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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 6th December, 2022

\+ **W.P.(C) 16607/2022**

MRS. X ..... Petitioner

Through: Mr. Anwesh Madhukar, Mr. Yaseen Siddiqui, Mr. Pranjal Shekhar and Ms. Prachi Nirwan, Advocates. (M:9899866844) with Petitioner with her husband in-person virtually.

versus

GNCTD & ANR. ..... Respondents

Through: Ms. Hetu Arora Sethi, ASC, GNCTD with Ms. Kavita Naillwal and Mr. Arjun Basra, Advocates for R-1 & 2.

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

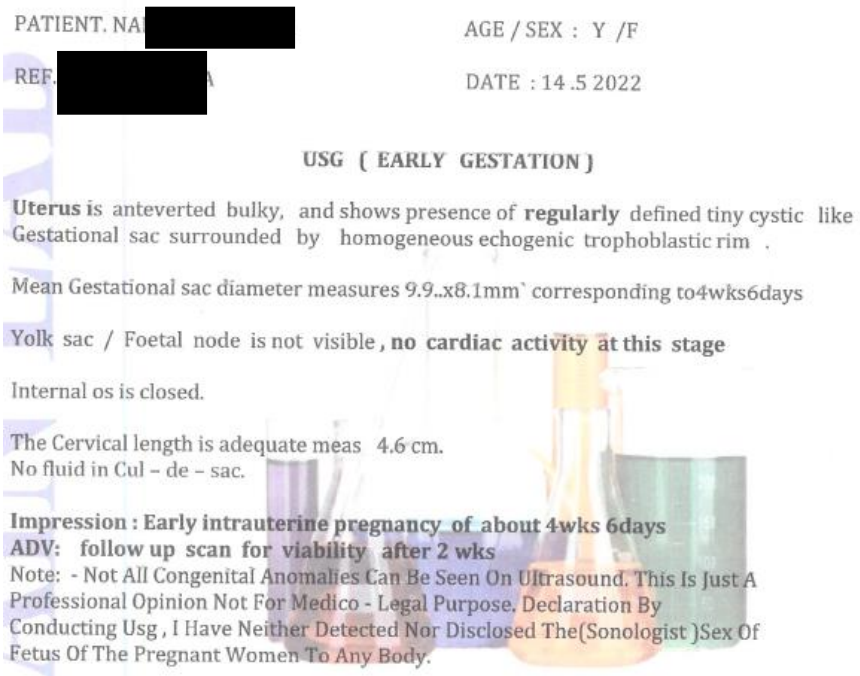
1. This hearing has been done through hybrid mode.

2. The right of a pregnant woman to terminate her pregnancy or abort the foetus has been the subject matter of debate across the world. This right gives a woman the ultimate choice as to whether to give birth to the child which she has conceived. India is amongst the countries that recognises this choice of the woman, in its law, and has even expanded this right in recent times with amendments permitting termination at an advanced stage, under various circumstances. While recognising the choice of the woman – the ultimate giver of life in this world, beyond the Omnipresent, such cases highlight the severe dilemma that women undergo while taking a decision to terminate her pregnancy. Courts are no exception – in that Judges have to grapple with issues that are not merely factual and legal but also involve ethical and moral

factors. With the emergence of modern technologies to detect abnormalitiesin an unborn child, the issues surrounding termination and abortion are bound to become more and more complex. Such technologies coupled with the unpredictability in ascertaining the degree of abnormalities, even by medical practitioners, pose challenges to the manner in which society may grow in the future.

3. The present petition has been filed by Mrs. X who, after her marriage in November, 2021, is stated to have conceived a child in March, 2022. The Petitioner is in the thirty-third week of gestation, and the due date of delivery is stated to be around mid-January, 2023.

4. The Petitioner underwent her first ultrasound at a diagnostic centre situated in Noida, where she resides along with her husband. The first ultrasound was conducted at four weeks and six days of her gestational period. The first ultrasound report dated 14th May, 2022, reads as under:



PATIENT. NA[redacted] AGE / SEX : Y /F

REF. [redacted] DATE : 14 .5 2022

USG (EARLY GESTATION)

Uterus is anteverted bulky, and shows presence of **regularly** defined tiny cystic like Gestational sac surrounded by homogeneous echogenic trophoblastic rim .

Mean Gestational sac diameter measures 9.9..x8.1mm` corresponding to4wks6days

Yolk sac / Foetal node is not visible , **no cardiac activity at this stage**

Internal os is closed.

The Cervical length is adequate meas 4.6 cm.
No fluid in Cul – de – sac.

Impression : Early intrauterine pregnancy of about 4wks 6days
ADV: follow up scan for viability after 2 wks
Note: - Not All Congenital Anomalies Can Be Seen On Ultrasound. This Is Just A Professional Opinion Not For Medico - Legal Purpose. Declaration By Conducting Usg , I Have Neither Detected Nor Disclosed The(Sonologist)Sex Of Fetus Of The Pregnant Women To Any Body.

