
Ashaben Vs State of Gujarat and Others

Special Criminal Application (Quashing) No. 1919 of 2015

Court: Gujarat High Court

Date of Decision: April 16, 2015

Acts Referred:

Constitution of India, 1950 - Article 2, 21, 226#Medical Termination of Pregnancy Act, 1971 - Section 2, 3, 3(1), 3(2)(b), 3(2)(b)(ii)#Penal Code, 1860 (IPC) - Section 114, 312, 313, 314, 315

Citation: (2015) 4 Crimes 1

Hon'ble Judges: J.B. Pardiwala, J.

Bench: Single Bench

Advocate: Pratik B. Barot, for the Appellant

Final Decision: Dismissed

Judgement

J.B. Pardiwala, J.

Two questions of considerable importance - i.e.

- 1) Is the foetus a human being with a fundamental right to life? and
- 2) Does a woman have the right to choose whether or not to have an abortion?

fall for my consideration in this writ application filed by a victim of an alleged rape who is carrying pregnancy as on today of around 28 weeks.

1. By this writ application under Article-226 of the Constitution of India, the applicant - a victim of alleged rape, has prayed for the following

reliefs:

(A) to admit and allow this petition;

(B) to quash and set aside the impugned order dated 26.03.2015 passed by the learned Principal Civil Judge, Dhandhuka and further be pleased

to grant permission to the petitioner-victim to terminate the pregnancy as the continuance of the pregnancy would cause grave injury to the

petitioner-victim;

(C) pending admission, hearing and final disposal of this petition, the Honourable Court be pleased to grant permission to the petitioner-victim to

terminate the pregnancy as the continuance of pregnancy would cause grave injury to the petitioner-victim as pregnancy is of 26 weeks and 5 days

presently, in the interest of justice;

(D) to direct the respondent No. 2 i.e. the In-charge Medical Officer of the General Hospital, Sola to undertake necessary medical tests of the

petitioner-victim Ashaben w/o. Dineshbhai Jasubhai Talsaniya (Devipujak) about physical and mental fitness to undergo termination of pregnancy

as required under the Medical Termination of Pregnancy Act, 1971 and to submit report thereof to this Honourable Court with immediate effect

for its subjective satisfaction;

(E) to direct the respondent No. 3 i.e. Medical Superintendent, General Hospital, Sola, Ahmedabad to examine the petitioner victim Ashaben w/o.

Dineshbhai Jasubhai Talsaniya (Devipujak) by 2 registered medical practitioners so also the opinion formed in good faith with certification to be

reported to the Honourable Court as required under Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971;

(F) to pass such other and further relief/s that may be deemed fit and proper in the facts and circumstances of the case"".

2. The facts giving rise to this application are as under:--

2.1 The applicant - a married lady aged 23 and mother of two children lodged a First Information Report bearing C.R. I-10/2014 with the

Ranpur Police Station on 16/3/2015 for the offence punishable under Sections-366, 376(D), 354, 506(2), 323, 344 r/w sec. 114 of IPC inter alia

stating that on 13/7/2014 while she was outside her house on a road, all of a sudden one of the accused persons grabbed her from behind and

took her away forcibly. Later on six other accused persons joined the accused who had forcibly kidnapped the first informant and was kept in

unlawful confinement at different places for a period of about 9 to 10 months. During that period she was subjected to forcible sexual intercourse.

One day she got an opportunity to escape from the clutches of the accused persons while she was confined at a particular place at village

Sundariyana. After running away from the place of confinement she immediately called-up her mother and other relatives on phone. The mother

and the other relatives rushed at the place from where the first informant had called-up. Immediately thereafter she was taken back to her house. A

first information report thereafter was lodged by her at the Ranpur Police Station.

2.2 It is her case that on account of forcible sexual intercourse by seven accused she became pregnant and by the time she could lodge the FIR

and get herself freed from the clutches of the accused she was pregnant by 24 weeks.

2.3 It appears that after the registration of the FIR she expressed her desire before the Investigating Officer to get the pregnancy terminated. The

Circle P.I. of the Botad Circle filed an application dated 23rd March, 2015 addressed to the JMFC, Dhandhuka seeking permission for

termination of the pregnancy as prayed for by the victim. It also appears that the victim was forwarded to the General Hospital, Sola at

Ahmedabad for her medical examination and the medical examination revealed that there was a "single intrauterine Live foetus of 23 weeks and 3

days". In the certificate at Annexure-C it has been stated that although the patient requested for the termination of the pregnancy yet having regard

to the provisions of the Medical Termination of The Pregnancy Act the foetus could be aborted provided the same is upto 20 weeks in age. Since

the foetus in the case of the victim was of 24 weeks, the Doctor refused to terminate the pregnancy without any valid permission from the Court.

