

ITEM NO.33

COURT NO.4

SECTION XIV

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No(s).12612/2022

(Arising out of impugned final judgment and order dated 15-07-2022 in CMA No. 30708/2022 passed by the High Court of Delhi at New Delhi)

X

Petitioner(s)

VERSUS

THE PRINCIPAL SECRETARY
HEALTH AND FAMILY WELFARE DEPARTMENT & ANR.

Respondent(s)

(IA No.98027/2022-EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT)

Date : 21-07-2022 This petition was called on for hearing today.

CORAM :

HON'BLE DR. JUSTICE D.Y. CHANDRACHUD
HON'BLE MR. JUSTICE SURYA KANT
HON'BLE MR. JUSTICE A.S. BOPANNA

For Petitioner(s) Dr. Amit Mishra, Adv.
Mr. Rahul Sharma, AOR

For Respondent(s) Ms Aishwarya Bhati, ASG
Ms. Deepabali Datta, Adv.
Mr. Ketan Paul, Adv.
Mr. Aman Sharma, Adv.
Mr. B.L.N. Shibani, Adv.
Mr. G.S. Makker, AOR

UPON hearing the counsel the Court made the following
O R D E R

- 1 Issue notice.
- 2 Ms Aishwarya Bhati, Additional Solicitor General, with Mr G S Makker, AOR, accepts notice on behalf of the second respondent.

- 3 We have heard Dr Amit Mishra, counsel appearing on behalf of the petitioner. We have requested Ms Aishwarya Bhati to assist the Court on the interpretative aspects of Section 3(2)(b) of the Medical Termination of Pregnancy Act 1971¹ and Rule 3B of the Medical Termination of Pregnancy Rules 2003².
- 4 The petitioner is a permanent resident of Manipur and is stated to be currently residing in Delhi. The petitioner has averred that she was in a consensual relationship and, in the month of June 2022 she learnt that she was pregnant. On 5 July 2022, an ultrasound scan revealed a single intrauterine pregnancy of a term of twenty-two weeks. The petitioner decided to terminate the pregnancy; her relationship has failed. She has stated that she is the eldest amongst five siblings and her parents are agriculturists. The petitioner has stated that she holds a BA degree and, in the absence of a source of livelihood, she would be unable to raise and nurture a child. She moved a writ petition before the High Court of Delhi.
- 5 The Division Bench of the High Court, by an order dated 15 July 2022, issued notice restricted only to prayer C of the petition, in which the petitioner has sought a direction for the inclusion of an unmarried woman within the ambit of Rule 3B of the MTP Rules for the termination of pregnancy in terms of the provisions of clause (b) of sub-section (2) of Section 3 of the MTP Act.
- 6 No notice has been issued by the High Court on prayer A or prayer B of the petition which effectively stand rejected.
- 7 For convenience of reference, prayers A, B and C of the petition before the High Court are extracted below:

“A. Permit the Petitioner to terminate her ongoing

1 “MTP Act”

2 “MTP Rules”

pregnancy through registered medical practitioners at any approved private or government center or Hospital before 15.07.2022 as her relief will be infructuous after that as the pregnancy will be of around 24 Weeks by that time;

- B. Restrain the Respondent from taking any coercive action or criminal proceedings against the Petitioner or any Registered Medical Practitioner terminating the pregnancy of the petitioner at any approved private center or hospital registered by Govt NCT of Delhi;
- C. Direct the Respondent to include unmarried woman also within the ambit of the Rule 3B of the Medical Termination of Pregnancy Rules 2003 (as amended on 21.10.2021) for termination of pregnancy under clause (b) of sub-section (2) Section 3 of the MTP Act, for a period of up to twenty-four weeks;

The petitioner has completed 24 weeks of her pregnancy on 18 July 2022.

8 Section 3 of the MTP Act reads as follows:

- “3. When pregnancies may be terminated by registered medical practitioners. -
- (1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.
 - (2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner, —
 - (a) where the length of the pregnancy does not exceed 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.
- (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."