5. The second ultrasound was conducted, at the same Diagnostic Centre, at seven weeks and four days of her gestational period. The second ultrasound report dated 1st June, 2022, reads as under:

> *"**USG EARLY PREGNANCY***
> ***Lmp 14.03.22 ga 11 wks 2 days aua 7 wks 4 days***
> ***Scan** shows single intrauterine regular Gestational sac MSD measuring 42.4 mm corresponding to 9wks1Days with adequate decidual reaction noted all around the sac.*
> *Single live fetus with CRL 13.6 mm ~_7weeks7days of gestation is noted.*
> *Fetal heart rate= is present, 156 bpm, regular, rhythmic, No adenexal mass.*
> *Cervix appears normal measuring 3.8 cm. Internal Os is closed.*
> `
> *Note:- **not all congenital anomalies can be seen on ultrasound**. This is just a professional opinion not for medico - legal purpose. Declaration: by conducting usg, i have neither detected nor disclosed the (sonologist) sex of fetus of the pregnant women to any body."*

6. The third ultrasound was conducted at sixteen weeks and five days of her gestational period. The third ultrasound report dated 7th August, 2022, reads as under:

> *"**USG LOWER ABDOMEN (PREGNANCY)***
> ***Lmp ? 13.03.22 ga 21 wks 0 days aua 16 wks 5 days***
>
> *Scans show single live fetus in cephalic presentation.*
> *Fetal heart rate = 154 beats per minute.*
> *Fetal heart rate and aortic pulsations and limb, body movements seen under real time scanning and appear normal.*
> *Placenta is anterior, grade I maturity, 2.9cm away from os, **low lying***

Liquor appears adequate for POG.
Fetal skull, spine, gastric bubble, kidneys, urinary bladder appear normal.
No obvious congenital abnormality seen in present fetal position during current examination.

Bi Parietal Diameter (B.P.D)	*=35.7 mm=16 weeks 6 days =/- 1 week*
Femur Length (F.L)	*=22.5 mm = 16 weeks 1 days +/- 1 week*
Fetal Abd. Circumference (FAC)	*108 mm = 16 weeks 5 days +/- 1 week*
Fetal Head circumference (FHC)	*133. mm = 16 weeks 3 days +/- 1 week*

EGA (BY USG) = 16 weeks5 days.
EDD (BY USG) = 17 /01 / 2023.
EFW = 168 =+/- 15%
GMS
Os is closed. Cervix is normal in length.

IMPRESSION: SINGLE LIVE FETUS OF ABOUT 16 WEEKS 5 DAYS +/- 1wk LOW LYING PLACENTA GR I
note: - ***not all congenital anomalies can be seen on ultrasound****. This is just a professional opinion not for medico – legal purpose. declaration: by conducting usg, I have neither detected nor disclosed the sex of (sonologist) fetus of the pregnant women to any body."*

7. As is evident from the above three ultrasounds reports, the foetus did not exhibit any abnormalities. However, all the three reports contain a clear disclaimer to the effect that *"Not all congenital anomalies can be seen on ultrasound".*

8. After a gap, the Petitioner underwent the fourth ultrasound at thirty weeks and one day of her gestational period. To her surprise, the same revealed *"significantly dilated left lateral ventricle of the brain"*. The relevant portion of the said ultrasound report dated 12th November, 2022, reads as under:

> *"LMP: 14, 3, 22 G. Age by LMP 34 wks 5 days EDD by LMP 19, 12,2, Single live fetus in Cephalic presentation at the time scan.*
> *Foetal cardiac activity (FHR= 133 bpm).*
> *Foetal movements present.*
> *xxx xxx xxx*
> ***IMPRESSION :- Single live foetus of 30 wks 1 days***
>
> *Note:**<u>There is an evidence of significantly dilated left lateral ventricle of brain measuring 23.7 mm at atria Right ventricle is not delated. Complete assessment not possible due to advanced Gest</u>**. age however grossly spine appear normal.*
> ***Left monventriculomegaly**."*

9. As can be seen from the above report, the foetus showed evidence of cerebral abnormality. In order to confirm the said finding, the Petitioner was advised to undergo an MRI of the foetus. Accordingly, the Petitioner underwent another ultrasound with a different diagnostic centre, two days later, i.e., on 14th November, 2022, which confirmed the said finding. The said ultrasound report dated 14th November, 2022, reads as under:

> ***"*Left cerebral ventricle is dilated up to 22.7 mm. There appears to be partial corpus callosum agenesis. No dilation of 3rd ventricle.***
> ***IMPRESSION: Single live intrauterine gestation of average age 30 weeks 2 days with Cephalic presentation with mild Oligohydramnios and left cerebral ventricular dilation with suspected partial corpus callosum agenesis."***

10. On 28th November, 2022, the Petitioner, went to a third hospital which also confirmed the said finding. Accordingly, the Petitioner was informed of the applicable laws and procedure, and the hospital's advice was as under:

> ***"ADV:***
>
> - ***Patient and Attendant explained about the new MTP Act***
> - ***Prognosis of foetus explained"***

11. Finally, the Petitioner approached the Guru Teg Bahadur Hospital (hereinafter, *"GTB Hospital"*), which is run by the Respondents - GNCTD. Thus, the Petitioner obtained confirmations from three different diagnostic centres/hospitals regarding the findings, and finally sought to exercise her choice to terminate the pregnancy.