2.4 The Principal Civil Judge, Dhandhuka vide order dated 26th March, 2015 refused to accord the permission for termination of the pregnancy

having regard to the provisions of the law and the age of the foetus.

2.5 In such circumstances referred to above, the applicant has come-up with a fervent appeal that being a victim of rape she would not like to

continue with the pregnancy and deliver the child.

3. Abortion is an issue overshadowed and shrugged with glaring questions of morality, infanticide, suicide, ethics, religious beliefs and women's

rights. To what amplitude, abortion should be permitted, encouraged, restricted or repressed is a social issue that has effectively divided

theologians, philosophers, legislators and general mass. The laws governing this delicate sphere of the woman's autonomy reflects immensely on

the plight of woman in the society and encompasses emotive and poignant sets of views making it a mammoth task for the legislators to ensure that

the constitutional mandate of equality and liberty are adhered to and the constitutional spirit is kept alive. (see women's Right to Abort (2011) 10

SCC J-23)

3.1 P. Ramanatha Aiyer's The Law Lexicon, defines "abortion" as, the delivery or expulsion of the human foetus prematurely i.e. before it is yet

capable of sustaining life. The unlawful destruction or the bringing forth prematurely of the human foetus before the natural time of birth. To cause

an abortion is unlawful, unless it is done in good faith for the purpose of saving the life of the mother. A woman is considered to be with child as

soon as she becomes pregnant. Quickening is the name applied to peculiar sensations experienced by a woman about the fourth or fifth month of

pregnancy. As stated in Modi on Medical Jurisprudence and Toxicology, at the first perception of "quickening" or the foetal movement by the

mother, she is said to be "quick with the child", and occurs at any time between 18-20 weeks. This term arises from the old notion that a foetus

becomes endowed with life and secures an identity apart from the mother, when the movements are felt by the mother. However, causing

miscarriage of a woman "quick with child" is considered a much graver offence, than causing miscarriage of a woman "with child". So in former, the

prescribed punishment is imprisonment of either description for a term which may extend to seven years and a fine, whereas in the latter, the

prescribed punishment is imprisonment of either description for a term which may extend to three years or with a fine or both.

3.2 In India, abortion is illegal according to the provisions of the Indian Penal Code. Section 312 to Section 318 deal with the needful in the

following manner:

* Section 312 - the offence of causing miscarriage.

* Section 313 - causing miscarriage without women's consent.

* Section 314 - death caused by act done with the intent to cause miscarriage.

* Section 315 - acts done with intent to prevent child being born alive or to cause it to die after birth.

* Section 316 - causing death of quick unborn child by act amounting to culpable homicide.

3.3 Section 312 of the Indian Penal Code provides:

312. Causing miscarriage.--Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for

the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or

with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may

extend to seven years, and shall also be liable to fine.

Explanation.--A woman who causes herself to miscarry, is within the meaning of this section.

Under this section, voluntarily causing a woman with the child to miscarry is an offence if such miscarriage is not done in good faith for the purpose

of saving the life of the woman; and the offence is liable to additional punishment if the woman is quick with child.

4. The medical termination of pregnancy bill was passed by both the Houses of the Parliament and received the assent of the President of India on

10th August, 1971. It came on the Statute Book as ""The Medical Termination of Pregnancy Act, 1971"". This law guaranteed the right of woman in

India to terminate an unintended pregnancy by a registered Medical Practitioner in a hospital established or maintained by the Government or a

place being approved for the purpose of this Act by the Government. However, not all pregnancies could be terminated.

4.1 I may quote the relevant provisions of the sections 3, 4 and 5 of the Act, 1971.

SECTION 3 : When pregnancies may be terminated by registered medical practitioners

(1) Notwithstanding anything contained in the Indian Penal Code, 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 1. 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 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.

(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 3 [""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.

SECTION 4 : Place where pregnancy may be terminated.

No termination of pregnancy shall be made in accordance with this Act at any place other than-

(a) a hospital established or maintained by Government, or

(b) a place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government

with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee:

Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the

Government may specify from time to time.

SECTION 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, 1860 (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.

4.2 The provision of law, as comprised under Section 3(1) of the said Act, provides that notwithstanding anything contained in the Indian Penal

Code, 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 the said Act. Sub-section (2) of Section 3 of the said Act provides that

subject to the provisions of Sub-section (4), a pregnancy may be terminated by a registered medical practitioner, where the length of the

pregnancy does not exceed twelve weeks, if such medical practitioner is, or 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 - 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 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 provides that 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 provides that 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. Sub-section (3) thereof provides

that 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 reasonable foreseeable environment. Sub-section (4) provides that 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, and save as otherwise provided in Clause (a), no pregnancy shall be terminated

except with the consent of the pregnant woman.

