

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. OF 2018

In the matter of Article 14, 15 and
21 of the Constitution of India

-AND-

In the matter of the Medical
Termination of Pregnancy Act,
1971

-AND-

In the matter of order dated
09.10.2017 passed by the Hon'ble
Supreme Court in Sonali Kiran

Gaikwad v. Union of India & Ors.
[W.P. (C) 928 of 2017]

-AND-

In the matter of the Universal
Declaration of Human Rights,
1948

-AND-

In the matter of International
Covenant on Civil and Political
Rights, 1966

-AND-

In the matter of International
Covenant on Economic, Social and
Cultural Rights, 1976

-AND-

In the matter of The Convention on
the Elimination of all Forms of
Discrimination Against Women,
1979

1. Kiran Kailas Gavhande)
Residing at, 131, grampanchayat,)
Varwand, Mehkar, Buldhana,)
Maharashtra - 443301)
2. Kailas Rambhau Gavhande)
Residing at, 131, grampanchayat,)

Varwand, Mehkar, Buldhana,)
Maharashtra - 443301)

3. Swati Rajendra Pawar)
Residing at Shivaji Housing Society,)
Plot No. 2, 9th lane, Rajarampuri,)
Kolhapur, Maharashtra - 416008.)

4. Rajendra Jayawantrao Pawar)
Residing at Shivaji Housing Society,)
Plot No. 2, 9th lane, Rajarampuri,)
Kolhapur, Maharashtra - 416008.) ... Petitioners

Versus

1. Union of India)
through the Secretary,)
Ministry of Law and Justice,)
Shastri Bhawan,)
“C” Wing, New Delhi 110001)

2. State of Maharashtra)
through the Principal Secretary,)
Public Health Services,)
Mantralaya, Mumbai 23.)

3. Ministry of Health and)
Family Welfare,)
through its Secretary,)
M.H. Division, New Delhi.) ... Respondents

TO

THE HONOURABLE CHIEF JUSTICE AND THE
HONOURABLE PUISINE JUDGES OF THE HONOURABLE
HIGH COURT OF JUDICATURE AT BOMBAY

THE HUMBLE PETITION OF THE
PETITIONER ABOVENAMED

MOST RESPECTFULLY SHEWETH:

1. The Petitioners No. 1 and 2 herein are residents of Buldhana and the Petitioners No. 3 and 4 are residents of Kolhapur district. The Petitioner No. 1 is 22 weeks + 2 days pregnant, and has been barred from seeking a Medical Termination of her pregnancy in spite of the diagnosis of a foetal abnormality which renders the possibility of survival of the foetus negligible. The Petitioner No. 1 is the surrogate in the present matter and Petitioner No. 2 is the husband of Petitioner No. 1 . The Petitioner No. 3 and 4 are the intended parents.
2. The Respondent No.1 herein, the Union of India is the sole authority responsible for implementing the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as *the MTP Act*). The refusal of the said Respondent to incorporate an exception to the MTP Act's ban on abortion after the 20th week of pregnancy so as to protect the mental and

physical health of the pregnant mother, have resulted in violation of the Petitioner's rights to life, health, dignity, informed choice, reproductive autonomy, equality and to be free from inhuman and degrading treatment. The Respondent No.2 herein is the Principal Secretary, Public Health Services, the State of Maharashtra, the state in which the Petitioner resides. The Respondent No.3 is the nodal Ministry for the implementation of the MTP Act.

3. The instant Petition has been preferred by the Petitioner challenging the constitutional validity of Section 3 (2) (b) of the MTP Act restricted to the ceiling of 20 weeks stipulated therein and scope of section 5 of the Act on the ground of its narrow and literal interpretation, particularly limited to the phrase "the termination of such pregnancy is immediately necessary to save the life of the pregnant woman". The aforesaid challenge primarily questions the rationale behind the period of limitation that has been statutorily prescribed to be not exceeding a period of 20 weeks for a woman to avail abortion services under section 3 (2) (b) which may have been reasonable when the section was enacted in 1971, but has ceased to be reasonable in the view of stride in technology and it is perfectly safe for a woman to abort even up to the 26th week and thereafter. Secondly, determination of fetal abnormality in many cases can only be done after the 20th

week, and by keeping the ceiling artificially low, women who obtain reports of serious fetal abnormality after the 20th week have to suffer excruciating pain and agony on account of the deliveries that they are forced to go through. The ceiling of 20 weeks is therefore arbitrary, harsh and discriminatory and violative of Articles 14 and 21 of the Constitution of India. Besides, the Petitioners is seeking relief and a declaration that the term 'save the life of the pregnant woman' in section 5 of the Act be read to include the protection of the mental and physical health of the pregnant mother. Such revisions would eliminate the severe mental anguish and trauma suffered by the Petitioner and women who are forced to carry the fetuses with serious abnormalities that are detected after the 20th week, as in the case of the Petitioner herein.

