave injury to the mother's physical or mental health. The scheme of the MTP Act, even otherwise, places the interests of a mother on a higher pedestal than the interests of a prospective child. This is based on the logic that the fetus cannot have independent extra uterine existence and the life of the mother who independently exists, is entitled to greater consideration.”

27. Having surveyed the relevant legal provisions and the case laws, let us revert back to the facts of the present case.

28. It is not disputed that petitioner is a victim of domestic violence for which she has initiated appropriate proceedings. She is also seeking divorce from the husband. She has pleaded that in the event the child is born she would not receive the financial and emotional support of her husband and in the absence thereof, it would be difficult for her to raise the child as she does not have any source of income.

29. In so far the medical opinion is concerned, the medical board of Grant Government Medical College and Sir J. J. Group of Hospitals, Mumbai comprised of four doctors - (i) Dr. Preeti Frank Lewis, Associate Professor and Head of Unit, Department of Obstetrics & Gynaecology; (ii) Dr. Bela Verma, Professor and Head, Department of Pediatrics; (iii) Dr. V. P. Kale, Professor and Head, Department of Psychiatry; and (iv) Dr. Shilpa Domkundwar, Professor and Head, Department of Radiology.

29.1. In her observations, Dr. Preeti Frank Lewis recorded that petitioner was diagnosed with adjustment disorder with mixed anxiety and depressed mood at Cooper Hospital in July after her pregnancy was confirmed. However, she has not given any individual opinion either recommending or not recommending medical termination of pregnancy.

29.2. According to Dr. Bela Verma, if the pregnancy is continued to term, it can have normal outcome of baby but considering the mental

state of the mother, proceeding with the pregnancy may jeopardize her mental health. She, therefore, opined that medical termination of pregnancy can be done with due risk explained to the petitioner.

29.3. As per Dr. V. P. Kale, petitioner is suffering from emotional distress due to marital discord though she does not suffer from mental illness at present. The distress on account of marital discord can be overcome through marital counseling. Besides there is no psychiatric indication for medical termination of pregnancy.

29.4. Dr. Shilpa Domkundwar, after examination of the petitioner, recorded her impression that the fetus had no lethal congenital anomaly.

29.5. In the above circumstances, the medical board opined that it is advisable to continue with the pregnancy further clarifying that it is beyond the authority of the committee (medical board) to opine on any other cause apart from medical cause with regard to termination of pregnancy.

30. We have given our careful consideration to the opinion of the medical board. As we have discussed above, though the expression 'mental illness' is defined in the Act, in section 3(2)(b)(i) the legislature has not used the words 'mental illness' but has used the expression 'mental health'. Coupled with the provisions of sub-section (3) of section 3 what is required to be seen or examined is whether continuance of the pregnancy would lead to grave injury to the mental health of the pregnant woman and while determining the same, the pregnant woman's actual or reasonable foreseeable environment is required to be taken note of.

31. We have before us a married pregnant woman who says that she is suffering from domestic violence repeatedly. She has filed police complaint complaining against violence meted out to her by her husband, besides lodging complaint before the competent magistrate

under the provisions of the Protection of Women from Domestic Violence Act, 2005. The husband has indicated that he would not share the burden of raising the child rather we have been informed at the Bar that petitioner is taking steps for dissolution of her marriage by a decree of divorce. Besides she has no income of her own.

32. In such circumstances and taking an overall view of the matter, we are of the view that declining permission to the petitioner will tantamount to compelling her to continue with her pregnancy which in the circumstances will not only become extremely burdensome and oppressive on her but has the potential to cause grave injury to her mental health.

33. Accordingly, we grant liberty to the petitioner to undergo medical termination of her pregnancy in Dr. R. N. Cooper Hospital, Mumbai without any further loss of time.

34. Outcome of the procedure shall be informed to the Court on the next date.

35. Stand over to 11.08.2021.

(MADHAV J. JAMDAR, J.)

(UJJAL BHUYAN, J.)

Minal Parab