4.3 Section 5 of the said Act, which is yet another section dealing with the pregnancy, in its Sub-section (1) provides that 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 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. Sub-section (2) provides that notwithstanding anything contained in the

Indian Penal Code, 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. Sub-section (3) provides that 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.

Sub-section (4) provides that 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 provides that for the

purpose of the said 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 the said Act. The

Explanation 2 provides that for the purpose of the said 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.

4.4 The above provisions of law comprised under the said Act clearly disclose the circumstances under which the pregnancy can be terminated.

Undoubtedly, Section 5 of the said Act relates to the right of a pregnant woman to terminate pregnancy in case it is found necessary to save her

life. Section 5 nowhere speaks of any right of a pregnant woman to terminate the pregnancy beyond 20 weeks on the ground of having conceived

on account of rape. It strictly restricts to the cases where the life of the pregnant woman would be in danger in case the pregnancy is not terminated

and does not refer to any other circumstances. Undoubtedly, the opinion in that regard has to be formed by a registered medical practitioner and

such opinion should be in good faith. The expression ""good faith"" discloses that the opinion has to be based on the necessary examination required

to form such an opinion.

4.5 As far as Section 3(2)(b)(ii) is concerned, it clearly speaks of the right to terminate the pregnancy where there is a substantial risk in allowing

the child to take birth as it would suffer from such physical or mental abnormalities as to be seriously handicapped. However, such right is

restricted to the maximum period of twenty weeks of pregnancy and not beyond it. Section 3(2)(b)(ii) is very clear in that regard. It also provides

that before opting for such pregnancy within the said period, it is necessary for two registered medical practitioners to form an opinion in good faith

for termination of the pregnancy. In case, the pregnancy has not exceeded twenty weeks, then such an opinion can be formed in good faith by any

one medical practitioner.

4.6 The Apex Court in the case of Suchita Srivastava and Another Vs. Chandigarh Administration, (Paras 10, 11, 12, 13, 15 and 30 of AIR) has

held as under:

20. In this regard we must stress upon the language of Section 3 of the Medical Termination of Pregnancy Act, 1971 [Hereinafter also referred to

as "MTP Act"] which 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 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 1.--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 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.

(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 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.

A plain reading of the above quoted provision makes it clear that Indian law allows for abortion only if the specified conditions are met.

21. When the MTP Act was first enacted in 1971 it was largely modelled on the Abortion Act of 1967 which had been passed in the United

Kingdom. The legislative intent was to provide a qualified "right to abortion" and the termination of pregnancy has never been recognised as a

normal recourse for expecting mothers.

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. Furthermore, women are also free to choose birth-control methods such as

undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its

full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling state interest" in

protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the

applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been

placed on the exercise of reproductive choices.

23. A perusal of the above mentioned provision makes it clear that ordinarily a pregnancy can be terminated only when a medical practitioner is

satisfied that a "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" [as per Section 3(2)(i)] or when "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" [as per Section 3(2)(ii)]. While the satisfaction of one medical practitioner is required for terminating

a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to

terminate a pregnancy between twelve to twenty weeks of the gestation period.

24. The explanations to this provision have also contemplated the termination of pregnancy when the same is the result of a rape or a failure of

birth-control methods since both of these eventualities have been equated with a "grave injury to the mental health" of a woman.

25. In all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This

position has been unambiguously stated in Section 3(4)(b) of the MTP Act, 1971.

26. The exceptions to this rule of consent have been laid down in Section 3(4)(a) of the Act. Section 3(4)(a) lays down that when the pregnant

woman is below eighteen years of age or is a "mentally ill" person, the pregnancy can be terminated if the guardian of the pregnant woman gives

consent for the same. The only other exception is found in Section 5(1) of the MTP Act which permits a registered medical practitioner to proceed

with a termination of pregnancy when he/she is of an opinion formed in good faith that the same is "immediately necessary to save the life of the

pregnant woman". Clearly, none of these exceptions are applicable to the present case.

27. In the facts before us, the State could claim that it is the guardian of the pregnant victim since she is an orphan and has been placed in

government-run welfare institutions. However, the State's claim to guardianship cannot be mechanically extended in order to make decisions about

the termination of her pregnancy. An ossification test has revealed that the physical age of the victim is around 19-20 years. This conclusively

shows that she is not a minor. Furthermore, her condition has been described as that of "mild mental retardation" which is clearly different from the

condition of a "mentally ill person" as contemplated by Section 3(4)(a) of the MTP Act.

