

17.02.2022
Court No.13
Item No.18
sp

WPA 2513 of 2022
Smt. Nivedita Basu
Vs.
The State of West Bengal & Ors.

(Through Video Conference)

Ms. Sutapa Sanyal,
Mr. Subhajit Dan

... for the petitioner.

Mr. Amitesh Banerjee, Id. Sr. St. Counsel,
Mr. T.M. Siddiqui,
Mr. Nilotpal Chatterjee

...for the State

The writ petitioner has authorized her husband to affirm an affidavit on her behalf, since she has not been able to be present physically. She is however present virtually. She and her husband have been identified by her Advocate who is physically present in Court.

The husband has affirmed an affidavit today at 1.30 pm before the Oath Commissioner indicating that he and his wife, the petitioner, have carefully considered the medical report that has been forwarded to them by counsel for the State and their Advocate Ms. Sutapa Sanyal. It has also been averred that the petitioner and her husband are desirous of getting her pregnancy terminated medically.

The petitioner has orally indicated to this Court that she is aware of all medical consequences both on the child and herself if the pregnancy is taken to term and/or if the child is delivered prematurely.

The petitioner and her husband have both unequivocally submitted before this Court and on

affidavit that notwithstanding uncertainty in course of surgery of this nature, and notwithstanding the consequences on the health of the petitioner and future consequences clearly indicated in the medical report, they wish to proceed with termination of the pregnancy.

The affidavit is taken on record. A copy of the affidavit is made available to the counsel for the State.

The petitioner and her husband have unequivocally acknowledged before this Court that they shall not hold any medical practitioner, or any of the advocates including their own and any court of any consequences that may arise out of the procedure of medical termination of pregnancy.

This Court has carefully considered the medical report dated February 15, 2022 submitted by the Medical Superintendent-cum-Vice Principal, IPGMER-SSKM Hospital, Kolkata including therewith a medical opinion of a team of nine Senior Doctors. The report of the Medical Board is set out hereinbelow.

The Decision of the Medical Board called in accordance to the MSVP, Notice Memo No. SSKM/MSVP/156/2022, Dated, 14.02.2022 and in connection Hon'rd Court Order Dated, 11.02.2022 is as follows:

Mrs. Nivedita Basu, 36 years, primigravida has presented at 34 weeks 6 days of gestation with the USG report showing open spina bifida (lumbosacral myelomeningocele) with lemon sign (Arnold Chiari malformation) and severe ventriculomegaly (hydrocephalus).

Baby born with open defect in spinal cord with malformation of brain will need immediate spinal surgery and shunt surgery for enlarged head. Even after surgery the baby will likely to suffer from serious physical, neurological and developmental problems like paralysis of limbs, lack of bowel and bladder control, convulsion, cognitive delay and visual problems.

In any case, if the baby is born premature the complications of prematurity will further aggravate the clinical condition of the infant.

The board offers the option of admission in our SSKM Hospital at any time from today whenever the woman wishes. Subsequent procedure for termination of pregnancy will start only after admission. Mrs. Nivedita Basu with her husband were explained the different methods of termination of pregnancy at this stage including surgical intervention if pharmacotherapy fails. Whatever method is adopted as treatment has got its inherent complications for the mother including postpartum hemorrhage which may rarely lead to maternal mortality.

After delivery of the baby there is substantial chance that it will be born alive when the neonatologists are likely to offer palliative and supportive treatment.

The risk of premature delivery has also been explained to the couple. After explaining all the pros and cons the couple is allowed to take their own decision regarding date of admission and mode of therapy. Accordingly all the board members agree to convey the verdict of the board to the Hon'ble Court.

Sd/- Prof. S.C. Biswas Prof. & HOD Dept. of G&O IPGME&R-SSKM, KOL	Sd/- Prof. Utpalendu Das Prof. & HOD Dept. of Radiology IPGME&R-SSKM, KOL	Sd/- Prof. Supratim Datta Prof. & HOD Dept. of Ped. Med IPGME&R-SSKM, KOL
Sd/- Prof. S. Mukherjee Prof. & HOD Dept. of Neonatology IPGME&R-SSKM, KOL	Sd/- Prof. R. Sarkar Prof. & HOD Dept. of Ped. Surgery IPGME&R-SSKM, KOL	Sd/- Prof. G. Gangopadhyay Prof. & HOD Dept. of Neuro. Med IPGME&R-SSKM, KOL
Sd/- Dr. Anuradha Ghosh Assoc. Prof Dept. of G&O IPGME&R-SSKM, KOL	Sd/- Dr. Pradip Ghosal Assoc. Prof Dept. of Cardiology IPGME&R-SSKM, KOL	Sd/- Ms. Amrita Mitra Asst. Prof Dept. of Clinical Psychologist IPGME&R-SSKM, KOL

An unequivocal view expressed by such doctors is that the likelihood of a healthy child being born out of this pregnancy is remote. Even if a child is born, the chances of survival are slim. It is also opined that even if a child is born by medical intervention, it is likely to develop severe impairments and long term ailments and would have limited mortality.

