

**X v. Principal Secretary, Health and Family Welfare Dept, Govt.
of NCT of Delhi & Anr.**

Special Leave Petition (Civil) No 12612 of 2022

Mr. Ayush Jha*

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Introduction

“My idea of how choice should have developed was not a privacy notion, not a doctor’s right notion, but a woman’s right to control her own destiny, to be able to make choices without a Big Brother state telling her what she can and cannot do.” - Justice Ruth Bader Ginsburg, Supreme Court of USA.

This judgement of *X v. Principal Secretary, Health and Family Welfare Dept, Govt. of NCT of Delhi and Anr.*, not only is an important piece of case law for expansion of MTP Act to unmarried women, but also exemplifies the manner in which a judgement should be written. The clarity and coherence with which it has been authored shows on to the extent of research done by the judges before arriving at a reasoned decision. This judgement is written in the simplest of languages and incorporates a jurisprudential discourse so much so that it appears more of a scholarly work than a judicial writing. The judgement has significant consequences on the reproductive rights of the women in India and it comes in the backdrop of the amendment to the Medical Termination of Pregnancy Act, 1971.

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Background of the MTP Legislation

The Medical Termination of Pregnancy Act was first enacted in the year 1971 by the Parliament to “provide for termination of certain pregnancies by registered medical practitioners”¹ Prior to 1971, abortion was criminalised under S. 312 of the Indian Penal Code. The only exception to the law was when abortion was carried out to save the life of the pregnant woman. The Government of India constituted a committee under the chairmanship of Shantilal Shah in 1964 to look into the prospect of legalisation of abortion in India. The committee in its report submitted in 1967 mentions that high mortality rates among women was a strong plea for legalisation of abortions.² The argument stems from the fact that due to restrictive abortion laws, women who do not want the pregnancy to continue will resort to means which are gravely damaging to their health and their life.³ The report also highlighted the fact that mortality arises when abortions are carried out by those who do not possess the required knowledge and expertise to perform such procedures.⁴ In light of the recommendations made by the committee, The Medical Termination of Pregnancy Act (hereinafter MTP Act) was passed in the year 1971.

The MTP Amendment Act 1971 was amended in the year 2021 to reform the old law and keep it abreast with modern society. The 2021 amendment, *inter alia*, made the following changes - (i) The gestation limits up to which abortion can be sought was increased from 20 to 24 weeks (ii) Constitution of medical boards to decide upon abortions sought after 24 weeks (iii)

¹ Object and purpose, Medical Termination of Pregnancy Act, 1971

² Shantilal Shah Committee Report, 1967, Pg - 18

³ *Ibid*

⁴ *Supra* note 2, pg - 22

Category of women who could seek abortion is enumerated under the rules (d) Failure of contraception is now enumerated as a ground for abortion (d) Gestational limits of medical abortion increased from seven to nine weeks. The latest amendment surely is a progressive move aimed at enabling women to exercise their reproductive choices.

Facts and Submissions in the present case

The present case was heard before the Supreme Court through a Special Leave Petition after the division bench of the Delhi High Court rejected the prayer of the petitioner to undergo an abortion on the grounds that she, being an unmarried woman was not covered within the scope of Rule 3B of the Medical Termination of Pregnancy Rules, 2003.

The order of the Delhi High Court gave rise to an appeal in the Supreme Court where the appellant prayed to terminate her pregnancy of almost 24 weeks on the grounds that her partner refused to marry her and that she lacked financial resources to raise a child all by herself. The appellant prayed that raising a child as an unwed mother would cause her mental and physical injury and that therefore, she did not want to carry her unwanted pregnancy to term. Therefore the material question that came up before the court was interpretation of Rule 3B of MTP Rules, 2003 read with S.3 of the MTP Act, 1971.

The counsels on behalf of the appellant argued that Rule (3)(2)(b) of Rule 3B of MTP Rules, 2003 are discriminatory to the extent that they exclude unmarried women from its ambit and this exclusion based on marital status is violative of Article 14 of the Constitution. It was also submitted on behalf of the Additional Solicitor General that Rule (3)(B)(c) must be interpreted in accordance with the purpose and the object that the statute seeks to achieve.

In doing so, the courts must also take into account the evolution that the society has undergone from the time of enactment of the statute. Hence legislations must be interpreted in a purposive manner rather than literally. It was also submitted that the term “change in marital status”⁵ under Rule (3)(B)(c) must be interpreted as change in relationship status to accommodate those women who are unmarried and have separated from their partners alongside married women who are divorced, widowed or deserted. The law in India recognises live - in relationships for the purposes of protection from domestic violence, maintenance and succession rights of children born out of such relationships. Lastly women, regardless of their marital status have the right to decisional autonomy and reproductive choices.