31. As mentioned earlier, in the facts before us the victim has not given consent for the termination of pregnancy. We cannot permit a dilution of

this requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim. We

must also be mindful of the fact that any dilution of the requirement of consent contemplated by Section 3(4)(b) of the MTP Act is liable to be

misused in a society where sex-selective abortion is a pervasive social evil.

58. In our considered opinion, the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above

the age of majority. Since none of the other statutory conditions have been met in this case, it is amply clear that we cannot permit a dilution of the

requirement of consent for proceeding with a termination of pregnancy. We have also reasoned that proceeding with an abortion at such a late

stage (19-20 weeks of gestation period) poses significant risks to the physical health of the victim.

5. The Constitutional validity of The Medical Termination of Pregnancy Act, 1971 was a subject matter of challenge before a Division Bench of the

Rajasthan High Court on the ground of being unethical and violative of Article-21 of the Constitution of India.

6. While up-holding the constitutional validity of the Act, the Division Bench in the case of Nand Kishore Sharma and Others Vs. Union of India

(UOI) and Another, observed thus -

4. The issues relating to medical termination of pregnancy in common parlance known as "abortion" are indeed of public importance. Counsel for

the parties attempted to go into the length and breadth of the issue. In our opinion, however, the point for consideration lies in a narrow compass.

This Court is not supposed to enter upon a debate as to when foetus comes to life or the larger question touching upon the ethics of abortion. We

are merely concerned with the validity of the relevant provisions of the Act. At the outset, it may be mentioned that the petition was sought to be

argued as if the Act has been enacted to legalise abortions but from a bare reading of the relevant provision it would appear that Act aims at

termination of pregnancy in the interest of the woman or the to-be-born child. Section 3 may be quoted in extenso as under:

3. When pregnancies may be terminated by registered medical practitioners:--

(1) Notwithstanding anything contained in the Indian Penal Code, 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 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 lunatic,

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.

5. On a plain reading, it is manifest that Section 3 permits termination of pregnancy by registered medical practitioner(s) on being satisfied, in good

faith, that the continuance of pregnancy would involve a risk to the life of the pregnant woman or cause grave injury to her physical and mental

health; or that if the child were born, it would suffer from such physical or mental abnormalities as would render it seriously handicapped. As per

the Explanation, where pregnancy is caused by rape, the anguish of pregnancy is regarded as "grave injury to the mental health" of the pregnant

woman. If the pregnancy occurs as a result of failure of any device or method used by the woman or her husband for the purpose of limiting the

number of children, the anguish caused by such unwanted pregnancy is also treated as constituting "grave injury to the mental health" of the

pregnant woman.

6. It would appear that dominant object to achieve which the law has been enacted is to save the life of the pregnant woman or to relieve her of

any injury toward physical and mental health or prevent the possible deformities in the child - to be born. We find support from the Statement of

Objects and Reasons of the Act, the relevant portion of which reads as under:

There is thus avoidable wastage of the mother's health, strength and, sometimes, life. The proposed measure which seeks to liberalize certain

existing provisions relating to termination of pregnancy has been conceived (1) as a health measure - When there is danger to the life or risk to

physical or mental health of the woman; (2) on humanitarian grounds - Such as when pregnancy arises from a sex crime like rape or intercourse

with a lunatic woman, etc.; (3) eugenic grounds - Where there is substantial risk that the child, if born, would suffer from deformities and diseases.

7. The object of the Act being to save the life of the pregnant woman or relieve her of any injury to her physical and mental health, and no other

thing, it would appear the Act is rather in consonance with Article 21 of the Constitution of India than in conflict with it. While it may be debatable

as to when the foetus comes to life so as to attract Article 21 of the Constitution of India, there cannot be two opinion that where continuance of

pregnancy is likely to involve risk to the life of the pregnant woman or cause grave injury to her physical and mental health, it would be in her

interest to terminate the pregnancy.

8. The perusal of Section 3 also makes it clear that the Act does not give a carte blanche to any person, even a medical practitioner, to cause

termination of pregnancy. The Act provides in express terms that the pregnancy can be terminated upto twenty weeks and only by registered

medical practitioner. If the length of pregnancy exceeds twelve weeks upto twenty weeks, it can be terminated only if a Board of at least two

registered medical practitioners is of the opinion, in good faith, that the continuance of pregnancy involves risk to the life of the pregnant woman or

cause grave injury to her physical and mental health.