12. At the GTB Hospital, the Petitioner was again informed of the procedure under the Medical Termination of Pregnancy Act, 1971 (as amended by the MTP Amendment Act, 2021) (hereinafter, *"MTP Act, 1971"*). Vide OPD Card dated 29th November, 2022 issued by the GTB Hospital, the concerned doctor advised as follows:

> *"Report to Court for grant of permission of termination of pregnancy*"

13. Pursuant to the above advice given at GTB Hospital, the Petitioner approached this Court with the present petition. The prayers sought in the present petition are set out below:

> *"i) Direct the Respondent No. 2 to form a board comprising not less than two registered medical practitioners and submit an opinion qua the medical termination of pregnancy of the Petitioner; and*
> *ii) Further direct the Respondents No.1 & 2 to medically terminate the pregnancy of the Petitioner. And/or*
> *iii) Pass any other order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."*

14. This matter was listed before this Court for the first time on 2nd December, 2022. On the said date, this Court considered the submissions made by the parties, and the following order was passed:

> *"2. The Petitioner, in the present petition, is a 26 year old married woman, currently at 33 weeks gestational age. The present petition has been filed by the Petitioner seeking directions to the Respondent No.2 - Guru Teg Bahadur Hospital (hereinafter, "GTB Hospital") to the following effect:*
>
> > *"i) Direct the Respondent No. 2 to form a board comprising not less than two registered medical practitioners and submit an opinion qua the medical termination of pregnancy of the Petitioner; and*
> > *ii) Further direct the Respondents No.1 & 2 to medically terminate the pregnancy of the Petitioner. And/or*
> > *iii) Pass any other order(s) as this Hon'ble Court may deem fit and proper in the facts and*

circumstances of the case."

3. The background of the case is that the Petitioner is stated to have undergone regular ultrasounds since the inception of the pregnancy and was not informed of any foetal abnormalities. However, in the ultrasound which was undertaken on 12th November, 2022, an abnormality was observed in the foetus, at the left lateral ventricle of the brain. Pursuant to the ultrasound report dated 12th November, 2022, it is submitted that the petitioner was orally advised that the said abnormality was life long and would subject the child to seizures etc., owing to immature cerebral development. This report was again confirmed by two other private ultrasound facilities on 14th November, 2022, and 28th November, 2022.

4. Hence, the foetus having been now found to have cerebral abnormality, the Petitioner approached the Respondent No.2 - GTB Hospital for the purpose of termination of the pregnancy, whereby she was referred to approach the Court to seek permission vis-a-vis medical termination of pregnancy, owing to the gestational age of 33 weeks.

5. Ld. Counsel for the Petitioner relies upon the decision of the Bombay High Court in ***Roshni Asik Khan vs. State of Maharashtra, [Writ Petition (L) No. 18582 of 2021,decided on 26th August, 2021]*** *and the decision of the Calcutta High Court in* ***Nivedita Basu vs. State of West Bengal &Ors., [WPA 2513/2022 decided on 17th February, 2022]****, in support of the plea that even after the expiry of 24 weeks of gestation period, the medical termination of pregnancy would be permitted if there is any substantial foetal abnormality, in terms of the mechanism prescribed under Section 3(2B) and 3(2D) of the MTP Act,1971 (as amended by the MTP Amendment Act, 2021).*

6. Ms. Sethi, ld. Standing Counsel for GNCTD submits that the GTB Hospital does not have a medical board which is already constituted for the purposes of

> *the MTP Act, 1971. However, the Petitioner can be examined by the Medical Board of the Lok Nayak Jai Prakash Narayan Hospital (hereinafter, "LNJP Hospital"), which is already in place.*
> *7. Considering the gestational period of the Petitioner herein, the Medical Board of LNJP Hospital is directed to conduct a medical examination of the Petitioner today itself, and submit a report to this Court. The said report be sent through e-mail to the Court Master on the evening of Sunday i.e., 4th December, 2022, and be placed before this Court on Monday i.e., 5th December, 2022.*
> *8. Let a copy of the said report of the medical board be also supplied to the ld. Counsel for the Petitioner, through e-mail.*
> *9. List this matter as Item No.1 in the supplementary list on 5th December, 2022.*
> *10. Copy of the present order be given dasti under signature of the Court Master."*

15. As per the above order dated 2nd December, 2022, the Medical Board of the Lok Nayak Jai Prakash Narayan Hospital (hereinafter, *"LNJP Hospital"*), constituted under the MTP Act, 1971, was to examine the Petitioner on Friday i.e., on 2nd December, 2022 itself, and give its recommendations/opinion. However, on 3rd December, 2022, the following email was received from the Medical Board of LNJP Hospital:

> *"This is with reference to the Sub: W.P. (C) 16607/2022 & CM Appl. 52253/2022 in the matter of Mrs. X Vs GNCTD & ANR regarding Medical Examination of Mrs. X and opinion regarding MTP. In this regard, it is to inform that the Medical Board of MTP has examined as this is the case of advanced pregnancy, more than 33 weeks a team of multiple doctors would conduct this (Paediatricians, gynaecologists, radiologists and Neurologists) for the safety of the mother.* ***The doctors of the board had advised foetal MRI which is***

scheduled on Monday. The detailed report will be submitted on the basis of the findings of foetal MRI report as informed by the Chairperson of the MTP Board. *This is for your kind information"*

16. The matter was mentioned on 5th December, 2022 in the morning at 10:30 a.m. and various grievances were raised by the Petitioner. It was submitted that the Medical Board made the Petitioner wait till around 10:30 p.m. There was an apprehension expressed on behalf of the Petitioner that the foetal MRI, which was scheduled for 5th December, 2022, could also be delayed. Accordingly, the Court directed LNJP to conduct the foetal MRI on an urgent basis, and submit the report by 2:30 p.m.

