



KP ASSOCIATES

ADVOCATES & CONSULTANTS

HANDBOOK
RIGHT TO ABORTION

K.P. ASSOCIATES

ADVOCATES & CONSULTANTS

ABOUT THE FIRM

KP Associates is a multi service law firm that strives to deliver quality and value to our clients. We believe in forging enduring relationships and give importance to the overall “Client Experience”.

The Firm houses a team of professionals from diverse specializations across major jurisdictions that enables us to assist clients throughout the country and abroad. We advise multinational companies, start-ups, individuals, government and public sector bodies on transactional, regulatory and litigation matters.

We provide innovative and pragmatic legal solutions tailor made to the needs of the client. We believe in investing time, effort and on giving attention to detail to every matter. We exhibit commitment to the excellence that our clients have come to expect of us.

The Firm is guided by its commitment to quality, collaborative culture, and its core values.

The Firm’s logo is represented through a pair of ‘Quotation Marks’, an identification of emphasis on ‘Precision – Exactness’, ‘Teamwork – Conclusiveness’, core values that the Firm embodies.

The Supreme Court of India has recently ruled that all women in India, regardless of marital status, have the right to have safe and legal abortions, a ruling that will have far-reaching implications. The Supreme Court's judgement, which overruled the Delhi High Court's refusal to provide relief to an unmarried woman seeking an abortion, ushers in a new era by mandating that society and state institutions recognise, embrace, and reflect changing social realities and mores around gender and freedom.

The Court ruled that the Medical Termination of Pregnancy Act of 1971 and its implementing laws improperly differentiated between married and unmarried women seeking legal, safe abortions. It relied on the principle against stereotyping to get to the conclusion that the perception that only married women are entitled to protection under the 2021 Rules is harmful and should be avoided. By definition, women should be able to make their own sexual decisions in accordance with the principles of free will and equal rights for all people.

Set out below is the brief analysis of the recent landmark judgment which proved as a turning stone in the jurisprudence of right to abortion:

“The woman alone has the right over her body and is the ultimate decisionmaker on the question of whether she wants to undergo an abortion. Law in modern times is shedding the notion that marriage is a precondition for the rights of persons. The law must not remain static and must keep in mind changing social realities”¹

X

Vs.

Principal Secretary, Health & Family Welfare Department, Govt. of NCT of Delhi and Anr.

[2022 SCC OnLine SC 1321]

THE SUPREME COURT OF INDIA

CORAM: D.Y. CHANDRACHUD, A.S. BOPANNA AND J.B. PARDIWALA, JJ.

DATE OF JUDGMENT: SEPTEMBER 29, 2022

HELD:

119. In the context of abortion, the right to dignity entails recognising the competence and authority of every woman to take reproductive decisions, including the decision to terminate the pregnancy. Although human dignity inheres in every individual, it is susceptible to violation by external conditions and treatment imposed by the state. The right of every woman to make reproductive choices without undue interference from the state is central to the idea of human dignity. Deprivation of access to reproductive healthcare or emotional and physical well-being also injures the dignity of women.

¹ X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi and Anr., 2022 SCC OnLine SC 1321.

-
- **Cases referred to:** Navtej Singh Johar v. Union of India, (2018) 10 SCC 1; Z v. State of Bihar, (2018) 11 SCC 572; Surendra Chauhan v. State of Madhya Pradesh, (2000) 4 SCC 110; Kanailal Sur v. Paramnidhi Sadhu Khan, AIR 1957 SC 907; Badshah v. Urmila Badshah Godse, (2014) 1 SCC 188; Deepika Singh v. Central Administrative Tribunal, 2022 SCC OnLine SC 1088; Chiranjit Lal Chowdhury v. Union of India, 1950 SCR 869; A. Thangal Kunju Musaliar v. M. Venkatachalam Potti, 1950 SCR 869; State of Himachal Pradesh v. Kailash Chand Mahajan, 1992 Supp (2) SCC 351; National Insurance Co. Ltd. v. Swaran Singh, (2004) 3 SCC 297.

