

GAHC010260582024



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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)(Suo Moto)/1/2024

IN RE - X
X

VERSUS

THE STATE OF ASSAM AND 3 ORS.
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
HEALTH AND FAMILY WELFARE DEPARTMENT
JANATA BHAWAN
DISPUR
GUWAHATI-781016

3:THE JOINT DIRECTOR OF HEALTH SERVICES
O/O THE JOINT DIRECTOR OF HEALTH SERVICES -CUM- MEMBER
SECRETARY
DISTRICT HEALTH SOCIETY
TINSUKIA
PIN-786125

4:THE CHAIRPERSON
CHILD WELFARE COMMITTEE
TINSUKIA
ASSA

Advocate for the Petitioner : MR. T J MAHANTA (SC, GHC),

Advocate for the Respondent : ,

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

ORDER

Date : 09.12.2024
(K.R. Surana, J)

Heard Mr. T.J. Mahanta, learned senior counsel and learned Amicus Curiae appointed in this matter, assisted by Ms. P. Sarma, learned counsel. Also heard Mr. D. Nath, learned Senior Govt. advocate appearing for the respondents.

2. This suo motu writ petition was registered on the basis of a news article appearing in the Times of India dated 29.11.2024, by which it came to the notice of this Court that a minor victim 'X' (name withheld), who was at the relevant time stated to be 14 years of age, was gang-raped by 7 people including 4 minors at a location in the district of Tinsukia. As per the newspaper report, the victim 'X' was 23 weeks pregnant at that time. In view of the minority of the victim, there is an apprehension that the unwanted pregnancy could lead to a substantial risk to the life of the victim, as well as the unborn foetus.

3. Accordingly, taking note of the provisions of section 3 and 4 of the Medical Termination of Pregnancy Act, 1971, and in light of the decision of the Supreme Court of India in the case of *A v. State of Maharashtra in (2024)*, 6 SCC 327, an administrative request was made to the Secretary, District Legal Services Authority (DLSA for short), Tinsukia, and accordingly, through a lady Para-Legal Volunteer, the parents/ guardian of the victim 'X', was approached on 03.12.2024, and they expressed their consent for a medical termination of the unwanted pregnancy of the victim 'X'. At the relevant time, when the Secretary

DLSA, along with paralegal volunteers, had visited the house of victim 'X' on 03.12.2024, she was not present at home as she was shifted to a certain shelter home. Therefore, in the morning of 04.12.2024, the said Para-Legal Volunteer along with the Secretary and other staff members of the DLSA, Tinsukia, visited the shelter home and when they met victim 'X', and her statement was recorded, whereby she has expressed her willingness for the termination of unwanted pregnancy.

4. As per the report of the Secretary of the DLSA, Tinsukia, a police case (particulars withheld) has been registered under section 376 DA/ 506 I.P.C. read with Section 6 of the POCSO Act, 2012.

5. This suo motu writ petition was listed on 05.12.2024, on which date, upon perusal of the report of the Secretary, DLSA, Tinsukia, a direction was issued that the Medical Board as provided under Section 3(2D) of the Medical Termination of Pregnancy Act, 1971 as well as the District Level Committee in terms of the proviso to Section 4 of the Medical Termination of Pregnancy Act, 1971, including the Chairman, Child Welfare Committee of the Tinsukia District, were required to have the victim 'X', examined by the Medical Board and to report as to whether it would be appropriate to have the unwanted pregnancy terminated with special emphasis to the risk involved in such a procedure.

6. The learned Senior Govt. advocate has produced a forwarding letter of the Child Welfare Committee, Tinsukia dated 07.12.2024 along with a report of the Joint Director of Health Services-cum- Member Secretary, District Health Society, Tinsukia dated 07.12.2024 in a sealed cover. The contents of the clinical examination report, after masking the name of the victim, the names of her parents, and the names of persons who were associated with the examination

as well as the place where the examination took place to prevent inadvertent disclosure of the identity of the victim 'X', is extracted below:

“Clinical Examination Report.

Place of Examination: xxxxx, Office premises of the xxxxx. Tinsukia.

Date and time of the Examination: 07 December, 2024, at 02:24 p.m.

Examination is done in presence of xxxxxx (Staff Nurse), xxxxx, Tinsukia

Informed consent of Parents was taken (Copy enclosed)

History, As stated by xxxx, 15 Years, daughter of xxxxx (Mother), xxxx (Father), she did not menstruate for last 6 months following history of alleged sexual assault. She could not say the date of her last menstrual period which is required to determine the durations of pregnancy.

On Examination :-Pulse rate is 80/mins., Blood Pressure 110/80 mm of Hg

Weight: 47 kg Height:-154 cm

Pallor:- Absent Oedema:- Absent

Icterus: Absent Chest:- Clear

C V S-Heart sounds are normal.