17. The report of the Medical Board of LNJP was received by this Court around 4:30 p.m. The Medical Board which examined the Petitioner, pursuant to order dated 2nd December, 2022, consisted of the following members:

i. *Dr. Y.M. Mala -*
Director Professor & Chairperson (Obst. & Gynae)

ii. *Dr. Rachna Sharma*
Sr. Specialist
Member Secretary (Obst. & Gynae)

iii. *Dr. Chandra Shekhar*
Specialist
Member (Deptt. Of Neurosurgery)

iv. *Dr. Meenakshi*
Asst. Professor
Member (Paediatrics Deptt.)

v. *Dr.Alpana Manchanda*
Director Professor
Member (Deptt. Of Radio Diagnosis)

18. The final opinion of the Medical Board is extracted below:

S.no.	*Reports*	*Opinion of the findings*
1.	*14/11/2022 ultrasound*	*Single live intrauterine gestation of average age 30 weeks 2 days with cephalic presentation with mild oligohydramnios and left cerebral ventricular dilation with suspected partial corpus callosum agenesis.*

5. Additional Investigation (if done):

S.No.	*Investigation done*	*Key findings*
1.	***05/12/2022 Foetal MRI***	***Unilateral ventriculomegaly with normal morphology of brain***

6. Opinion by Medical Board for termination of pregnancy
a). Allowed
b). Denied- TICKED
Justification for the decision: Fetal MRI dated 05/12/2022 reveals dilation of cerebral left lateral ventricle with resultant parenchymal thinning of left temporal and occipital lobe. Rest of the cranial structures appear normal. No other associated gross congenital malformations were seen.
This condition is compatible with life and can be managed surgically following delivery. However, degree of handicap in the baby post delivery cannot be

predicted. She is an advanced pregnancy and due date for delivery is around mid January 2023.

19. Upon receiving the above report, the Court interacted virtually, in the course of the hearing, with the following persons:

i. Dr. Chandra Shekhar/Specialist (Department of Neurosurgery);

ii. Dr. Rachna Sharma/Sr. Specialist, Member Secretary, (Obst. & Gynae.);

iii. Mrs. X/Petitioner; and

iv. Mr. Y/Husband of the Petitioner.

20. Dr. Chandra Shekhar, the Neurologist, has stated that although the written opinion of the Medical Board records that the condition of the foetus is "compatible with life", however, the quality of life cannot be predicted. He stated that though the brain appears normal, the child would be required to undergo surgery immediately after birth. The same could be performed around the tenth week after birth. He confirmed to the Court that the ventricular dilation could be due to other medical reasons, but the brain parenchyma is normal. Upon being queried as to the degree of handicap in the child after delivery, he submitted that the same cannot be predicted as it is a congenital anomaly.

21. Dr. Rachna Sharma, the Gynaecologist, has stated that the pregnancy is almost at full-term and the risks for the mother, associated with medical termination at this stage, would be the same as those associated with the delivery of a child in normal course. She states that if medical termination is directed, the same could be through induced labour.

22. The Petitioner, in her conversation with the Court, stated that almost all doctors have confirmed the foetal abnormality, and this fact has caused

considerable mental trauma to her. In Hindi, she stated "ये बात दिमाग में घूमती रहती है". The husband of the Petitioner stated that he works in the Accounts Department of a private company.

23. It is in the background of the foregoing facts that this Court has to consider the prayer for the medical termination of pregnancy made by the Petitioner.

ANALYSIS

24. In India, termination of pregnancy is governed and regulated by the Medical Termination of the Pregnancy Act, 1971. The MTP Act, 1971 provides the legal framework for termination of certain pregnancies by registered medical practitioners. The MTP Act, 1971 was recently amended by the Parliament, vide the Medical Termination of Pregnancy (Amendment) Act, 2021, *(hereinafter "2021 Amendment")* with effect from 24th September, 2021.

25. The earlier regime, prior to the 2021 Amendment, permitted medical termination of pregnancy which did not exceed twelve weeks, with the opinion of the one registered medical practitioner. Further, for medical termination of pregnancy between twelve to twenty weeks, the opinion of at least two registered medical practitioners, formed in good faith, was required. The Amendment in 2021 has, however, expanded the permissible gestational period to twenty weeks in the first category, and twenty to twenty-four weeks in the second category. In addition, various sub-sections under Section 3 of the MTP Act, 1971, which provide for instances when pregnancies may be terminated, being sub-sections 3(2A), 3(2B), 3(2C), and 3(2D) were also added, vide the 2021 Amendment. Section 3 of the MTP Act, 1971, as it stands, after the 2021 Amendment, 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."

26. A perusal of the above provision shows that, under Section 3(2), the pregnancy can be terminated under various conditions. For the present case,

Section 3(2B) of the MTP Act, 1971 which relaxes the conditions of length of pregnancy, would be applicable, as the gestational period is beyond thirty-three weeks. Under Section 3(2B), termination of pregnancy can be permitted only if the said termination is necessitated by the diagnosis of **"substantial foetal abnormalities"**.

27. The MTP Act, 1971 does not define as to what constitutes *"substantial foetal abnormalities*" and thus the Court is required to take the assistance of external material for interpreting the said expression. The definitions of the following expressions in various statutes across jurisdictions are set out below:

S. No.	***Country/State Statute***	***Terminology***	***Definition***
1.	*Abortion Act, 1967 (United Kingdom)*	*physical or mental abnormalities as to be seriously handicapped*	*1(1)(d) That 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****.*
2.	*Northern Ireland, The Abortion (Northern Ireland) (No. 2) Regulations 2020*	*Grounds for termination: cases with no gestational limit Severe fetal impairment or fatal fetal abnormality*	*7.—(1) A registered medical professional may terminate a pregnancy where two registered medical professionals are of the opinion, formed in good faith, that there is a substantial risk that the condition of the fetus is such that—* *(a)* ***the death of the fetus is likely before, during or shortly after birth****; or* *(b)* ***if the child were born, it***

			would suffer from such physical or mental impairment as to be seriously disabled.
3.	*USA/Florida, Title XXIX Public Health, Chapter 390 Termination of Pregnancies*	*Fatal fetal abnormality*	*means a terminal condition that, in reasonable medical judgment, regardless of the provision of life-saving medical treatment, is incompatible with life outside the womb and will result in death upon birth or imminently thereafter.*

28. A perusal of the above definitions would show that some of the definitions are extremely broad and wide, whereas, others are narrow and constricted. The question as to what would constitute *"substantial foetal abnormalities"* is, thus, dependent not only upon the medical conditions of the foetus, but also, on the broad public policy of the particular State or Country.