FACTS OF THE CASE:

4. The Petitioner No. 1 is a resident of Buldhana. The Petitioners No. 3 and 4 are the intended parents. The Petitioners had entered into surrogacy agreement and the same was executed on 19.03.2018, whereat the Petitioner No. 1 agreed to be a surrogate mother and conceive by way of the placement of the intended parents' embryo into her uterus through Assisted Reproductive Treatment (ART) process. Hereto annexed and

marked as **EXHIBIT A** is a copy of the surrogacy agreement dated 19.03.2018.

5. On 08.12.2018, at the time of a routine screening for structural defects, it was detected for the first time that the foetus of the Petitioner, with a gestational age corresponding of 22 weeks + 2 days suffered from severe tricuspid regurgitation and fetal right ventricle and pulmonary artery appear hypoplastic. Annexed hereto and marked as **EXHIBIT B** is a copy of the 2nd Trimester Anomaly Scan Report dated 08.12.2018. Thereafter on 17.12.2018 the doctor of the Petitioner No. 1 approached Dr. Rahul Saraf, consultant pediatric cardiologist with the aforementioned reports seeking his opinion. After going through the relevant reports, Dr. Rahul Saraf opined as under-

“The images are suggestive of a complex cyanotic heart disease. The nature of intervention depends on the clinical status of the baby after delivery. The baby will require multiple high risk cardiac surgical/catheter based intervention with guarded long term prognosis. Longevity and quality of life is low in comparison with the normal population.”

Hereto annexed and marked as **EXHIBIT C** is a copy of the opinion of Dr. Rahul Saraf, consultant pediatric cardiologist dated 17.12.2018

6. On learning of the foetal abnormality and on the basis of the prognosis, although all the Petitioners mutually desire to terminate the pregnancy, the Petitioner No. 1 has been barred from doing as per section 3 of the Medical Termination of Pregnancy Act, 1971 that does not allow for the termination of a pregnancy beyond 20 weeks. The continuation of the pregnancy and Enforcement of the Act has led the Petitioner No. 1 to undergo severe psychological, physical and emotional trauma.

7. Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as '*MTP Act*') allows women to have an abortion where the length of the pregnancy "does not exceed twenty weeks, 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;

(ii) there is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped."

The MTP Act also allows for termination in the case of rape and contraceptive failure in married couples. Sec. 5 (2) provides only one exception to the 20 week limit when "the termination of such pregnancy is immediately necessary to

save the life of the pregnant woman” No explanation is given for the MTP Act’s 20 week cut-off, which severely jeopardizes the physical and mental health of the Petitioner who faces the substantial risk that if their child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. A true copy of the MTP Act, 1971 is annexed hereto and marked as **EXHIBIT D**.

8. The Federation of Obstetric and Gynecological Societies of India (FOGSI), a body comprising of 24,000 plus members, stated: “[the] risk to the mother in case of termination of pregnancy at 25 weeks is not significantly higher than the risk at 20 weeks.” FOGSI advised that “in case of fetal abnormality which has been detected late and which leads to an extremely serious handicap at birth, such foetus should be allowed to be terminated, even after 20 weeks.”
9. A report by Dr. R.M. Saraogi of Cooper Hospital and Seth G.S. Medical College in Special Leave Petition 5334/2009, Dr. Nikhil D. Datar v. Union of India 2009, found that the “abortion process at 20 weeks and 25 weeks carries the same risk”.
10. In 2008, the Union of India MTP Review Committee consisting of Health Secretary Naresh Dayal and former Director General of the Indian Council of Medical Research,

Dr. N.K. Ganguly concluded that the cut-off time should be extended to 24 weeks. The Respondents have not released this report.

11. In this regard, it is imperative to state that some fetal impairment cannot be detected or fully evaluated until 20 weeks. A 2006 study in the American Journal of Obstetrics & Gynecology found, “Advances in fetal magnetic resonance imaging (MRI) have allowed detection of increasingly subtle cerebral anomalies, particularly in the posterior cranial fossa.” “Embryologically, the cerebellum is one of the first brain structures to arise and one of the last to reach its mature configuration.” Thus, the prenatal diagnosis for these anomalies was made at a median gestational age of 21 weeks (with range of 19-26 weeks).

12. An article published by the Australian Medical Journal states, “The uterus is indeed the best intensive care unit; fetuses with the most terrible abnormalities usually do not die before birth. Denying abortion may only delay the inevitable and extend the suffering of the family.” Because the MTP Act forbids the Petitioner from terminating her pregnancy once doctors diagnosed her fetal abnormality, the continuation of the pregnancy in spite of the knowledge of the inevitable death of the foetus, the suffering of the Petitioner is being inhumanly

prolonged. A study by the American Psychological Association Task Force on Mental Health and Abortion found that women who terminate a previously wanted pregnancy, even late in the pregnancy, experience less severe psychological harm than women who deliver a child with severe abnormalities. The study also found that eight weeks after pregnancy, women who had terminated their pregnancy expressed significantly less grief than those who had a spontaneous child loss. The ability to terminate a pregnancy prior to loss of a child had a significant influence on a woman's mental and emotional health. In this case, the Petitioner's suffering could be significantly reduced if she was permitted to terminate the pregnancy.