9. An important aspect of the case is that the termination of pregnancy is not something which is provided for the first time by the Medical

Termination of Pregnancy Act. Section 312 of the Indian Penal Code too protects termination of pregnancy described as miscarriage; if it is done

in good faith for the purpose of saving the life of the woman"". Similarly Section 315 of the Indian Penal Code protects any act done with intent to

prevent child from being born alive or causing it to die after its birth ""if such act has been done in good faith for the purpose of saving the life of the

mother"". To bring home the point, it would be useful to quote Sections 312 and 315 as under:--

Section 312. Causing miscarriage,- Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good

faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three

years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which

may extend to seven years, and shall also be liable to fine.

Section 315. Act done with intent to prevent child being born alive or to cause it to die after birth.--Whoever before the birth of any child does any

act with the intention of thereby preventing the child from being born alive or causing it to die after its birth, and does by such act prevent that child

from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother,

be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

10. It would not be out of place to mention that the deficiency in the Indian Penal Code as regards termination of pregnancy or abortion was

noticed in the Statement of Objects and Reasons in the following words:

The provisions regarding the termination of pregnancy in the Indian Penal Code which were enacted about a century ago were drawn up in

keeping with the then British Law on the subject. Abortion was made a crime for which the mother as well as the abortionist could be punished

except where it had to be induced in order to save the life of the mother. It has been stated that this very strict law has been observed in the breach

in a very large number of cases all over the country. Furthermore, most of these mothers are married women, and are under no particular necessity

to conceal their pregnancy.

11. Read in the context of Sections 312 and 315, IPC, it would appear that the object of the Act was to make the provisions relating to

termination of pregnancy stringent and effective rather than to permit blatant termination of pregnancy. Section 312 of the IPC made causing

miscarriage an offence except in good faith for the purpose of saving the life of the woman without laying down the manner in which pregnancy

could be medically terminated. Section 3 of the Act provides the guidelines or limitation within which the pregnancy could be terminated.

7. As I am considering the issue of the right to life of foetus, I deem it appropriate to quote a West German Constitutional Court decision in the

abortion reform law case (1975) 39 B Verf GE. In the said case the West German Constitutional Court laid down the following proposition:

(1) "Everyone" in Article 2 includes an unborn being;

(2) Human life exists in embryo from the fourteenth day of the conception;

(3) It is the duty of the State to protect and promote the life of the foetus and defend it from unlawful interference by other person;

(4) The right of development accrues in the foetus from the mother's womb and is not complete even after birth;

(5) If the foetus was considered only as a part of the maternal organism, the termination of pregnancy would remain entirely in the sphere of private

life, not warranting public interferences. But because the foetus is "an autonomous human being" under the protection of the Constitution, the

termination of pregnancy has a social dimension which demands public regulation;

(6) The Constitution also protects a woman's right to free development of her personality, which includes freedom to decide against parenthood.

But this right is not guaranteed without limitations. The right of others, the constitutional order, and the moral code all restrict it;

(7) A compromise which guarantees both the protection of foetus as well as the freedom of abortion of a pregnant woman is impossible because

the termination of pregnancy always means "destruction of unborn life". The legal order cannot, therefore, make a woman's self-determination, the

principle of its regulations. On the other hand, the protection of foetus must be given priority to the woman's right of self-determination;

(8) The State is to effectively fulfil its duty to protect the "developing life". In discharging this duty the State is to make a reasonable adjustment

between unborn right to life and the woman's right to her own life and health. The unborn's right to life can lead to burdens for the woman which

sharply exceed those of a normal pregnancy. In such a case, the State may exempt the pregnant woman from punishment for destroying the foetus

where there is necessity to protect the pregnant woman from a threat to her life or a threat of a serious impact on her health or other cases, where

the burden is extraordinary; and

(9) The duty of the court is not to put itself in the legislator's place, but to determine whether the legislator has fulfilled its duty to protect the

developing life"" and made a reasonable adjustment between the right of the unborn and the right of the pregnant woman. (see D.D. Basu,

Commentary on Constitution of India, Vol. III Edn, 2008 3143)

8. Roe v. Wade 35 L Ed 2d 147 : 410 US 113 (1973) became one of the most politically significant decisions of the Supreme Court of the United

States. This is a landmark United States Supreme Court decision establishing that most laws against abortion violate a constitutional right to

privacy, thus overturning all State laws restricting the abortion that were inconsistent with the decision. Jone Roe, wanted to terminate her

pregnancy because she contended that it was a result of rape. Relying on the then current state of medical knowledge, the decision established a

system of Trimesters that attempted to balance the State's legitimate interests with the individual constitutional rights. The Court ruled that the State

cannot restrict a women's right to an abortion during the first trimester, the State can regulate the abortion procedure during the second trimester

in ways that are reasonably related to maternal health"" and in the third trimester, demarketing the viability of the foetus, a State can choose to

restrict or even to prescribe abortion as it would deem fit. It was held that ""the childbirth endangers the lives of some women, voluntary abortion

"at any time and place" regardless of medical standards would impinge on a rightful concern of the society. The woman's health is part of that

concern as is the life of the foetus after quickening. These concerns justify the State in treating the procedure as medical one.

