

S. No. 218
Suppl. List

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH**  
**AT SRINAGAR**

**WP (C) No. 2321/2022**  
**CM No. 5821/2022**

**Ms. X (Minor)**

...Petitioner

Through: Mr. Vaseem Aslam, Advocate.

**Vs.**

**UT of J&K and others**

... Respondents

Through: Mr. Rais-ud-din Ganai, Dy. A.G.

**CORAM:**

**HON'BLE MR JUSTICE JAVED IQBAL WANI, JUDGE**

**ORDER**  
**21.10.2022**

1. In this Petition, filed under Article 226, the petitioner - a minor craves indulgence of this Court through her father in granting the following reliefs:

“a) Mandamus directing the respondents to permit “Ms. X” to terminate her ongoing pregnancy through registered medical practitioners at any approved private or government center or Hospital before 30.10.2022 as her relief will be infructuous after that as the pregnancy will be of around 24 weeks by that time.

b) Issue a writ, order or direction including one in the nature of prohibition, prohibiting/restraining the Respondents 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 Government of J&K;

c) Any other Writ, order or direction which this Hon'ble Court may deem fit and proper also be issued in favour of the Petitioner and against the Respondents.”

2. The background facts enumerated in the petition, under the cover of which the aforesaid reliefs are being claimed, are that the petitioner a minor came to be kidnapped and abducted and was subjected to rape. Upon

lodging of a missing report by her father with the concerned police on 10.11.2021, FIR No. 36/2021 under sections 363, 366-A, 109 IPC and 3 and 4 of the Protection of Children from Sexual Offence Act, 2012 got registered in Police Station Kral Khud, Srinagar. Petitioner would submit that upon being recovered by the concerned police, petitioner was handed to her parents, where after a medical checkup is stated to have been conducted. As per the petitioner, during the conduct of the ultrasound test on 16.10.2022, she was found to be pregnant by 22 weeks. It is next stated in the petition that petitioner's parents consented for termination of the aforesaid unwanted pregnancy, which, according to the petitioner, has been causing great mental, psychological and social stigma besides health danger to her and in this regard, she approached the Head of the Department, Gynecology, LD Hospital, Government Medical College, Srinagar, but the authorities there refused to undertake the process of termination of pregnancy, thereby leaving no option for the petitioner but to approach this Court through the medium of the present petition. The petitioner, while seeking the aforesaid reliefs in the petition, has referred to section 3 of the Medical Termination of Pregnancy (Amendment) Act, 2021 (for brevity Act of 2021) and Rules made thereunder.

3. Upon coming of this matter on 18.10.2022, this Court while displaying indulgence passed the following order which is reproduced hereunder:

*“Through the medium of the instant petition filed under Article 226 of the Constitution of India, the petitioner being father of minor victim of an alleged rape seeks termination of her pregnancy after the same is claimed to have been refused by respondents 2 and 3.*

*Before proceeding to deal with the matter on its merits it is deemed appropriate to have the victim examined by a Medical Board which shall upon examination of the victim make a report to this court as to whether the pregnancy could be terminated at this stage having regard to the health condition of the victim. The Medical Superintendent LD Hospital, Srinagar is directed to have the victim examined for the purpose by a Board and also have the victim examined by an expert psychologist and have his/her opinion in the matter as well.*

*Mr. Rais-u-Din Ganai, Dy. AG present on asking of the court enters appearance. Mr. Rais-u-Din Ganai is directed to convey the order passed by this court to Medical Superintendent LD Hospital, Srinagar who shall without any delay and fail have a Board as aforesaid constituted and victim examined on 20-10-2022 and make a report on the very same day to this court through Mr. Rais-u-Din Ganai, Dy. AG.*

*Learned counsel for the petitioner shall coordinate with Mr. Rais-u-Din Ganai and make the victim available for examination as and when directed by the Medical Superintendent LD Hospital, Srinagar. A copy of this order shall be furnished to Mr. Rais-u-Din Ganai under the seal and signature of the Bench Secretary.”*

4. Mr. Rais-ud-Din Ganai, Dy.A.G, appearing counsel for the respondents has produced a communication dated 20.10.2022 of the Medical Superintendent, Government Lalla Ded Hospital, Srinagar, along with a report of the Head of the Department, Gynae and Obst. Government Lalla Ded Hospital, Srinagar. Medical report / opinion of the team of experts seemingly comprised of 03 Gynecologists. The team, upon examination of the petitioner-victim on 20.10.2022, gave the following opinion:

“01. On examination, the general condition of the victim is satisfactory.