29. In India, judicial precedents have supported the rights of women to abort/medically terminate the pregnancy, depending upon the gestational period, the medical condition of the foetus, the physical and mental health of the woman, and other such factors. As far back as in the year 2009, the Supreme Court in ***Suchitra Srivastava v. Chandigarh Administration (2009) 9 SCC 1*** recognised a woman's right to make reproductive choices as a dimension of 'personal liberty', as understood under Article 21 of the Constitution of India. The relevant part of the said judgment reads as under:

"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."*

30. Illustratively, the following decisions delivered after the enactment of the 2021 Amendment, have been considered by the Court:

S.No.	***Case Name***	***Period of Gestation***	***Medical Condition/Abnormality***	***Decision***
1.	***Roshni Ashik Khan v. State of Maharashtra &Anr. [W.P.(L) 18582/2021, decision dated***	*33 weeks*	*Serious neurological and skeletal abnormalities in form of 'Gros Hydrocephalus, small compressed posterior fossa with spina bifida and large meningomyelocoele with*	*Termination of pregnancy permitted.*

	26th August, 2021]		*a tethrered spinal cord (Arnold Chari alformation II_ and bilateral clubfoot'.*	
2.	***Pratibha Gaur v. Government of NCT of Delhi &Ors. [W.P.(C) 14862/2021, date of decision 31st December, 2021]***	*28 weeks*	*Tetralogy of Fallot (TOF) with absent pulmonary valve (APV). The disease includes a hole in the heart (Ventricular Septal Defect, VSD) along with poorly developed valve that guards the blood vessel taking blood from right side of the heart (right ventricle) to lungs which leads to both obstruction & leaking of valve. The blood vessels of the lungs (pulmonary arteries) are usually grossly enlarged. In addition to the heart disease, the patient may also have associated airway problems that may lead to requirement of respirator support in one-third of cases with in first year of life. TOF with APV does not have impact on immediate post-natal survival.*	*Termination of pregnancy permitted.*
3.	***Smt. Nivedita Basu v. The State of West Bengal &Ors. [W.P.A.***	*34 weeks, 6 days*	*Open spina bifida (lumbosacral myelomeningocele) with lemon sign (Arnold Chiari malformation)*	*Termination of pregnancy permitted.*

	2513/2022, decision dated 17th February, 2022]		*and severe ventriculomegaly (hydrocephalus).*	
4.	***Neethu Suhas&Ors. v. State of Kerala, Represented by Secretary, Department of Women & Child Development &Ors. [W.P.(C) 20872/2022, date of decision 1st July, 2022]***	*33 weeks.*	*Distension of the stomach and a dilated proximal duodenum, suggesting obstruction at the level of the distal duodenum suggestive of atresia/ stenosis. Along with this, there is growth restriction (EFW at 3 centile – 28 weeks 4 day) and renal findings. Foetal dopplers are normal with high resistance in the mean uterine artery Doppler.* *Collective findings point to an increased possibility of chromosomal abnormalities like Down's syndrome in around 30% of cases. Also a reported association with some genetic syndromes which may be evident only postnatally.*	*Termination of pregnancy permitted.*

An overall analysis of the judicial decisions mentioned above would show that Courts have permitted termination of pregnancy even at an advanced stage i.e., even in the ninth month if substantial foetal abnormalities are detected in the foetus. But in all the above cases, the Medical Board gave an

opinion in favour of termination of the pregnancy.

31. Coming to the facts of the present case, the Court has received the Opinion of the Medical Board of LNJP is that the termination ought to be 'Denied'. The abnormalities have, however, been diagnosed and mentioned in the report extracted above. It is on the basis of the said abnormalities revealed in the foetus MRI in the background of the various ultrasound reports filed by the Petitioner that the Court is called upon to determine as to whether the abnormality that the foetus has been diagnosed with, constitutes *"substantial foetal abnormality"* under Section 3(2B), or not. For the said purpose, the Court can only rely upon the various test reports which have been placed on record by the Petitioner, and the diagnosis of the Medical Board. A perusal of the same reveals the following admitted facts:

i. The foetus shows evidence of unilateral cerebral ventriculomegaly;

ii. Foetus exhibits ***Partial corpus callosum agenesis*** – i.e., Agenesis of the Corpus Callosum is also suspected which is a rare congenital disorder that may lead to severe mental disability, seizures, developmental delays, etc.

ii. The left lateral ventricle of the brain is significantly dilated, though the brain parenchyma is stated to be normal;

iii. Post-birth, a surgery would be required, though upon being queried by the Court, Dr. Chandra Shekhar described the said surgery as a common surgery;

iv. In its report dated 5th December, 2022, the Medical Board states that the condition is compatible with life. However, the report is unclear as to the quality of life of the child post birth, and Dr.