8.1 The Supreme Court of Canada, interpreted Article 7 of the Canadian Charter which guarantees an individual's right to life, liberty and freedom

and security of a person. In the leading case of Morgentalor Smoling and Scott v. R (1988) 44 DLR (4th) 385, the Court focused on the bodily

security of the pregnant women. The Criminal Code of the country required a pregnant woman who wanted an abortion to submit an application to

a therapeutic committee, which resulted in delays. The Supreme Court found that such a procedure infringed the guarantee of security of a person.

This subjected the pregnant woman to psychological stress.

8.2 The Abortion Act, 1967 of the UK also in its Article 2 does not confer an absolute right to life to the unborn. It was so held in Paton v. United

Kingdom (1980) 3 EHRR 408. Abortion is permitted if the continuance of the pregnancy involves risk. The right to life of foetus is subject to an

implied limitation allowing the pregnancy to be terminated in order to protect the life of a mother. The same was upheld in H v. Norway ((1992) 73

DR 155)

8.3 I may quote with profit a decision of the Supreme Court in the case of Dr Jacob George Vs. State of Kerala, , in which the Supreme Court

observed as under:

1. Life is said to be the most sublime creation of God. It is this belief and conception which lies at the root of the arguments, and forceful at that,

by many religious denominations that human beings cannot take away life, as they cannot give life. This idea is so intense with some religious

leaders that they would even oppose any measure of birth control. Abortion or miscarriage would be opposed with greater force by these persons.

2. Mahatma Gandhi, Father of the Nation, urged long back in Harijan that God alone can take life because He alone gives it. For the Jains taking

away of even animal life is a sin, as, according to them, animals are as much part of God as human beings. Buddhists too preach Ahimsa.

3. Our Rig Veda II recites:

Grant us a hundred autumns that we may see the manifold world.

May we attain the long lives which have been ordained as from yore." Atharva Veda I contains the following:

May we be enabled to see the sun for a long time.

The aforesaid shows that life is beyond price and it is not only a legal wrong, but a moral sin as well, to take away life illegally.

4. in the present appeals we are not concerned with taking away of life before its birth. We are concerned with destruction of foetus life. This is

what is known as abortion or miscarriage. To dispel any doubt as to whether the foetus has a life, what has been stated by Taylor in his Principle

and Practice of Medical Jurisprudence may be noted where the learned author has opined at p. 332 (13th Edn.) that legally both abortion and

miscarriage are synonymous because the foetus being regarded as a "human life... from the moment of fertilisation". It may, however, be stated that

sometimes the word "miscarriage" is used for "spontaneous abortion" and "abortion" for "miscarriage produced by unlawful means".

5. This distinction is, however, not material for our purpose because Section 312 of the Penal Code speaks about causing of miscarriage and

Section 314 punishes the person who has intent to cause miscarriage of a woman and while doing so causes the death of such woman. It is under

this section that the appellant has been found guilty by the High court of Kerala after setting aside the acquittal order of the learned Assistant

Sessions Judge. For the offence under Section 314, the appellant has been sentenced RI for 4 years and a fine of Rs. 5,000.00. The High court

had also taken suo motu cognizance against the order of acquittal and it is because of this that along with the criminal appeal filed by the State

which was registered as Criminal Appeal No. 415 of 1989 the High court disposed of Cr.R.C. No. 44 of 1989, which is relatable to its own

action. So, two aforesaid appeals have been preferred by the appellant. It may be stated that out of fine of Rs. 5,000.00 as awarded, a sum of Rs.

4,000.00 was directed to be paid to the children of the deceased towards compensation for loss of their mother, in case of realisation of fine.

6. Our law-makers had faced some difficulty when our Penal Code was being enacted. The authors of the Code observed as below while enacting

Section 312:

With respect to the law on the subject of abortion, we think it necessary to say that we entertain strong apprehension that this or any other law on

that subject may, in this country, be abused to the vilest purposes. The charge of abortion is one which, even where it is not substantiated often

leaves a stain on the honour of families. The power of bringing a false accusation of this description is therefore a formidable engine in the hands of

unprincipled men. This part of the law will, unless great care be taken, produce few convictions but much misery and terror to respectable families,

and a large harvest of profit to the vilest pests of society. We trust that it may be in our power in the Code of Criminal Procedure to lay down rules

which may prevent such an abuse. Should we not be able to do so, we are inclined to think that it would be our duty to advise his Lordship in

council rather to suffer abortion, where the mother is a party to the offence, to remain wholly unpunished, than to repress it by provisions which

would occasion more suffering to the innocent than to the guilty.