02. Patient is 23-24 weeks of pregnancy as per history examination and USG done at LD Hospital (USG attached).

03. Patient and her parents want pregnancy to be terminated as it is a cause of psychological trauma to them and there is social stigma associated to it.

04. As the patients gestational age is above 20 weeks, and is a teenage pregnancy which has a high risk of MTP.

05. MTP can be undertaken with extra risk consent given by guardians / parents.

06. FSL lab to be informed for collecting products of conception for further DNA analysis and paternity testing.”

5. Upon receipt of the aforesaid expert opinions / report, copies of which were furnished to learned counsel for the petitioner, who on the said basis would insist for grant of reliefs as prayed for in the petition. Learned counsel for the petitioner - victim in support of his case, while making his

submissions, referred to Section 3 of the MTP Act, as amended by the Medical Termination of Pregnancy (Amendment) Act 2021 [8 of 2021] which reads as under:

“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.”

6. While referring to 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’, the learned counsel would contend that the alleged pregnancy of the petitioner - victim, having been caused by the alleged rape, constitutes a grave injury to the mental health of the petitioner- victim and that the rider and restraint of 24 weeks, as provided in sub section 2(i) of section 3 of the Amended Act of 2021 is

relaxed under the provisions of section 5 of the Act of 2021 which according to the learned counsel is incorporated as an enabling provision beneficial to the pregnant woman seeking termination beyond aforesaid stipulated period. The counsel for the petitioner-victim, while reiterating the contentions urged in the writ petition and making the aforesaid submissions would also buttress the same, relying heavily on the judgement of the Apex Court reported in **2022 LiveLaw (SC) 621** titled as ***X v. Principal Secretary Health & Family Welfare Department*** and **(2016) 14 SCC 382**, titled as ***X v. Union of India & others*** **(2017) 7 SCC 289** titled as ***Sarmishtha Chakraborty & others v. Union of India Secretary & others*** : **(2017) 3 SCC 458** titled as ***X vs. Union of India & others***.

In order to demonstrate that the pregnancy of the petitioner-victim need to be terminated notwithstanding stipulation of 24 weeks placed as in some cases the Hon'ble Supreme Court allowed the same.

7. The legal position in such kind of a case fairly seems to be well settled by various decisions of the Apex Court including judgement supra referred by the counsel for the petitioner wherein the Apex Court allowed in specific IGH cases termination of pregnancy beyond aforesaid stipulated period. Reference in this regard is made to the judgements as under:

**(2018) 14 SCC 75** titled as ***A vs. Union of India***.

**(2018) 12 SCC 57** titled as ***Tapasya Umesh Prisal v. Union of India***.

**(2017) 14 SCC 525** titled as ***Indu Devi v. State of Bihar and Ors.***

**(2018) 11 SCC 572** titled as ***Z v. State of Bihar***.

8. The Apex Court in a recent judgement reported as **2022 LiveLaw (SC) 621** titled as ***X v. Principal Secretary Health & Family Welfare Department*** has finally observed as under:

*“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.”*

9. The Hon’ble Supreme Court also observed in paragraphs (9), (10) and (11) which reads thus:

“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 fetal 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.”

10. Analyzing the contentions urged by the petitioner-victim in the petition, Report filed by the respondents coupled with the aforesaid medical opinions and taking into account the aforesaid Judgments of the Apex Court, this petition can be disposed of in the following terms:

“The respondents 2 and 3 to undertake a fresh check up / examination of the petitioner-victim by a Medical Board including a Psychiatrist, a Radiologist as well and on the basis of opinion / report of the said Board, take a final call regarding termination of pregnancy of the petitioner-victim. Should the respondents 2 and 3 on the basis of said medical opinion/report decide to undertake termination of pregnancy of the petitioner-victim, necessary measures be also taken for preserving of DNA samples of the fetus. Needless to mention here that the petitioner-victim be provided appropriate free medical facilities in the event termination of pregnancy is undertaken.”

11. Disposed of.

**(JAVED IQBAL WANI)**  
**JUDGE**

**SRINAGAR**  
**21.10.2022**  
*Isaq*

Whether approved for reporting?      Yes / No.