Chandra Shekhar was clear that, at this stage, he is ***unable to predict the quality of life***;

v. The report of the Medical Board is unclear as to the ***degree of handicap post-birth***, and the same also cannot be predicted. Upon being queried by the Court, this position is further confirmed by Dr. Chandra Shekhar;

vi. The surgery, which may be required immediately upon birth, would have to be conducted around the tenth week of the birth of the child.

32. The above facts which are admitted on record leave no doubt as to the presence of foetal abnormalities in this case, but a reading of Section 3(2B) of the MTP Act, 1971 shows that the statute requires "**substantial foetal abnormalities"** and not *mere foetal abnormalities*, for the medical termination of pregnancy beyond twenty / twenty-four weeks.

33. In view of the above, some guidance can be taken from reliable external sources as to what would constitute "substantial foetal abnormalities". A report titled *"Termination of Pregnancy for Fetal Abnormality in England, Scotland and Wales"* by the Royal College of Obstetricians and Gynaecologists, which analyses the risk and gravity of foetal abnormality, advises that the following factors could be considered to determine the gravity of the same:

> *"The 1996 RCOG report also provided helpful guidance on the scaling of severity, noting that both the size of risk and the gravity of the abnormality are important. Our advice is that doctors should continue to weigh up the following factors when reaching a decision:*

> *·the potential for effective treatment, either in utero or after birth*
> *·on the part of the child, the probable degree of self-awareness and of ability to communicate with others the suffering that would be experienced*
> *·the probability of being able to live alone and to be self-supportive as an adult*
> *·on the part of society, the extent to which actions performed by individuals without disability that are essential for health would have to be provided by others.'*
>
> *Doctors will be better able to demonstrate that their opinions were formed in good faith if they have sought advice from appropriate specialists. These may not be obstetricians but may be specialists in the management of the particular condition. For example, in the case of cleft palate, the woman should be referred to the surgical team that specialises in its treatment. In other cases, the appropriate specialist may be a neonatologist, paediatrician or neurologist. If it is their opinion on which reliance is based, it may be appropriate for them to provide one of the signatures under the Act. In complex cases, it may be appropriate to hold a multidisciplinary team meeting.*
>
> *A further issue unresolved by the law concerns the time when the handicap will manifest itself. Children born with a correctable congenital abnormality, such as diaphragmatic hernia, may be deemed to be seriously handicapped until they receive effective surgical treatment; others suffering from a genetic condition, such as Huntington's disease, are unlikely to manifest the condition until later in life."*

34. It is relevant to take note of two decisions involving the termination of pregnancy beyond twenty-four weeks:

i. The decision of the Supreme Court of New South Wales in ***A v.***

X; [2022] NSWSC 971 decided on 20th July, 2022, wherein, upon the detection of ventriculomegaly in the foetus on the basis of the 26-week ultrasound, as also, considering the prognosis and anticipated quality of life, the medical termination procedure was performed. The relevant portion of the said decision has been extracted below:

> *"However, the parties became aware, from the **26-week ultrasound**, that there was a complication. On that occasion, **Z was diagnosed with ventriculomegaly**. Two weeks later, after a follow-up ultrasound and MRI were performed, the parties were informed that Z's brain had stopped developing and that she had suffered severe brain damage. **Having discussed Z's prognosis and anticipated quality of life, A, B, X and Y jointly decided to medically terminate the pregnancy. The medical termination procedure was performed on 2 September 2021. Z was delivered stillborn four days later, on 6 September 2021.** On 22 November 2021, and in accordance with s 12(3)(b) and s 13(1) of the Births, Deaths and Marriages Registration Act 1996 (Vic), Z's stillbirth was registered by X and Y."*

ii. The decision of the High Court of Justice Queen's Bench Division in ***"CC", "GC" v. Blackpool, Fylde and Wyre Hospitals NHS Trust; [2009] EWHC 1791 (QB) decided on 21st July, 2009***. The relevant portion of the said decision has been extracted below:

> *"56 Dr Meire, who has never seen a case of schizencephaly antenatally in his vast experience in ultrasonography and teaching ultrasonography, considered that the explanation for this was that most schizencephaly cases have normal ventricles at 20*

> *weeks. He said that 75% of babies with enlarged ventricles are normal at birth with a normal brain. He considered therefore that Dr Sprigg's suggestion that fewer cases of schizencephaly were found because the* ***cases were terminated for other reasons such as ventriculomegaly*** *or holoprosencephaly, could not be correct. Many pregnancies where the foetus has enlarged ventricles are not terminated. Dr Meire said in his report that the timing of the insult was unclear and undoubtedly varies from case to case. The structural nature of the clefts indicates that in most cases the insult probably occurs before 16 weeks of pregnancy though it could occur up to about the 20th week. At some stage in C's case the condition would have progressed but it was not possible to say at what stage."*

Both of the above decisions record, as a matter of fact, that the termination of pregnancy had taken place in the case of foetuses which had been detected with ventriculomegaly.

35. Considering the factors as set out in the material extracted above, the two conditions that need to be highlighted are –

i. unilateral cerebral ventriculomegaly and dilation of the left lateral ventricle of the brain;

ii. Foetus exhibits ***Partial corpus callosum agenesis*** – i.e., Agenesis of the Corpus Callosum;

The above condition requires surgery and the extent of handicap is unpredictable as per the Medical Board's opinion. Publicly available material indicates that these conditions constitute a rare disorder that is present at birth in a very small percentage of pregnancies. The Medical Board's opinion is to 'Deny' the termination, but the Court has to take an overall view of the matter.