Observations and Reasoning of the Court

- **Purposive interpretation of provisions to address barriers in access to abortions** - The Court in its observation noted that there are multiple barriers in women’s access to safe abortion. The Court stated that in some situations, *unmarried women face particular barriers due to gender stereotypes about women’s sexual autonomy outside marriage.*⁶ The Court noted that there is a misconception around the fact that termination of pregnancy by unmarried woman is illegal and a woman and her partner may resort to availing of abortions by unlicensed medical practitioners in facilities not equipped for such procedure⁷, thereby increasing the chances of maternal mortality. The Court also observed that prosecution under the country’s criminal law⁸ is another impediment in accessing safe abortion. In order to remedy this, S.

⁵ Rule (3)(B)(c) of MTP Rules, 2003

⁶ Pg- 16, para 18

⁷ Pg -20, para 27

⁸ Pg -16, para 19

3(1) of the MTP Act, 1971 has an overriding effect over sections 312 - 318 of the IPC, 1860. It states that if a Registered Medical Practitioner (RMP) conducts an abortion in accordance with the provision of the MTP, he/she shall not be liable under the provisions of IPC. The court also noted that *MTP is a provider centric law and since women's right to access abortion is conditional on the approval of an RMP, denial of services by an RMP, compels women to approach courts or seek abortions in unsafe conditions.*⁹ The Court further observed that it is a common practice by the RMPs to seek extra-legal compliances such as consent from the woman's family, documentary proofs or judicial authorisation.¹⁰ It was reiterated that it is only the woman's consent that is required under the law (guardians consent is required in case she is a minor or suffers from mental illness). The court stated that the beneficial legislations must be interpreted in light of the societal evolution. Therefore interpreting a legislation literally may run counter-productive and the courts should resort to purposive interpretation in such cases.

- **Law must remain cognizant of changing social structures** - The Court reiterated from a previous judgement¹¹ that transformative constitutionalism promotes and engenders societal change by ensuring that every individual is capable of enjoying the life and liberties guaranteed under the constitution.¹² The Court noted that law must keep sight of changing family structures. Notions of social morality are largely subjective and should not be used as a tool to interfere with personal liberty of individuals.

⁹ Pg- 17, para 20

¹⁰ Pg - 18, para 22

¹¹ Navtez Singh Johar v. UOI (2014) 1 SCC 188

¹² Pg-28, para 40

- **Woman includes persons other than cis gender women** - The Apex Court early on in this judgement noted that the word ‘woman’ includes persons other than cis gendered woman who may require access to safe medical termination of their pregnancies.¹³

- **Marital “Rape” to be included within the meaning of rape for the purposes of MTP Act** - The Court observed that it is not uncommon for women to become *pregnant as a result of their husbands having “raped” them*.¹⁴ The Court observed that Exception 2 to sec. 375 of IPC is merely a legal fiction through which marital rape is excluded from the ambit of rape.¹⁵ The Court then went on to state that notwithstanding Exception 2 to Sec. 375, the meaning of words “sexual assault” or “rape” in Rule 3(B)(a) includes a husband’s act of sexual assault or rape committed on his wife.¹⁶ The Court reasoned that any other interpretation would have the effect of compelling a woman to give birth to and raise a child with a partner who inflicts mental and physical harm upon her.¹⁷ Carrying a pregnancy to term and delivering a child born out of intimate partner violence can lead to grave psychological impact on the woman. The judges have looked beyond the archaic understanding of consent to render “marital rape” at par with “non - marital rape” at least for the purpose of this Act, which is commendable.