IMPACT OF RESTRICTIVE ABORTION LEGISLATION
ON THE PETITIONER:

13. Dr. Nikhil Datar v. Union of India & Ors., [W.P. (L) 1816/2008] provides another example of victims of the MTP Act. In her 20th week of pregnancy, Niketa Mehta's sonography showed her foetus to be normal. However, in the 22nd week the gynecologist found that the foetus had a congenital complete heart block which would lead to a poor quality of life and could be fatal. Because the condition of Mrs. Mehta's foetus was not discovered until the 22nd week of

her pregnancy, she sought permission to terminate the pregnancy from the Bombay High Court. The Court refused to allow an abortion and Mrs. Mehta was forced to continue with her pregnancy. She ultimately miscarried after months of grief and torment and at risk to her own personal health and safety. Because situations like Mrs. Mehta's are on the rise, Dr. Datar filed a special leave petition, *Dr. Nikhil D. Datar v. Union of India & Ors.*, [S.L.P. (C) 5334/2009], before the Hon'ble Supreme Court challenging the order passed by the Bombay High Court.

14. It is pertinent to note that the Hon'ble Supreme Court of India permitted medical termination of pregnancy at the 26th week in the matters of *Sarmishtha Chakraborty & Anr. V. Union of India & Ors.* [W.P.(C) 431/2017] and while doing the same observed as under:

“Frankly speaking, cases of this nature have to rest on their own facts because it shall depend upon the nature of the report of the Medical Board and also the requisite consent as engrafted under the Medical Termination of Pregnancy Act, 1971. In the instant case, as the report of the Medical Board, which we have produced, in entirety, clearly reveals that the mother shall suffer mental injury if the pregnancy is continued and there will be multiple problems if the child is born alive. That

apart, the Medical Board has categorically arrived at a conclusion that in a special case of this nature, the pregnancy should be allowed to be terminated after 20 weeks. In the case of *Suchita Srivastava & Anr. vs. Chandigarh Administration* [(2009) 9 SCC 1], the Court has expressed the view that the right of a woman to have reproductive choice is an inseparable part of her personal liberty, as envisaged under Article 21 of the Constitution. She has a sacrosanct right to have her bodily integrity. The case at hand, as we find, unless the pregnancy is allowed to be terminated, the life of the mother as well as that of the baby to be born will be in great danger. Such a situation cannot be countenanced in Court. Regard being had to the aforesaid and keeping in view the 11 report of the Medical Board, we are inclined to allow the prayer and direct medical termination of pregnancy of the 1st petitioner at the IPGMER-SSKM Hospital.”

A copy of the order of Hon’ble Supreme Court of India in *Sarmishtha Chakraborty & Anr. V. Union of India & Ors.* [W.P.(C) 431/2017], dated- 03.07.2017 is annexed hereto and marked as **EXHIBIT E**.

15. Most recently, the Hon’ble Supreme Court vide common order in identical cases of “*Sonali Kiran Gaikwad v. Union of India*”

and “Nisha Suresh Aalam v. Union of India”, while allowing medical termination of pregnancy at gestational ages of 29 weeks and 30 weeks respectively, observed and directed that:

“A categorical view reflected in the above said report is that if the pregnancy of the petitioners is terminated at this stage it is not going to be more hazardous than spontaneous delivery at term. On the contrary, continuing pregnancy will cause more mental anguish to the petitioners. Having regard to the aforesaid report and the law laid down by this Court in various judgments including in judgment dated 16.01.2017 in W.P. (C) No.17 of 2017 titled as Meera Santosh Pal & Ors. vs. Union of India & Ors., the prayer made in the writ petitions(s) is allowed to the extent the petitioners are free to undergo medical termination of their pregnancy. For this purpose, petitioners-Sonali Kiran Gaikwad and Nisha Suresh Aalam may visit the hospital on 12th October, 2017 and they would be attended immediately.”

A true copy of the order of Hon’ble Supreme Court of India in W.P.(C) 928/2017 and W.P. (C) 929/2017, dated- 09.10.2017 is annexed hereto and marked as **EXHIBIT F**. Similarly in the case of Tapasya Umesh Pisal vs. the Union of India & Ors. [Writ Petition (Civil) No. 635 of 2017], the Petitioner’s fetus

was diagnosed as having hypoplastic right heart with tricuspid and pulmonary atresia with small size pulmonary arteries. A medical board was constituted by the Hon'ble Supreme Court vide order dated. 07.08.2017. The Medical Board stated in its report that the surgeries that will be necessary on the fetus have been reported to carry high morbidity and mortality and that in spite of the surgeries, such children do not achieve normal oxygen level and would remain physically incapacitated. The life span of these children even after corrective surgeries is limited as described in medical literature. The Supreme Court while recording that it is certain that the fetus if allowed to born, would have a limited life span with serious handicaps which cannot be avoided, granted the Petitioner permission to undergo medical termination of her pregnancy. The Petitioner at the time was well into her 24th week of pregnancy. Hereto annexed and marked as **EXHIBIT G** is a copy of the order of the Supreme Court dated 10.08.2017.