Obstetric Examination: Uterine size 24 + weeks

Fetal movement:-Present

Fetal Heart sound:- Present, 140/ min, regular

Ultra Sonography (USG) Report:- Single intra uterine live fetus of 23 weeks 04 days

(+/-14 days)

Date of USG Examination 19-11-2024

Place of (USG) Examination: Life Line Diagnostic Clinic, Doomdooma, Dist.- Tinsukia

Report [Copy enclosed].

Inference: From Clinical Examination, the duration of Pregnancy appears to be 26 weeks & USG report the duration of pregnancy is 23 weeks 04 days on 11-11- 2024. Hence on 07-12-2024 the duration of Pregnancy is 26 weeks 01 days. However, there may be a variation of +/- 14 days.

Regarding

1. Duration of Pregnancy:-By Clinical & USG:- more than 24 weeks.

2. Viability of Fetus:- Viable at 24 weeks.

3. Gross Fetal Anomalies: Not detected.

4. Regarding Fitness :- She is fit to undergo any Obstetrical procedure.

Final Report of Medical Board on direction of the Honorable Gauhati High Court " the victim to be examined by the Medical Board and to report as to whether it would be appropriate to have the unwanted pregnancy

terminated with special emphasis as to risk involved in such a procedure." Termination of Pregnancy of 24 weeks (+) period is not allowed as per MTP Act 1971 and the Amendments 2021. Therefore, the Medical Board cannot opine on termination of the unwanted pregnancy in context with the concerned case. Furthermore, the Fetus at 24 (+) weeks of pregnancy after termination may be viable.

Regarding risks involved in the termination process: Hemorrhage, Sepsis, future Infertility, Severe Morbidity and Mortality are recorded as unforeseen complications in the Standard Obstetrics Text Books as complication during and after termination."

7. From the hereinabove extracted report, we take note of the fact that as per the opinion of the Medical Board (MTP related) District Tinsukia, the victim 'X' is reportedly fit to undergo any obstetrical procedure. However, in view of the fact that under the Medical Termination of Pregnancy Act, 1971, termination of pregnancy of 24 weeks (+) is not allowed, no opinion was expressed on the termination of unwanted pregnancy. In this connection, we also take note of the fact that as per the opinion expressed in the clinical examination report, on clinical examination, the duration of pregnancy appears to be 26 weeks and as per the Ultra Sonography report, the duration of pregnancy appears to be 23 weeks 4 days as on 11.11.2024 and accordingly, on 07.12.2024, the duration of pregnancy is calculated at 26 weeks 1 day, with a possibility of variation of (+/-) 14 days.

8. The learned Amicus Curiae has submitted that there are certain degree of risk involved in every procedure for medical termination and he has further pointed out that the estimation of the duration of pregnancy is 26 weeks. Therefore, he urges that although the victim is stated to be fit to undergo any obstetrical procedure, if the Court allows such procedure to be adopted, the medical team should be so constituted that experts in the field should be requested to do the procedure.

9. The learned Senior Govt. advocate has submitted that in view of the prescription provided in the Medical Termination of Pregnancy Act, 1971, he is unable to concede to the prayer made by the learned Amicus Curiae for termination of pregnancy. However, he has submitted that as per the clinical examination report, there is apparently no complication reported.

10. The Court is conscious of the fact that the victim girl is a minor aged about 15 years now and she is presently carrying an unwanted pregnancy of more than 26 weeks. The Court is also conscious of the fact that at this stage, there is a threat of life to the victim 'X', if termination of pregnancy is carried out at this stage. However, comparing the present situation with the risk that the victim may undergo at the time of delivery at full term of pregnancy, the risk factor appears to be same at the present stage as well as the risk that would be involved at the time of delivery at full term of pregnancy.

11. We have also examined the question arising out of the prescription as provided in the Medical Termination of Pregnancy Act, 1971 relating to the termination of pregnancy. In this connection, on examination of the materials on record, it is seen that the medical termination of pregnancy is sought for in respect of the victim who is now stated to be 15 years as per the clinical examination report. We also take note of the fact that the pregnancy is alleged as a result of gang rape which the victim had suffered by 7 people including 4 minors. The victim is not even able to say when she had her last menstrual period and that it is a fact that she did not menstruate for last 6 months and therefore, as per the opinion of the Medical Board, the victim 'X' is suffering an unwanted pregnancy for more than 26 weeks. In this connection, we take note of the decision of the Supreme Court of India in the case of *A (mother of X) v. State of Maharashtra*, order dated 22.04.2024, passed in SLP (C) (Nos)

9163/2024, reported in (2024) 0 Supreme SC 368. In the said case, the High Court of Bombay had refused permission for the termination of unwanted pregnancy which the victim therein had suffered due to sexual assault. In the said case also, the victim was aged 14 years. Under the circumstances, taking note of the risk situation which the victim was facing there with 24 weeks pregnancy, the Supreme Court of India also took note of the risk which is involved at the time of delivery of the full term of pregnancy, observed and held as follows:

“9. In view of the urgency of the situation, we are inclined, while reserving judgment, to issue the following directions. We have duly borne in mind the provisions of the Medical Termination of Pregnancy Act 1971 [“MTP Act”] . This Court is inclined to exercise its powers under Article 142 of the Constitution. In a similar case which is reported as X v Union of India and Another, 2023 SCC Online SC 1338 this Court had adverted to its constitutional jurisdiction under Article 142.