The risks and consequences to the petitioner, that would follow in course of such procedure i.e. for

terminating of pregnancy at this stage have also been clearly indicated and the petitioner as well as her husband have carefully considered the same and have accepted such risks. It also appears that there is no serious risk to the life of the petitioner.

Ms. Sutapa Sanyal, learned counsel has cited two decisions. The first of which is in the case of ***Sarmishtha Chakraborty and another vs. Union of India Secretary and others*** reported in **(2018) 13 SCC 339**. This decision has been applied by the Division Bench of the Bombay High Court in the case of ***Shaikh Ayesha Khatoon vs. Union of India and others*** reported in **2018 SCC Online Bom 11**.

In ***Sarmishtha Chakraborty (supra)*** the Supreme Court has stated as follows at paragraphs 8 to 12.

“8. Mr A.K. Panda, learned Senior Counsel appearing for the Union of India has drawn our attention to two other orders, one passed in *Savita Sachin Patil v. Union of India* [*Savita Sachin Patil v. Union of India*, (2017) 13 SCC 436] and another in *Sheetal Shankar Salvi v. Union of India* [*Sheetal Shankar Salvi v. Union of India*, (2018) 11 SCC 606] . In *Savita Sachin Patil* [*Savita Sachin Patil v. Union of India*, (2017) 13 SCC 436] , the Court declined to grant permission by holding, thus: (SCC p. 438, paras 6-9)

“6. ... As regards the prognosis, the said medical report clearly does not and possibly cannot, observe that this particular foetus will have severe mental and physical challenges. It states that the “*baby is likely to have mental and physical challenges*”.

7. In the earlier part of the said medical report, there is no observation made by the aforesaid Medical Board that every baby with Down Syndrome has low intelligence, but it was observed that “*intelligence among people with Down Syndrome is variable and a large proportion may have an intelligence Quotient of less than 50 (severe mental retardation)*”.

8. In any case, it is not possible to discern the danger to the life of Petitioner 1 in case she is not allowed to terminate her pregnancy. In the facts and circumstances of the case, it is not possible for us to grant permission to Petitioner 1 to terminate the life of the foetus.

9. In view of the above, as it presently advised, we decline Prayer (a) of the petitioners for directing the respondents to allow Petitioner 1 to undergo medical termination of the pregnancy.”

(emphasis supplied)

9. In *Sheetal Shankar Salvi* [*Sheetal Shankar Salvi v. Union of India*, (2018) 11 SCC 606] , after perusing the report, the Court observed that there is no danger to mother's life and the likelihood that the baby may be born alive and survive for variable period of time, and, therefore, it would not be appropriate to allow Petitioner 1 to undergo medical termination of her pregnancy.

10. The orders [*Savita Sachin Patil v. Union of India*, (2017) 13 SCC 436] · [*Sheetal Shankar Salvi v. Union of India*, (2018) 11 SCC 606] which have been referred to by Mr Panda, in our considered opinion, rest on their own facts. Frankly speaking, cases of this nature have to rest on their own facts because it shall depend upon the nature of the report of the Medical Board and also the requisite consent as engrafted under the Medical Termination of Pregnancy Act, 1971.

11. In the instant case, as the report of the Medical Board which we have produced, in entirety, clearly reveals that the mother shall suffer mental injury if the pregnancy is continued and there will be multiple problems if the child is born alive. That apart, the Medical Board has categorically arrived at a conclusion that in a special case of this nature, the pregnancy should be allowed to be terminated after 20 weeks.

12. In *Suchita Srivastava v. State (UT of Chandigarh)* [*Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] , the Court has expressed the view that the right of a woman to have reproductive choice is an insegregable part of her personal liberty, as envisaged under Article 21 of the Constitution. She has a sacrosanct right to have her bodily integrity. The case at hand, as we find, unless the pregnancy is allowed to be terminated, the life of the mother as well as that of the baby to be born will be in great danger. Such a situation cannot be countenanced in Court.”

Applying the said dicta in the facts of the case particularly the medical report it is clear and explicit, that there are remote chances of the child being born out of the instant pregnancy surviving or leading ay normal life. The risks to the mother as well as the child are also highlighted in no uncertain terms.

Considering the entire gamut of facts and circumstances, this Court permits the petitioner to medically terminate her pregnancy at an authorized hospital and/or medical facility.

With the aforesaid observations, the writ petition is disposed of.

There shall be no order as to costs.

All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)