16.As submitted, the MTP Act encourages desperate women who learn about a fetal abnormality after the 20th week to seek out unsafe abortions from untrained medical personnel. Illegal abortions are the third leading cause of maternal death in India and account for 13% of maternal deaths worldwide. Expanding the exceptions allowed under the MTP Act to include

protection of maternal health could easily eliminate any of these senseless deaths.

17. Inadequate access to health care, poor quality services, and outdated abortion restrictions contribute to India's high Maternal Mortality Rate of 212. Improving maternal health and reducing the Maternal Mortality Rate (MMR) is a United Nations Millennium Development Goal (MDG). India is expected to have an MMR of 139 deaths per 1 lakh live births in 2015, missing the MDG by 30 percentage points.

18. When abortion laws like India's MTP Act do not provide exceptions to protect the health and welfare of the mother, these laws violate the Petitioner's fundamental right to life, health and dignity under the domestic and international norms.

19. Noting deficiencies in the MTP Act, the National Commission for Women proposed the following changes to Sec. 3 (2)(b):

“Provided that where the pregnant woman is minor; pregnancy is a result of rape or incest, pregnant woman is physically challenged; or continuance of pregnancy would involve risk to the life of the pregnant woman; or grave injury to her physical or mental health; or there is a substantial risk that if the child were born it would suffer physical or mental abnormalities; then the upper limit on

gestational time shall not apply to the termination of pregnancy.”

VIOLATION OF THE PETITIONER’S FUNDAMENTAL RIGHT TO LIFE:

20. Article 21 of the Constitution of India guarantees the right to life and personal liberty. In *Pt. Parmanand Katara v. Union of India & Ors.* [1989 SCR (3) 997], this Hon’ble Court held that Article 21 of the Constitution obligated the State to preserve life. This Hon’ble Court held that because the obligation to preserve life is “total, absolute and paramount,” laws of procedure [like the Medical Termination of Pregnancy Act] which “interfere with the discharge of this obligation cannot be sustained and must, therefore, give away.”

21. Without an exception to the ban on abortion to protect the health and welfare of the pregnant mother, the MTP Act forces pregnant women, like the Petitioner herein, who learn about fetal abnormalities after the 20th week of pregnancy, to compromise their own personal safety and welfare by carrying abnormal foetuses to term, a violation of the Petitioner’s right to life. Alternatively, the MTP Act restrictions encourage desperate women to seek out unsafe abortions from untrained medical personnel, putting their lives in extreme danger.

Unsafe abortion is the third leading cause of maternal death in India. Thus, enforcement of the MTP Act without exception denies Petitioner No.1's protection of life in violation of Article 21.

VIOLATION OF THE PETITIONER'S RIGHT TO BE FREE
FROM INHUMAN AND DEGRADING TREATMENT:

22. This Hon'ble Court has recognized that the right to life includes the right to be free from inhuman and degrading treatment. As described in *Francis Coralie Mullin v. Union Territory of Delhi & Ors.* [1981 SCR (2) 516]: "There is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the ICCPR."

23. Article 7 of the ICCPR states that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. This imposes an obligation on the State to protect individuals from ill treatment and to protect women from unnecessarily prolonged physical or mental suffering. Because it is not medically necessary, forcing Petitioner No. 1 to carry a foetus knowing it would not survive amounts to the inhuman

and degrading treatment prohibited by Article 7 of the ICCPR.

24. The United Nations Human Rights Committee (HRC) found such violation in *K.L. v. Peru* where a woman in Peru was forced to carry a severely malformed foetus to term even though doing so posed risk to her health. On 17 November 2005, the HRC found that because depression and emotional distress caused by the denial of a therapeutic abortion was a foreseeable harm, the State violated Article 7 of the ICCPR.

25. In February 2013, the United Nations Special Rapporteur Juan E. Mendez identified reproductive rights practices that are tantamount to torture or ill-treatment including denial of information about a woman's medical condition and restricting legally available health services. "The Committee against Torture has repeatedly expressed concerns about restrictions on access to abortion and about absolute bans on abortion as violating the prohibition of torture and ill-treatment."

26. The anguish of women forced to carry a foetus that will not survive or will be severely handicapped amounts to cruel, inhuman and degrading treatment. Thus, restrictive abortion laws like the MTP Act violated the Petitioner's fundamental rights protected by Article 21 of the Constitution.