The Court has to weigh the risks that are involved in such medical conditions and the unpredictability of the same *qua* the post-birth life. As per Section 3(2B), the termination of pregnancy beyond the twenty-four weeks period has to be necessitated by the diagnosis of *"substantial foetal abnormalities"* by the Medical Board. The Opinion of the Board, based on the diagnosis, has been submitted for the assistance of the Court. In the facts of this case and in view of the above, it emerges that the ultrasound reports, diagnostic reports, the Medical Board's diagnosis of the dilation of the left lateral ventricle of the brain of the foetus which may in all likelihood require surgery immediately after the birth, *Corpus Callosum Agenesis* reveal the *unpredictability of the quality of life*, as also, the *degree of handicap*, and would constitute ***"substantial foetal abnormalities".***

36. The Court, at this stage, notes that even in such a situation, covered by Section 3(2B), other factors such as the physical and mental health of the mother would also have to be taken into consideration. It would be apt to consider one of the speeches in the Lok Sabha debates while considering the amendments to the MTP Act, 1971. The same reads as under:

> *"HON. CHAIRPERSON: Since it is a women's issue, we have to pass it.*
> *SHRIMATI SANGEETA KUMARI SINGH DEO : As I was saying that the world is essentially divided into two major lobbies or groups, one which is pro-life and the other which is pro-choice. According to the data provided by the Ministry of Health & Family Welfare, there are five categories. The first category where abortions are prohibited altogether and this category comprises of 26 countries. The second category permits abortions only to save a woman's life. This theory is followed by 39 countries. The third category is to preserve health which is followed by five countries. Then comes the fourth*

> *category which is based on broad social or economic grounds which permits abortion under a broad range of circumstances, acknowledging woman's actual or reasonably foreseeable environment and her social or economic circumstances. India falls into this category. The last and the fifth category is the category which believes that abortions should be performed on request. The gestational limits vary in this category and 67 countries conform to that theory.*"

37. Recently, the Supreme Court in the case of ***X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr. [Civil Appeal No. 5802/2022, date of decision 29th September, 2022]*** considered the meaning of 'mental health' under the MTP Act, 1971. Justice D.Y. Chandrachud, speaking for the Court, held that the same has a wide connotation. Some of the observations of the Court, are as under:

> *"63. The grounds for approaching courts differ and include various reasons such as a change in the circumstances of a woman's environment during an ongoing pregnancy, including risk to life,? risk to mental health, **discovery of foetal anomalies**, late discovery of pregnancy in case of minors and women with disabilities, and pregnancies resulting from sexual assault or rape. These are illustrative situations thrown up by cases which travel to the court. Although the rulings in these cases recognized grave physical and mental health harms and the violation of the rights of women caused by the denial of the option to terminate unwanted pregnancies, the relief provided to the individual petitioner significantly varied.*
>
> *64. The expression "mental health" has a wide connotation and means much more than the absence of a mental impairment or a mental illness. The World Health Organization defines mental health as a state of "mental well-being that enables people to cope with the stresses of life, realize their abilities, learn well and work well, and*

> *contribute to their community. The determination of the status of one's mental health is located in one's self and experiences within one's environment and social context. Our understanding of the term mental health cannot be confined to medical terms or medical language, but should be understood in common parlance. The MTP Act itself recognizes the need to look at the surrounding environment of the woman when interpreting injury to her health. Section 3(3) states that while interpreting "grave injury to her physical or mental health", account may be taken of the pregnant woman's actual or reasonably foreseeable environment. The consideration of a woman's "actual or reasonably foreseeable environment" becomes pertinent, especially when determining the risk of injury to the mental health of a woman."*

38. As per Section 3(2B), discovery of *"substantial foetal abnormalities"* is a justified ground for directing medical termination of pregnancy and the limitations to the length of the pregnancy which are imposed under Section 3(2) would not apply in such cases.

39. The Medical Board, in the present case, unfortunately has not been able to predict or give a categorical opinion as to the degree of handicap or as to the quality of life of the child after birth, with certainty. In the mind of the Court, such unpredictability and risks ought to weigh in favour of the woman seeking termination of pregnancy.

40. On the basis of the conversation between the Court and the Petitioner, the Court has clearly been able to gauge the mental trauma affecting the parents, their economic and social conditions, as also, the fact that the Petitioner is taking a cautious and well-informed decision, while seeking termination of pregnancy. She has understood as to what termination of pregnancy entails at such an advanced stage. This Court is convinced that, as a mother, she has weighed the same with the unpredictability and the risks

involved, considering the condition of the foetus.

41. These factors, though may not be strictly relevant under Section 3(2B) of the MTP Act, 1971 ought to be considered while exercising discretion under Article 226 of the Constitution of India. In addition, the factors such as mental and physical health of the woman, the risk of the child if born suffering from serious physical or mental abnormality, the likelihood of the child being born with deformities, and living with deformities, coupled with the risks of surgery at such a nascent stage after being born, the results of which are also not conclusively known, and the lingering question as to whether the child would be self-sustaining or not, tilts the Court's mind in favour of the plea of the Petitioner.