124. The object of “Section 3(2)(b)” of the “MTP Act” read with Rule 3B is to provide for abortions between twenty and twenty-four weeks, rendered unwanted due to a change in the material circumstances of women. In view of the object, there is no rationale for excluding unmarried or single women (who face a change in their material circumstances) from the ambit of Rule 3B. A narrow interpretation of Rule 3B, limited only to married women, would render the provision discriminatory towards unmarried women and violative of Article 14 of the Constitution. **Article 14** requires the state to refrain from denying to any person equality before the law or equal protection of laws. Prohibiting unmarried or single pregnant women (whose pregnancies are between twenty and twenty-four weeks) from accessing abortion while allowing married women to access them during the same period would fall foul of the spirit guiding Article 14. The law should not decide the beneficiaries of a statute based on narrow patriarchal principles about what constitutes “*permissible sex*”, which create invidious classifications and excludes groups based on their personal circumstances. The rights of reproductive autonomy, dignity, and privacy under Article 21 give an unmarried woman the right of choice on whether or not to bear a child, on a similar footing of a married woman.

125. In view of the purposive interpretation accorded to Rule 3B, we are not required to adjudicate upon its constitutional validity.

■ **THE ANALYSIS:**

In the light of discussed judgement, it would be pertinent to draw a brief analysis to understand the different aspects of judgment more comprehensively.

✓ **THE RULE OF PURPOSIVE INTERPRETATION:**

The question that arose in the discussed judgment was “whether Rule 3B includes unmarried women, single women, or women without a partner under its ambit.” The answer was discerned in the said recent matter by imparting a purposive interpretation to Rule 3B².

It is pertinent to note that the cardinal principle of the construction of statutes is to identify the intention of the legislature and the true legal meaning of the enactment. The intention of the legislature is derived by considering the meaning of the words used in the statute, with a view to

² See Rule 3(B), The Medical Termination of Pregnancy Act, 1971.

understanding the purpose or object of the enactment, the mischief, and its corresponding remedy that the enactment is designed to actualise. Ordinarily, the language used by the legislature is indicative of legislative intent.

In *Kanailal Sur v. Paramnidhi Sadhu Khan*³, Gajendragadkar, J. (as the learned Chief Justice then was) opined that “the first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself.” But when the words are capable of bearing two or more constructions, they should be construed in light of the object and purpose of the enactment.

The purposive construction of the provision must be “illuminated by the goal, though guided by the word.” Aharon Barak opines that in certain circumstances this may indicate giving “an unusual and exceptional meaning” to the language and words used.

But it is noteworthy that before applying the purposive construction, the caution must be taken by the court that a court's power to purposively interpret a statutory text does not imply that a judge can substitute legislative intent with own individual notions. The alternative construction propounded by the judge must be within the ambit of the statute and should help carry out the purpose and object of the Act in question.

A catena of decisions emanating from the Apex Court, including *Kerala Fishermen's Welfare Fund Board v. Fancy Food*⁴, *Bharat Singh v. Management of New Delhi Tuberculosis Centre, New Delhi*⁵, *Bombay Anand Bhavan Restaurant v. ESI Corpn.*⁶, *Union of India v. Prabhakaran Vijaya Kumar*⁷, settle the proposition that progressive and beneficial legislation must be interpreted in favour of the beneficiaries when it is possible to take two views of a legal provision.

Thus, when it comes to construe a specific law, it must be interpreted in order to serve its purpose to the fullest so that the benefit to the potent beneficiaries and therefore, the ambit of impugned Rule 3B kept inclusive of unmarried and single women too.

³ (1957) AIR 907 1958.

⁴ (1995) 4 SCC 341.

⁵ (1986) AIR 842.

⁶ (2009) 9 SCC 61.

⁷ (2008) 2 T.A.C. 777 (SC).

✓ THE RIGHT TO REPRODUCTIVE AUTONOMY:

The discussed judgment once again strikes on the ambit of reproductive rights. Basis the judgment, it can be said that reproductive rights are not restricted to the right of women to have or not have children. It also includes the constellation of freedoms and entitlements that enable a woman to decide freely on all matters relating to her sexual and reproductive health. Reproductive rights include the right to access education and information about contraception and sexual health, the right to decide whether and what type of contraceptives to use, the right to choose whether and when to have children, the right to choose the number of children, the right to access safe and legal abortions, and the right to reproductive healthcare. Women must also have the autonomy to make decisions concerning these rights, free from coercion or violence.

Moreover, the right to reproductive autonomy emerges from **Article 21**⁸ and is concomitant to “right to privacy” as in *KS Puttaswamy v. Union of India*⁹, a nine-judge bench of the Hon’ble Supreme Court recognized the “right to privacy” as a constitutionally protected right under Article 21 of the Constitution. In Puttaswamy (supra), the Court held that the right to privacy enables individuals to retain and exercise autonomy over the body and mind. The autonomy of the individual was defined as “the ability to make decision on vital matters of concern to life”.