VIOLATION OF THE PETITIONER'S FUNDAMENTAL RIGHT
TO HEALTH:

27. The Hon'ble Supreme Court held that Article 21 of the Constitution included a fundamental right to health, and that this right is a "most imperative constitutional goal" in *Consumer Education and Research Center v. Union of India* [1995 SCC (3) 43]. The right to health has been construed to mean both physical and mental well-being and health. The MTP Act itself recognizes the importance of mental health, as Section 1 allows for termination before 20 weeks if a doctor determines a pregnancy would cause a woman mental anguish. Women who require a termination after 20 weeks have no choice but to take on the physical and psychological risks.

28. The MTP Act's 20 week restriction also places a traumatic sense of urgency on Petitioner, forcing her to undergo significant emotional distress in deciding whether to go forward with an abortion when adequate medical information is not available. At grave risk to the emotional and psychological well being, the Petitioner chose to obtain a termination. Enforcement of the MTP Act is a clear violation of the right to health under Article 21 of the Constitution of India.

29. India is a signatory to the International Covenant on

Economic, Social and Cultural Rights (ICESCR) which, in Article 12, requires States to “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” The ICESCR treaty monitoring body, the committee on Economic, Social and Cultural Rights (ICESCR) further clarifies the right to health, explaining that: “The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one’s health and body, including sexual and reproductive freedom.”

30. The MTP Act takes complete control over the Petitioner’s reproductive freedom and choice at 20 weeks of pregnancy. ICESCR has expressly advised State parties to permit or consider permitting abortion for medical reasons including high risk pregnancies. Here, this exception would entail allowing the Petitioner to make the best choice for her mental and physical well-being. An exception to the MTP Act’s ban on abortion for the health of the pregnant mother is imperative to ensure India’s compliance with its international obligations under ICESCR.

31. Article 2 of the ICESCR requires states to undertake steps to the maximum of their available resources to achieve full realization of the rights recognized. According to General

Comment 14, violations of this obligation include those State actions, policies or laws that contravene the standards set out in Article 12 of the Covenant and are likely to result in bodily harm, unnecessary morbidity and preventable mortality. Furthermore, the General Comment No. 22 (2016) on the Right to sexual and reproductive health enunciates that; “the right to sexual and reproductive health is also indivisible from and interdependent with other human rights. It is intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy, such as the right to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment; privacy and respect for family life; and non-discrimination and equality. For example, lack of emergency obstetric care services or denial of abortion often lead to maternal mortality and morbidity, which in turn constitutes a violation of the right to life or security, and in certain circumstances can amount to torture or cruel, inhuman or degrading treatment.”

32. Enforcement of the MTP Act as it stands greatly impacts the health of the pregnant mother and results in preventable mortality of pregnant mothers who have no choice but to resort to unsafe abortion services. The Petitioner is forced to undergo severe psychological stress and trauma and is needlessly being

compelled to carry a foetus to term when the foetus has a substantial anomaly and has no probability of independent survival. Thus, the State's enforcement of the MTP Act clearly violates its obligation to enforce the rights of women under Article 12 of ICESCR.

33. Enforcement of the MTP Act's ban on abortion after the 20th week endangers women's physical and mental health and in cases of substantial fetal abnormalities, prolongs the suffering of the mother when she is aware of the prognosis and is compelled to continue the pregnancy against her will.

34. The NCW's proposed amendments to Sec 3(2)(b) of the MTP Act provides guidance on how the MTP Act must be revised to protect the lives and health of pregnant women, particularly where there is a substantial risk of physical or mental fetal abnormality.

ENFORCEMENT OF THE MTP ACT VIOLATES THE
PETITIONER'S RIGHT TO LIVE WITH DIGNITY:

35. The right to live with dignity has also been enshrined in Article 21 of the Constitution of India and accepted as a fundamental right protected under international law. In Francis Coralie Mullin v. Union Territory of Delhi & Ors. [1981 SCR (2) 6] this Hon'ble court has held as under:

“Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live.”

36. Furthermore, under international law, Article 12.1 of the ICESCR states that “every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.”

37. Forcing the Petitioner to carry a severely deformed foetus for months knowing that it would not survive has caused her acute mental anguish, despair and physical pain. She is being deprived of dignity by not being able to make decisions about her own health, by having no control over her own body and by being forced to continue with her pregnancy.

38. Enforcement of the MTP Act has deprived the Petitioner of the dignity of making an informed decision about her own body and health.

RESPONDENT VIOLATES WOMEN’S RIGHT TO PERSONAL LIBERTY AND PRIVACY:

39. The right to privacy is also implicit in Article 21 of the Constitution of India. In *K.S. Puttaswamy (retd.) & Anr. vs. the Union of India* [Writ Petition (Civil) No. 494 of 2012] a nine-judge bench of the Hon’ble Supreme Court has held that

the fundamental right to privacy is intrinsic to life and liberty and thus falls under Article 21 of the Indian constitution. Vide its order dated 24.08.2017, the Hon'ble Apex Court held that *“Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution”*. It is submitted that the Petitioner being forced to continue an unwanted pregnancy, amounts to her losing her right to safeguard the privacy of procreation, motherhood and childbearing because ostensibly the MTP Act is making those choices for her.