42. In ***Pratibha Gaur v. NCT of Delhi [W.P.(C) 14862/2021, date of decision 31st December, 2021]***, Justice Jyoti Singh, considered similar factors relevant for permitting the termination of pregnancy at the twenty-eighth week. The observations of the Court in the said judgment are as under:

> *"....*
> *This entire medical regime would expose the child to intra and post-operative complications and may lead to further complexities, adversely impacting the quality of the child's life. While the Board has opined that following surgical repair, patient is likely to have an average physical growth, but the same is with a caveat that the surgical repair is "successful'. The opinion indicates that the entire life of the child, if born, would largely depend on the clinical condition and quality of medical care provided to the child. Thus, lack of compatibility of the foetus with a healthy and normal life is looming large. The mental frame of the Petitioner, a mother, in such circumstances, in taking a tough call to terminate pregnancy, is perhaps understandable.*

> *28. Petitioner, in my view, is justified in contending that continuing with the pregnancy, once it is known that the foetus suffers from a rare congenital heart disease, which is a 'substantial foetal abnormality', with attendant complications and risks, would have a deleterious impact on the mental health of the Petitioner. Keeping in line with the judgements referred to above, purposively and liberally interpreting the provisions of Section 3(2)(b)(i) of the MTP Act, as amended, this Court finds merit in the contention of the Petitioner that continuing the pregnancy would cause grave injury to the mental health of the Petitioner. As repeatedly held by the Courts, in the judgements referred above, reproductive choice is a facet of reproductive rights of a woman and a dimension of her personal liberty enshrined in Article 21 of the Constitution of India and thus the Petitioner cannot be deprived of the freedom to take a decision to continue or not to continue with the pregnancy, in the backdrop of the foetal abnormalities brought forth in the Medical Opinion of the Board.*
>
> *29. For the reasons recorded above, the writ petition is allowed. Petitioner is permitted to undergo medical termination of pregnancy at a medical facility of her choice. Board has explained the possible complications of the procedure of termination at this stage to the couple. Accordingly, it is for the Petitioner to take the final decision to undergo the procedure of medical termination of pregnancy, which would be at her own risk and consequences."*

43. A similar view was taken by Justice V.G. Arun at the Kerala High Court, Ernakulam Bench in ***Neethu Suhas & Ors. v. State of Kerala, [2022 SCC OnLine Ker 3395]***, where the pregnancy was at thirty-three weeks of the gestational period, and the opinion of the Medical Board was stated to be *"not definite"*. In the said decision, the Court observed as under:

> *"7. Learned Counsel for the petitioners submitted that the first petitioner is highly anxious and is on the verge of*

> *depression and unless the pregnancy is permitted to be terminated, the she may go into manic depression and cause harm to herself. It is contended that the first petitioner's case falls within Section 5(1) of the Act and warrants urgent intervention by this Court.*
> *8. Learned Government Pleader pointed out that the Medical Board has not givenany conclusive opinion.*
> *9. From Exhibits P1 to P3 and the report of the Medical Board, it is evident that the first petitioner will be at risk if the pregnancy is continued and the baby born to her may be abnormal. In such circumstances, the first petitioner cannot be compelled to continue the pregnancy. The freedom of a pregnant woman to take an informed decision regarding her pregnancy cannot be curtailed by rigid adherence to the letter of law. The plight of the hapless woman compels me to exercise the discretionary jurisdiction in her favour."*

44. In conclusion, the Court holds that the ultimate decision in such cases ought to recognize the choice of the mother, as also, the possibility of a dignified life for the unborn child. Keeping in mind these two factors, the Court comes to the conclusion that the mother's choice is being made in a completely *bona fide* manner. There is considerable doubt and risk involved in the unborn child's chances of leading a dignified and self-sustaining life, based upon the medical evidence and reports. Considering this position, this Court holds that the medical termination of pregnancy ought to be permitted in the present case.

45. Section 4 of the MTP Act, 1971 mandates that the termination can take place at a place as provided therein. The same reads as under:

> *"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."*

46. In the facts and circumstances of the present case, the present petition is allowed, with the following directions:

i. The Petitioner is permitted to undergo the procedure for medical termination of pregnancy immediately at the LNJP Hospital, or the GTB Hospital, or an approved medical facility of her choice as per Section 4, under the supervision of a properly constituted medical team;

ii. Prior to undergoing the procedure for medical termination of pregnancy, the Petitioner shall once again be informed of the procedure being undertaken, and her informed consent for the same shall be obtained;

iii. The Petitioner shall undergo the said medical termination of pregnancy, at her own risk, as to the consequences of the same.

47. The present petition is allowed in the above terms. All pending applications are also disposed of.

Post Script:

48. The opinion of the Medical Board in cases of termination of pregnancy is of considerable importance for assistance of the Courts. Such Opinions cannot be sketchy and fragmented. They ought to be comprehensive in nature.

In such cases, speediness coupled with qualitative reports is of utmost importance. There ought to be some standard factors on which the Opinion should be given by the Board/s to whom such cases are referred. Such factors ought to include:

i. Medical condition of the foetus – While giving the scientific or medical terminologies, some explanation in lay-person terms as to the effect of such condition ought to be mentioned. Alternatively, medical literature could be annexed with the Opinion;

ii. Medical condition of the woman – The Medical Board ought to interact with the woman in a congenial manner, and assess her physical and mental condition. The same ought to be mentioned in the Opinion.

iii. Risks involved for the woman – The Opinion should briefly mention as to what are the risks for the woman in either continuing the pregnancy or undergoing termination.

iv. Any other factors to be considered – The Opinion should bring to the notice of the Court any other relevant factor/s which may have a bearing on the case for taking the decision relating to termination of the pregnancy.

49. *Dasti.*

PRATHIBA M. SINGH
JUDGE

DECEMBER 6, 2022
Rahul/AD/SK