So what finds place in the aforesaid section is the result of very mature and hard thinking and we have to give full effect to it.

7. After the enactment of the Medical Termination of Pregnancy Act, 1971, the provisions of the Penal Code relating to miscarriage have become

subservient to this Act because of the non obstante clause in Section 3, which permits abortion/miscarriage by a registered practitioner under

certain circumstances. This permission can be granted on three grounds:

(i) Health when there is danger to the life or risk to the physical or mental health of the woman;

(ii) humanitarian such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman;

(iii) eugenic - where there is substantial risk that the child, if born, would suffer from deformities and diseases.

(See Statement of Objects and Reasons).

8. The above shows that concern for even unborn child was evinced by the legislature, not to speak of hazard to the life of the woman concerned.

8.4 The religious, moral and cultural sensibilities continue to influence the abortion laws throughout the world. The right to life, the right to liberty,

and the right to security of person are major issues of human rights that are sometimes used as justification for the existence or the absence of laws

controlling abortion. Many countries in which abortion is legal require that certain criteria be met in order for an abortion to be obtained, often, but

not always, using a trimester-based system to regulate the window in which abortion is still legal to perform. In many debates, arguments presented

in favour of or against abortion focus on either the moral permissibility of an induced abortion, or justification of laws permitting or restricting

abortion. The arguments on morality and legality tend to collide and combine, complicating the issue at hand. Abortion debates, especially

pertaining to abortion laws, are often spearheaded by advocacy groups belonging to one of the two camps. Most often those in favour of legal

prohibition of abortion describe themselves as pro-life while those against legal restrictions on abortion describe themselves as pro-choice. Both

are used to indicate the control principles in arguments for and against abortion: ""Is the foetus a human being with a fundamental right to life"" for

pro-life advocates, and, for those who are pro-choice. ""Does a woman have the right to choose whether or not to have an abortion"". (see ""Right to

Abortion"" by Manisha Garg)

9. Mr. Pratik Barot, the learned counsel appearing for the applicant made a fervent appeal for issuing directions for permitting the pregnancy of the

applicant to be terminated for the same having been caused against her wishes and because of rape. Mr. Barot further submitted that the husband

of the applicant has also disowned her and at any cost wants the wife to get the pregnancy terminated.

10. On the other hand, Mr. Mitesh Amin, the learned Public Prosecutor and Mr. N.J. Shah, the learned Additional Public Prosecutor appearing

for the State vehemently opposed this application and submitted that even assuming for the moment that the pregnancy is on account of an act of

rape, still the law does not permit the termination of the pregnancy if the foetus is of more than twenty weeks. It was submitted that whatever may

be the ultimate outcome, the applicant will have to deliver the child. Mr. Amin, the learned Public Prosecutor submitted that the State would take

care of the applicant so far as delivery of the child is concerned and if she is disowned ultimately by the husband and her family members, then the

State would see to it that the applicant is provided adequate shelter and protection with the necessary financial aid.

11. Having heard the learned counsel for the parties and having gone through the materials on record, I find myself unable to grant the relief as

prayed for mainly for two reasons.

11.1 First, Considering the background facts and pendency of investigation I am not in a position to directly come to the conclusion that it had

been a matter of rape. Secondly, for the time being I leave this aspect of rape aside. Assuming that the pregnancy for whatever reason had been

against the wish and desire of the applicant, the intriguing aspect in the present case is that by the time the applicant chose to file this writ petition

i.e. on 31/3/2015, the pregnancy had been of about 27 weeks as is borne out from the medical reports. Although it is the case of the applicant that

since she was in unlawful confinement of the accused persons she had no opportunity to get the pregnancy terminated within the statutory time

period as provided in the Act, yet I am unable to accept such submission as the law does not permit the termination of pregnancy beyond 20

weeks except in cases where the life of the mother is in danger.

11.2 The learned counsel for the applicant strenuously contended that when read in the context of the Explanation-1 to Section-3, where

pregnancy caused by rape is said to be of grave injury to the mental health of a pregnant woman, the same aspect must ipso facto ought to have

been made applicable to the provisions of Sec. 5 of the Act of 1971 too whereby the pregnancy could be terminated if required immediately in

order to save the life of the pregnant woman. Mr. Barot wants this Court to read something on the statute which the legislature has not thought fit

to provide.

11.3 A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a

distress resulting from its operating. A statute must of course be given effect to whether a court likes the result or not.