40. Additionally, CEDAW explicitly affords women the right to freely decide the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights, *See Article 12 and 16 of CEDAW and General Recommendation 24*. While interpreting Article 12's right to health, CEDAW in General Recommendation 24 recommends that States *“require all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice.”*

41. It is reiterated that the Petitioner is losing her right to decide

freely on the number and spacing of her children. This right is integral to the enjoyment of reproductive self-determination encompassed within the right to privacy. The Petitioner has been unable to have an abortion despite the negative impact on her health and well-being. Thus, the MTP Act violates Petitioner's rights to personal liberty and privacy, guaranteed by the Indian Government and International law.

ENFORCEMENT OF THE MTP ACT VIOLATES PETITIONER'S
RIGHT TO CHOICE AND INFORMED CONSENT:

42. This Hon'ble Court in *Samira Kohli v. Dr. Prabha Manchanda and Anr.* [Appeal (Civil) 1949 of 2004], established the requirement that a doctor should seek and secure the consent of the patient before commencing treatment. The consent obtained must be real and valid, meaning: the patient should have the capacity and competency to consent; her consent should be voluntary, and her consent should be on the basis of adequate information. The 'adequate information' should enable the patient to make a balanced judgment as to whether she should submit herself to the particular treatment or not.

43. Congenital/ Structural Echocardiography tests are advised after a sonography detects a defect in the foetus. Such sonographies,

used to find abnormalities, can only be done after the 18th week of pregnancy. The subsequent test then requires at least two to three more weeks to be analyzed. By the time the results are available, the pregnancy is likely to have passed the MTP Act's 20 week restriction for termination. Because medical staff often cannot determine the extent of a fetal abnormality until after 20 weeks, it is impossible for women in a position such as that of the Petitioner to give informed consent when they do not have enough time to access adequate medical information.

44. Justice requires that the MTP Act be revised to allow women sufficient time to consider the results of Level- II Ultrasounds which is same as sonography but done with intent of finding out anomalies, which are only available after the 20th week. Without this information, women cannot fully and voluntarily consent to an abortion when their mental and physical health is at stake. Without such an exception, enforcement of the MTP Act allows the woman's right to consent to be overridden by uninvolved third parties with dubious moral authority. The 20 week deadline effectively bars women who learn about fetal cerebral abnormalities from accessing safe medical terminations. Under the current law, these women are deprived of their right to choice and informed consent and are often compelled to seek out abortions from untrained medical

personnel.

VIOLATION OF THE PETITIONER'S RIGHT TO EQUALITY

BEFORE THE LAW:

45. Article 14 of the Constitution of India guarantees equality before the law and Article 15 prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. This Hon'ble Court describes gender equality as one of the "most precious Fundamental Rights guaranteed by the Constitution of India." *Apparel Export Promotion Council v. Chopra*, [AIR 1999 SC 625]. This Hon'ble Court reaffirmed the government's obligation to "gender sensitize its laws" and placed the judiciary "under an obligation to see that the message of the international instruments are heard."

46. The burdens of pregnancy, delivery, and childbearing are inequitably borne by women. Accordingly, women's quality of life and ability to pursue personal development stand to be disproportionately affected by the decision to carry a pregnancy involving fetal impairment to term. Criminalization of therapeutic abortion not only constitutes discrimination against women on the basis of sex, but also discrimination on the basis of socio-economic status as lower-income groups of women tend to have less access to information and resources

related to reproductive health services. Nevertheless, the MTP Act provides no exception to account for this disproportionate impact in the health and welfare of the pregnant mother and therefore, violates the right to equality before the law as guaranteed under Article 14 and 15 of the Constitution of India.

47. India is a signatory to the Convention on the elimination of All Forms of Discrimination against Women (CEDAW). As such, India is bound to honor the recommendations developed by CEDAW, which serve to clarify the obligations enforced by the treaty. General Recommendation 24 declares, “State parties that have laws that criminalize medical procedures only needed by women punish women who undergo those procedures.” Abortion is a medical procedure only needed by women and it is women whose lives and health are disproportionately put at risk by the MTP Act’s restrictions. Therefore, the Petitioner is being unduly discriminated against and punished based on her sex by the MTP Act’s criminalization of abortion after the 20th weeks of pregnancy. The right to no-discrimination under CEDAW requires that abortion be lawful when necessary to protect women’s health as a measure to eliminate discrimination against women in the field of health care.

48. It is pertinent to mention that the Ministry of Health and Family Welfare has released a draft of the Medical Termination of Pregnancy (Amendment Bill), 2014 which proposes to improve access to abortion through steps that will expand the health care providers' base and simultaneously reduce women's dependency on health care providers during the process of seeking abortion. The amendment Bill also explicitly extends abortion care to unmarried women and aims at ensuring privacy for women seeking abortion. The gestational limit for abortion will be extended from 20 to 24 weeks and in addition, abortion will be provided for specific fetal anomalies after this period. Hereto annexed and marked as **EXHIBIT H** is a copy of the Medical Termination of Pregnancy (Amendment Bill), 2014.