- **POCSO and MTP Act to be read harmoniously** - Protection of Children from Sexual Offences Act proscribes and criminalises sexual activity by those

¹³ Pg - 9, para 11

¹⁴ Pg- 46, para 73

¹⁵ Pg- 46, para 74

¹⁶ Pg- 47, para 75

¹⁷ *Ibid*

below the age of eighteen. The Court observed that despite such prohibitions, the social reality is that adolescents engage in such activities consensually, which sometimes leads to pregnancy and hence it is important to include adolescents and young woman within the ambit of Rule 3B of MTP Rules. The Court also clarified that upon the request of the minor and their guardians only, the RMP is exempted from disclosure of identity and other personal information required in a criminal proceeding to prevent any conflict between statutory obligation of an RMP under POCSO and rights of privacy and reproductive autonomy of the minor under Art. 21 of the Constitution.¹⁸

● **Mention of widowhood, divorce at the tail end of Rule 3B(c) only illustrative and includes unmarried women as well** - Perhaps the most important observation of the court for the purposes of present case is that the court interpreted Rule 3(B)(c) to include unmarried women. The court reasoned that change in marital status can lead to material changes in a woman's life. So a divorce or death of husband can lead to material changes. Similarly when an unmarried woman separated from her partner or is abandoned by him, this too can lead to material changes in her life. They may find themselves in the same position (socially, mentally, financially or even physically) as the other categories of woman enumerated in Rule 3B but for other reasons.¹⁹ The Court went on to state that it is not possible for the legislature to include all instances of material changes and that it has to be interpreted on a case to case basis. The Court also mentioned it was not the intention of the legislature to restrict the benefit of sec. 3(2)(b) and Rule 3B to only those women who are enumerated thereunder. Rather the benefit must

¹⁸ Pg- 50, para 81

¹⁹ Pg- 54, para 92

be understood to extend to all women who undergo a sea of material changes in their lives regardless of their marital status.

- **Women have the right to reproductive autonomy and dignity and such rights emanate from our constitutional values** - The Court borrowing from the words of Zakia Luna²⁰, stated that “*reproduction is both biological and political. According to Luna, it is biological since physical bodies reproduce, and it is political since the decision on whether to reproduce or not is not solely a private matter. The decision is intimately linked to wider political, social and economic structures. A woman’s role and status in family and society generally, is often tied to childbearing and ensuring the continuation of successive generations.*”²¹ Societal factors often find reinforcement by legal barriers restricting a woman’s right to access abortion.²² By compelling a woman to carry pregnancy to term, she is stripped of her expression as an individual and her right to make a choice for herself, which is a facet of Art. 19 (1)(a) and Art. 21 of our constitution.

- **State has no compelling interest in protecting the institution of marriage** - The Court reiterated from a previous judgement²³ that the state has no compelling interest in protecting the institution of marriage, including child marriages. In this context, the court also noted that marriage in itself cannot be the beginning and end of all rights and there are multiple legislations which does not discriminate between women based on their marital status.

²⁰ Associate Professor of Sociology, Washington University

²¹ Pg- 56, para 97

²² Pg- 56,para 98

²³ Independent Thought v. Union of India (2017) 10 SCC 800

The Court held that prohibiting “*unmarried or single pregnant woman from accessing abortion while allowing married woman to access them during the same period would fall foul of the spirit guiding Art. 14 of the Constitution. The law should not decide the beneficiaries of the statute based on narrow patriarchal principles about what constitutes “permissible sex” and exclude groups based on such classification.*”²⁴ Denying women access to safe abortion and compelling them to carry their pregnancies where they are unwilling to do so would be a violation of their reproductive autonomy and dignity under Art. 21 of the Constitution.

Conclusion and way forward

The approach taken by the Hon’ble court while interpreting the scope of Rule 3B (c) of the MTP Rules in that it is expanded, by way of application of Mischief Rule, to include an unmarried woman, even though its literal interpretation suggests otherwise. The court has shown a way to include more situations where a woman becomes eligible to medically terminate pregnancy. One such situation, though not recognised by court, can be the one where a woman is married and the pregnancy is planned, but she decides to terminate it nevertheless, without any requirement of mental anguish. While a woman should always have autonomy to decide whether or not she wants to continue with an unwanted pregnancy, she doesn’t get the same if it was initially a planned pregnancy, and later she changes her mind. Various issues of morality and public policy can be raised in this context, and it is the opinion of the authors that there is a need to elaborately deal with the question of autonomy of a woman to undergo medical termination of pregnancy.

²⁴ Pg - 69, para 121

The legislature, in its wisdom, has recognised two categories of gestation periods for the purpose of the Act, i.e., 20 weeks and 24 weeks. While in case of the former, there is a presumption of grave mental injury if there is failure of birth control device or methods; the same standard is not applicable to the latter. It is the opinion of the authors that such a distinction is artificial and serves no purpose. The Hon'ble court, while taking a broader approach, could have shed some light on this distinction, albeit as an *obiter*. There is a need to further discuss the question of grave mental injury and its presumption, so as to not leave the same in the hands of the medical board.