9 Clause (a) of sub-section (2) of Section 3 permits the termination of pregnancy where the length of pregnancy does not exceed twenty weeks. Clause (b) permits termination where the length of pregnancy exceeds twenty weeks but does not exceed twenty four weeks for such categories of women "as may be prescribed by Rules made under this Act". However, an opinion must be formed by not less than two registered medical practitioners that *inter alia* "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".

10 Explanation 1 to Section 3 stipulates that for the purpose of clause (a), where a pregnancy has occurred as a result of a failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. Explanation 1 evidently qualifies clause (a) but not clause (b).

11 Rule 3B of the MTP Rules has been made in pursuance of the provisions of clause (b) of sub-section (2) of Section 3 of the MTP Act. Rule 3B is as follows:

"3B. Women eligible for termination of pregnancy up to twenty-four weeks.- The following categories of

women shall be considered eligible for termination of pregnancy under clause (b) of sub-section(2) section 3 of the Act, for a period of up to twenty-four weeks, namely:-

- (a) survivors of sexual assault or rape or incest;
- (b) minors;
- (c) change of marital status during the ongoing pregnancy (widowhood and divorce);
- (d) women with physical disabilities [major disability as per criteria laid down under the Rights of Persons with Disabilities Act, 2016 (49 of 2016)];
- (e) mentally ill women including mental retardation;
- (f) the foetal malformation that has substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped; and
- (g) women with pregnancy in humanitarian settings or disaster or emergency situations as may be declared by the Government.”

12 The High Court held that since the petitioner is an unmarried woman whose pregnancy arose out of a consensual relationship, her case is “clearly not covered” by any of the above clauses of Rule 3B and, as a consequence, Section 3(2)(b) is not applicable.

13 On the submission that Rule 3B, insofar as it excludes an unmarried woman, is violative of Article 14 of the Constitution, the High Court has issued notice on the writ petition. However, it held that as of the date of its order, it was not open to it to traverse beyond the provisions of Rule 3B in the exercise of the jurisdiction under Article 226 of the Constitution.

14 *Prima facie*, quite apart from the issue of constitutionality which has been addressed before the High Court, it appears that the High Court has taken an

unduly restrictive view of the provisions of clause (c) of Rule 3B. Clause (c) speaks of a change of marital status during an ongoing pregnancy and is followed in parenthesis by the words “widowhood and divorce”. The expression “change of marital status” should be given a purposive rather than a restrictive interpretation. The expressions “widowhood and divorce” need not be construed to be exhaustive of the category which precedes it.

- 15 The fundamental principle of statutory interpretation is that the words of a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intent of the legislature. Parliament by amending the MTP Act through Act 8 of 2021 intended to include unmarried women and single women within the ambit of the Act. This is evident from the replacement of the word ‘husband’ with ‘partner’ in Explanation I of Section 3(2) of the Act.
- 16 Explanation 1 expressly contemplates a situation involving an unwanted pregnancy caused as a result of the failure of any device or method used by a **woman or her partner** for the purpose of limiting the number of children or preventing pregnancy. The Parliamentary intent, therefore, is clearly not to confine the beneficial provisions of the MTP Act only to a situation involving a matrimonial relationship. On the contrary, a reference to the expression “any woman or her partner” would indicate that a broad meaning and intent has been intended to be ascribed by Parliament. The statute has recognized the reproductive choice of a woman and her bodily integrity and autonomy. Both these rights embody the notion that a choice must inhere in a woman on whether or not to bear a child. In recognizing the right the legislature has not intended to make a distinction between a married and unmarried woman, in her ability to make a decision on whether or not to bear the child. These rights, it must be underscored, are in consonance with the provisions of Article 21 of the

Constitution.

- 17 In this case, the petitioner submits that she was deserted by her partner at the last stage in June 2022 causing her immense mental agony, trauma, and physical suffering. Excluding unmarried women and single women from the ambit of the statute goes against the purpose of the legislation. The Statement of Objects and Reasons of the MTP Act seeks to *“liberalise certain existing provisions relating to termination of pregnancy ... (1) as a health measure—when there is danger to the life or risk to physical or mental health of the woman”*.
- 18 A comparison between the two provisions before and after the 2021 amendment is tabulated below:

MTP, 1971	MTP Amendment 2021
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.	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.