49. The Respondents have failed through their acts and omissions to adhere to Constitutional obligations to protect the Petitioner's reproductive rights, including the right to life and health enshrined in Article 21 and the rights to equality and non-discrimination in Articles 14 and 15. Moreover, the Respondents have impermissibly derogated from their legal obligations under binding international human rights treaties to respect, protect, and fulfill the human rights of the Petitioner, as required under Article 51(c) of the Constitution of India. Immediate action is necessitated from this Hon'ble Court to

provide necessary medical and psychological care, and to revise the MTP Act to protect pregnant women and families from suffering the physical and mental pain of carrying a foetus that cannot survive and ensure that reproductive health care is accessible and administered in a dignified, humane, equitable, and gender-focused manner. Aggrieved by the same, the Petitioner seeks to assail the same on the following grounds which are without prejudice to one and other-

GROUND:

- A. That by enforcing the MTP Act without an exception for the health and welfare of the pregnant mother, the Respondents have failed to protect the right to life by leaving desperate women carrying severe fetal abnormalities no choice but to seek unsafe abortions, which contributes significantly to India's poor maternal mortality rate.
- B. That the technological basis of the MTP Act's abortion limit to 20 weeks (section 3(2)(b)) is outdated and arbitrary.
- C. That the Respondents have violated Petitioner's Constitutional Rights to health and life guaranteed by Article 21, by subjecting them to life-threatening or life-altering conditions without a medical need.

- D. That the Petitioner's right to dignity and to be free from cruel, inhumane or degrading treatment has been violated inasmuch as the MTP Act forced her to compromise her own personal safety and welfare to abide by the law.
- E. That the MTP Act as it stands today compels the Petitioner to suffer physical pain, bear the risk of excessive bleeding in the delivery process, and compromise her mental health due to the severe trauma of giving birth to an infant that would die immediately after delivery, a violation of Article 7 of the ICCPR's right to be free from inhuman and degrading treatment.
- F. That the right to health is protected by Article 21 of the Indian Constitution and this right includes both emotional and mental health.
- G. That forcing the Petitioner to deliver a foetus with no potential to survive, gravely endangering her mental and physical health by causing her significantly more mental anguish, trauma and physical pain than she would have had to endure if the MTP Act does not allow her terminate her pregnancy.
- H. That forcing the Petitioner to go through an unwanted

pregnancy violates her right to dignity and sexual and reproductive freedom as guaranteed under Article 21 of the Indian Constitution and ICESCR.

- I. That forcing the Petitioner to continue an unwanted pregnancy has deprived her of her right to safeguard the privacy of procreation, motherhood and child- bearing, as guaranteed under Article 21 of the Indian Constitution.
- J. That Indian and International human rights standards demand that India reinterpret the MTP Act to ensure justice for the Petitioner and to protect future pregnant women and families from suffering the physical and mental pain of carrying a foetus that cannot survive.
- K. That it is impossible for a pregnant woman to give informed consent when she does not have sufficient time to access information on the condition and deformity of the foetus she is carrying. Justice requires that the MTP Act be reinterpreted so as to allow women sufficient time to consider the results of fetal abnormalities, which are only available after the 20th week.
- L. That the enforcement of the MTP Act also violates the Petitioner's right under CEDAW requiring that men and women be treated equally in terms of reproductive services

and choice.

M. That reinterpreting the MTP Act to allow for protection of the health and welfare of pregnant women would not only serve to partially redress the Petitioner's injuries but would also protect the rights of future pregnant women in India.

N. That the Respondents in enforcing the MTP Act as it stands, clearly violates the rights of the Petitioner as guaranteed by binding international treaties and conventions including ICESCR, ICCPR, and CEDAW.

49. In the circumstances the Petitioner is entitled to reliefs including interim reliefs.

50. The Petition have been read out to the Petitioners in the language they understand i.e Marathi.

51. The Petitioner has no other efficacious alternate remedy but to approach this Hon'ble Court under Article 226 of the Constitution of India and the reliefs as prayed for if granted shall be complete.

52. The Petitioner is a resident of Mumbai and the Respondents offices are within the State of Maharashtra. Hence the cause of action arises within the jurisdiction of this Hon'ble Court to entertain and try this Petition.

53. The Petitioner has not filed any other Petition before this Hon'ble Court or any other High Court or Hon'ble Supreme Court of India arising out of this subject matter.