10. The following circumstances have been borne in mind, at this stage:

- (i) The medical termination of pregnancy is sought in respect of a minor who is 14 years old;*
- (ii) The pregnancy is alleged to be an emanation from a sexual assault which has resulted in the registration of a First Information Report. The FIR was recorded on 20 March 2024 beyond the period of 24 weeks envisaged in the MTP Act;*
- (iii) The minor was unaware of the fact that she was pregnant until a very late stage;*
- (iv) The Medical Board at Sion Hospital has clearly opined that the continuation of the pregnancy against the will of the minor “may impact negatively on physical and mental well being of the minor who is barely 14 years old”; and*
- (v) While a certain degree of risk is involved in every procedure for medical termination, the Medical Board has opined that the threat to life of the patient if termination of pregnancy is carried out at this stage is not higher than the risk of delivery at full term of pregnancy.*

11. We will further elaborate on the guiding parameters in a reasoned order which will be delivered separately. However, bearing in mind the exigencies of the situation, the welfare of the minor, which is of paramount importance and her safety, we pass the following order:

- (i) The judgment and order of the High Court of Judicature at Bombay dated 4 April 2024 shall stand set aside for reasons to follow;*
- (ii) The Dean at Sion Hospital is requested to immediately constitute a team for undertaking the medical termination of pregnancy of the minor in respect of whom*

the Medical Board has submitted its report dated 20 April 2024;

(iii) Arrangements shall be made by the State for transportation of the minor to the Hospital and for her return home after the completion of the procedure;

(iv) The State has agreed to bear all the expenses in connection with the procedure and all medical expenses required in the interest of the safety and welfare of the minor; and

(v) Post-termination if any further medical care is required, this may be ensured in the interest of the minor.

12. Counsel for the State of Maharashtra shall communicate the gist of the order to the Dean at Sion Hospital immediately for compliance."

12. We are also conscious of the fact that the said order was passed by the Supreme Court of India by invoking the provisions of Article 142 of the Constitution of India. In this case, the unwanted pregnancy is now at 26 weeks and the degree of risk which is involved in every procedure for medical termination of pregnancy, at this stage or at the stage of delivery at full term of pregnancy, would be same. Therefore, the Court is of the considered opinion that this Court would not be powerless under Article 226 of the Constitution of India for ordering the medical termination of pregnancy.

13. As the medical termination of pregnancy would be carried out in terms of the order of this Court, it goes without saying that the penal provision of the Medical Termination of Pregnancy Act, 1971 and Rules framed thereunder would not be attracted.

14. In view of the nature of urgency, considering the tender age of the victim 'X' and the length of pregnancy, the Court is of the considered opinion that this is a fit case for ordering MTP i.e. Medical Termination of Pregnancy of an unwanted foetus which would be in best interest of the victim 'X' in view of her minority. Accordingly, we provide as under:

i. That the Medical Board (MTP related) District

Tinsukia along with the Child Welfare Committee, District Tinsukia are requested to immediately constitute a team of expert Medical Practitioners in the field for undertaking the medical termination of pregnancy of the minor 'X' in respect of whom the report of Medical Board dated 07.12.2024 has been forwarded to this Court.

ii. That the said Medical Board shall will also examine the facilities available in the Government/ Civil Hospital at Tinsukia or any other Private Hospital or Public Nursing Home at Tinsukia for undertaking the said procedure.

iii. It is also provided that in the event the Medical Board does not find the facilities in the district of Tinsukia to be adequate, the State would make arrangements for the transportation of the minor victim 'X' to the nearest Dibrugarh Medical College and Hospital as well as for her return home after the completion of the procedure.

iv. The State would bear all the expenses in connection with the procedure and all medical expenses required in the interest of the safety and welfare of the minor victim 'X'. The State shall also provide and extend all facilities for further medical care, post termination, if any, required. This is ordered to ensure the best interest of the minor victim X.

v. The district authorities shall also take the help of a counselor for the minor so as to assist the minor in the mental preparation to undergo the procedure as well as post counseling, if so required.

15. The learned Senior Govt. advocate shall expeditiously transmit the downloaded copy of this order to (1) the Child Welfare Committee, Tinsukia, (2) District Commissioner, Tinsukia, and (3) the Joint director of Health Services, Tinsukia to do the needful in immediate compliance of the order to save time that may be consumed in obtaining certified copies.

16. The Court Master shall also provide a copy of the report of the Medical Board to the learned Senior Govt. advocate as well as to the learned Amicus Curiae. The said clinical report shall kept in a seal cover envelope and made a part of record.

17. List this matter on 19.12.2024 for production of status report.

JUDGE

JUDGE

Comparing Assistant