The above table shows that the phrase ‘married woman’ was replaced by ‘any woman’ and the word ‘husband’ was replaced by ‘partner’. But evidently, there is a gap in the law : while Section 3 travels beyond conventional relationships based on marriage, Rule 3B of the MTP Rules does not envisage a situation involving unmarried women, but recognizes other categories of women such as divorcees, widows, minors, disabled and mentally ill women and survivors of sexual assault or rape. There is no basis to deny unmarried women the right to medically terminate the pregnancy, when the same choice is available to other

categories of women.

- 19 A woman's right to reproductive choice is an inseparable part of her personal liberty under Article 21 of Constitution. She has a sacrosanct right to bodily integrity. In **Suchita Srivastava v Chandigarh Administration**³, this Court has recognized that a woman's right to reproductive autonomy is a dimension of Article 21 of the Constitution:

"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."

In **Justice K.S. Puttaswamy (Retd.) and Anr v. Union of India and Ors**,⁴ the decision of a woman to procreate or abstain from procreating has been recognized as a facet of her right to lead a life with dignity and the right to privacy under Article 21 of the Constitution:

"298. [p]rivacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised."

³ (2009) 9 SCC 1

⁴ (2017) 10 SCC 1

The Bombay High Court in **High Court on its Own Motion v. State of Maharashtra**,⁵ observed as follows:

“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”**

(Emphasis Supplied)

20 Denying an unmarried woman the right to a safe abortion violates her personal autonomy and freedom. Live-in relationships have been recognized by this Court. In **S Khusboo v. Kanniammal**,⁶ this Court observed that criminal law should not be weaponized to interfere with the domain of personal autonomy. It was observed:

“46. While there can be no doubt that in India, marriage is an important social institution, we must also keep our minds open to the fact that there are certain individuals or groups who do not hold the same view. To be sure, there are some indigenous groups within our country wherein sexual relations outside the marital setting are accepted as a normal occurrence. **Even in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in premarital sex. Notions of social morality are inherently subjective and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and criminality**

⁵ 2017 Cri LJ 218 (Bom HC); (2016) SCC OnLine Bom 8426

⁶ (2010) 5 SCC 600.

are not co-extensive.”

(Emphasis Supplied)

21 On the above premises, we are inclined to entertain the Special Leave Petition. In the meantime, we are of the view that allowing the petitioner to suffer an unwanted pregnancy would be contrary to the intent of the law enacted by Parliament. Moreover, allowing the petitioner to terminate her pregnancy, on a proper interpretation of the statute, *prima facie*, falls within the ambit of the statute and the petitioner should not be denied the benefit on the ground that she is an unmarried woman. The distinction between a married and unmarried woman does not bear a nexus to the basic purpose and object which is sought to be achieved by Parliament which is conveyed specifically by the provisions of Explanation 1 to Section 3 of the Act. The petitioner had moved the High Court before she had completed 24 weeks of pregnancy. The delay in the judicial process cannot work to her prejudice.

22 In the above background, we pass the following *ad interim* order:

- (i) We request the Director of the All India Institute of Medical Sciences, Delhi to constitute a Medical Board in terms of the provisions of Section 3(2D) of the Act, extracted in the earlier part of this order, during the course of 22 July 2022; and
- (ii) In the event that the Medical Board concludes that the fetus can be aborted without danger to the life of the petitioner, a team of doctors at the All India Institute of Medical Sciences shall carry out the abortion in terms of the request which has been made before the High Court and which has been reiterated both in the Special Leave Petition and in the course of the submissions before this Court by counsel appearing on behalf of the petitioner. Before doing so the wishes of the petitioner shall

be ascertained again and her written consent obtained after due verification of identity.

- 23 The report shall be furnished to this Court after compliance with this order within a period of one week thereafter.
- 24 For considering the report of the Medical Board, list the Special Leave Petition on 2 August 2022.
- 25 The *ad interim* direction of the High Court of Delhi declining to grant interim relief shall stand modified in the above terms.

(SANJAY KUMAR-I)
DEPUTY REGISTRAR

(SAROJ KUMARI GAUR)
COURT MASTER