54. The Petitioner is paying the fixed court fee of _____ for the purpose of filing this petition.

55. The Petitioner shall rely upon the documents referred to and relied upon hereinabove.

56. The Petitioner has not received any Caveat application from the Respondent side till date.

57. The Petitioner therefore prays as under:

- a. For a writ of declaration or any other appropriate writ, order or direction in the nature of declaration, declaring section 3(2)(b) of The Medical Termination of Pregnancy Act, 1971 to the limited extent that it stipulates a ceiling of 20 weeks for an abortion to be done under Section 3, as ultra vires Article 14 and 21 of the Constitution of India;
- b. For a writ of declaration or any other appropriate writ, order or direction quashing section 5(1) of the Act to the limited extent that it restricts abortions under section 5 to a restricted field

where it is immediately necessary to save the life of the pregnant woman;

- c. For a writ of declaration or any other appropriate writ, order or direction in the nature of declaration, declaring that the case of the Petitioner is a fit case for exercising jurisdiction under Section 5 of the Medical Termination of Pregnancy Act, 1971.
- d. For a writ of mandamus or any other writ, order, or direction in the nature of mandamus directing the Respondents to-
 - (i) constitute a Medical Committee for the examination of the Petitioner to assist this Hon'ble court in arriving at a decision on the plea of the Petitioner;
 - (ii) allow the Petitioner to undergo Medical Termination of Pregnancy at a medical facility of her choice.
- e. For a writ of mandamus or any other writ, order, or direction in the nature of mandamus directing the Respondents to set up appropriate Medical Committees in each district in the State of Maharashtra to assess the pregnancy and offer MTP to the Petitioner and other women in need of the procedure beyond the prescribed 20 weeks limit.
- f. For an order directing Respondent No.1 to produce the report of MTP Committee which included the Health Secretary, Mr.

Naresh Dayal, former Director- General of the Indian Council of Medical Research and Dr. N K Ganguly as its members as stated in para 9 of the petition.

- g. Pending the hearing and final disposal of this matter this Hon'ble be pleased to direct the constitution of a Medical Committee for the examination of the Petitioner to assist this Hon'ble court in arriving at a decision on the plea of the Petitioner.
- h. Pending the hearing and final disposal of this matter this Hon'ble be pleased to allow the Petitioner to undergo Medical Termination of Pregnancy at a medical facility of her choice.
- i. Pending the hearing and final disposal of this matter this Hon'ble be pleased to direct the Respondents to set up appropriate Medical Committees in each district in the State of Maharashtra to assess the pregnancy and offer MTP to the Petitioner and other women in need of the procedure beyond the prescribed 20 weeks limit.
- j. For ad-interim relief in terms of prayer clause (e) to (g).
- k. For any other order/ direction that this Hon'ble Court may deem fit.

Advocate for the Petitioner

Petitioner

VERIFICATION

I, Kalyani Bansode, 02, Narayan Suryavanshi Chawl No. 38, Vishnu Laxman, Sawant Marg, Near Hanuman Mandir Amboli Pada, Andheri West, Mumbai - 400058. do hereby state and solemnly declare that what is stated in the petition in paragraph No.1 to is based on my own knowledge and whatever is stated in the remaining paras no to is stated on information and belief to be true.

Solemnly declared at)

On this day of May, 2018) Petitioner

Identified by me

Kranti L C/ Meenaz Kakalia

Advocates for the Petitioner

Before me

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. OF 2018

In the matter of Article 14, 15 and
21 of the Constitution of India

-AND-

In the matter of the Medical
Termination of Pregnancy Act,
1971

-AND-

In the matter of order dated
09.10.2017 passed by the Hon'ble
Supreme Court in Sonali Kiran
Gaikwad v. Union of India & Ors.
[W.P. (C) 928 of 2017]

-AND-

In the matter of the Universal
Declaration of Human Rights,
1948

-AND-

In the matter of International
Covenant on Civil and Political
Rights, 1966

-AND-

In the matter of International
Covenant on Economic, Social and
Cultural Rights, 1976

-AND-

In the matter of The Convention on
the Elimination of all Forms of
Discrimination Against Women,
1979

Kalyani Bansode)
02, Narayan Suryavanshi Chawl No. 38)
Vishnu Laxman, Sawant Marg,)
Near Hanuman Mandir Amboli Pada,)
Andheri West, Mumbai - 400058.) ...Petitioner

Versus

1. Union of India)
through the Secretary,)
Ministry of Law and Justice,)

Shastri Bhawan,)
"C" Wing, New Delhi 110001)

2. State of Maharashtra)
through the Principal Secretary,)
Public Health Services,)
Mantralaya, Mumbai 23.)

3. Ministry of Health and)
Family Welfare,)
through its Secretary,)
M.H. Division, New Delhi.) ...Respondents

VAKALATNAMA

To,
The Registrar,
Bombay High Court,
Mumbai, 400 001.

Madam/Sir,

I, Kalyani Bansode, the Petitioner herein, do hereby appoint Kranti LC
and Sangram Chinappa Advocates, High Court to act, appear and plead
on my behalf in the above matter.

IN WITNESS WHEREOF I set and subscribe my hand on this writing
dated

____ of May, 2018

Accepted by me,

Kranti L.C./ Sangram Chinappa

Petitioner

Advocates for Petitioner

First Floor, Jalaram Krupa,

61, Janmabhoomi Marg, Fort, Mumbai- 400001.

Adv. Code: I10585 / I15707 / I18524

Email Address-

Cont. No. - 9819493794