11.4 I may quote with profit a decision of the Supreme Court in the case of Rohitash Kumar and Others Vs. Om Prakash Sharma and Others, .

22. The Court has to keep in mind the fact that, while interpreting the provisions of a Statute, it can neither add, nor subtract even a single word.

The legal maxim ""A Verbis Legis Non Est Recedendum"" means, ""From the words of law, there must be no departure"". A section is to be

interpreted by reading all of its parts together, and it is not permissible, to omit any part thereof. The Court cannot proceed with the assumption

that the legislature, while enacting the Statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said;

even if there is some defect in the phraseology used by it in framing the statute, and it is not open to the court to add and amend, or by

construction, make up for the deficiencies, which have been left in the Act. The Court can only iron out the creases but while doing so, it must not

alter the fabric, of which an Act is woven. The Court, while interpreting statutory provisions, cannot add words to a Statute, or read words into it

which are not part of it, especially when a literal reading of the same, produces an intelligible result. (Vide: Nalinakhya Bysack Vs. Shyam Sunder

Haldar and Others, ; Sri Ram Ram Narain Medhi Vs. The State of Bombay, ; M. Pentiah and Others Vs. Muddala Veeramallappa and Others, ;

Balasinor Nagrik Cooperative Bank Ltd. Vs. Babubhai Shankerlal Pandya and Others, ; and Dadi Jagannadham Vs. Jammulu Ramulu and Others,

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23. The Statute is not to be construed in light of certain notions that the legislature might have had in mind, or what the legislature is expected to

have said, or what the legislature might have done, or what the duty of the legislature to have said or done was. The Courts have to administer the

law as they find it, and it is not permissible for the Court to twist the clear language of the enactment, in order to avoid any real, or imaginary

hardship which such literal interpretation may cause.

11.5 I am conscious of the fact that to carry a child in her womb by a woman as a result of conception through an act of rape is not only extremely

traumatic for her but humiliating, frightening and psychologically devastating and as a human being, more particularly in the Indian society she

becomes an object of scorn and ostracisation. This is very unfortunate. However, at the same time, assuming for the moment that termination at this

stage is permissible, there would be likelihood of danger to the life of the applicant in case of carrying-out termination of pregnancy. If labour is

induced for carrying-out termination of pregnancy, in every possibility the same would result in a live birth of a new born as the maturity of foetus is

28 weeks.

12. I may only say having regard to the peculiar facts and circumstances of the case that the applicant will have to bravely go ahead with the

pregnancy and when time comes, she should deliver the child. I am conscious of the fact that it is easy for a judge to say so in his judgment

because it is ultimately the applicant who will have to face the hard days ahead, but as observed above, howsoever harsh one may find the law, yet

it remains the law and one has to respect it. She must understand that termination at this stage will put her own life in peril. I can only remind her of

what Helene Evans, a victim of rape, had to say in these type of situations. I quote ""After the abortion, I wanted to die. How could I live when I

had just ended the life of my child? The negative feelings resulting from the rape were not eliminated by the abortion. Nothing was solved; instead,

the grief was now doubled.

13. I may also quote a short extract from an article ""rape, incest and abortion; searching beyond the myths by David C. Reardon Ph.D. "" Finally

we must recognize that children conceived though sexual assault also deserve to have their voices heard. Rebecca Wasser-Kiessling, who was

conceived in a rape, is rightfully proud of her mother's courage and generosity and wisely reminds us of a fundamental truth that transcends

biological paternity. ""I believe that God rewarded my birth mother for the suffering she endured, and that I am a gift to her. The serial rapist is not

my creator, God is.

Similarly, Julie Makimaa, who works diligently against the perception that abortion is acceptable or even necessary in cases of sexual assault,

proclaims. ""it doesn't matter how I began. What matters is who I will become.

14. In the result, this application fails and is hereby rejected. However, I would like to issue few directions in the matter;

(i) The District Superintendent of Police, Botad shall take over the investigation of the first information report bearing No. C.R. No. I-10 of 2015

registered with the Ranpur Police Station and see to it that it is completed at the earliest in accordance with law. I am told that out of the seven

persons named as an accused in the first information report, three have been arrested, whereas the other four are yet not arrested and are

absconding. All steps should be taken to see that the other four co-accused are arrested at the earliest.

(ii) The Collector, Botad shall personally look into the matter and keep a close watch on the applicant and her family members including the

husband of the applicant. The Collector shall ensure that proper medical facilities are provided to the applicant and the child is delivered safely. The

Collector shall also see to it that after the delivery of the child, the child is looked after well and is not abandoned in any manner. If necessary, the

Collector can avail of the services of any NGO or any other govt. social organization in this regard.