Furthermore, In *Suchita Srivastava v. Chandigarh Administration*¹⁰ to reiterate that the statutory right of a woman to undergo termination of pregnancy under the MTP Act is relatable to the constitutional right to make reproductive choices under Article 21 of the Constitution.

Hence, it can be inferred that the right to reproductive autonomy comes with the absolute authority of one’s body exercised by the individual.

✓ THE RIGHT TO DIGNITY:

The right to dignity encapsulates the right of every individual to be treated as a self-governing entity having intrinsic value. It means that every human being possesses dignity merely by being a

⁸ See Article 21, The Constitution of India, 1950.

⁹ (2017) 10 SCC 1.

¹⁰ (2009) 9 SCC 1.

human, and can make self-defining and self-determining choices. Dignity has been recognized as a core component of the right to life and liberty under **Article 21**.

If women with unwanted pregnancies are forced to carry their pregnancies to term, the state would be stripping them of the right to determine the immediate and long-term path their lives would take. Depriving women of autonomy not only over their bodies but also over their lives would be an affront to their dignity. The right to choose for oneself - be it as significant as choosing the course of one's life or as mundane as one's day-to-day activities - forms a part of the right to dignity. It is this right which would be under attack if women were forced to continue with unwanted pregnancies.

In *Navtej Singh Johar v. UOI*¹¹, it was held that “Dignity while expressive of choice is averse to creation of any dent. When biological expression, be it an orientation or optional expression of choice, is faced with impediment, albeit through any imposition of law, the individual's natural and constitutional right is dented. Such a situation urges the conscience of the final constitutional arbiter to demolish the obstruction and remove the impediment so as to allow the full blossoming of the natural and constitutional rights of individuals. This is the essence of dignity and we say, without any inhibition, that it is our constitutional duty to allow the individual to behave and conduct himself/herself as he/she desires and allow him/her to express himself/herself, of course, with the consent of the other. That is the right to choose without fear. It has to be ingrained as a necessary prerequisite that consent is the real fulcrum of any sexual relationship”.

✓ TRANSCENDING THE INSTITUTION OF MARRIAGE AS A SOURCE OF RIGHTS:

The whole tussle is between the stand of right to abortion between married & unmarried women, it is crucial to understand that whether discriminating on the basis of marital status in extending a protection is justifiable? While much of law's benefits were (and indeed are) rooted in the institution of marriage, the law in modern times is shedding the primordial notion that marriage is a precondition to the rights of individuals. Therefore, changing social mores must be borne in mind when interpreting the provisions of an enactment to further its object and purpose as statutes are considered to be “always speaking”¹². This notion can evidently be observed in the case of *S. Khushboo v. Kanniammal*¹³, in which a three-judge Bench of Apex Court acknowledged that

¹¹ (2018) 10 SCC 1.

¹² *Dharni Sugars and Chemicals Ltd. v. Union of India*, (2019) 5 SCC 480.

¹³ (2010) 5 SCC 600.

live-in relationships and pre-marital sex should not be associated with the lens of criminality.

Accordingly, it is crucial to promote equality between married and unmarried or single women when it comes to extend the protection against their rights as the same have been conferred upon them by virtue of their womanhood and not their marital status indeed. Even Over the years, the Parliament has enacted legislation bringing about a congruence between the rights of married and unmarried women. Instances can be seen where rights are granted to women irrespective of their marital status, some of which are set out as below:

- **The Maternity Benefit Act, 1961**, was enacted to provide maternity benefits to women employed in any establishment. In terms of Section 5 of the Maternity Benefit Act 1961, the payment of maternity benefits is extended to all women (including unmarried women) by the use of the phrase “every woman.”
- **The Hindu Succession Act, 1956**, was enacted to codify the law relating to intestate succession among Hindus. The Act¹⁴ pertains to devolution of interest in coparcenary property in which a daughter, irrespective of her marital status, is a coparcener in her own right in the same manner as the son by virtue of the **Hindu Succession (Amendment) Act 2005**.
- **The Hindu Adoptions and Maintenance Act 1956**¹⁵ stipulates that any female Hindu regardless of her marital status has the capacity to take a son or daughter in adoption. Sections 7 and 8 of the Guardian and Wards Act 1890 allows for persons to apply for an order of guardianship without making any distinction between men or women, married or unmarried.

Through the above enactments, the law has emphasized that unmarried women have the same rights as married women in terms of adoption, succession, and maternity benefits. Importantly, these legislations also signify that both married and unmarried women have equal decisional autonomy to make significant choices regarding their own welfare.

Therefore, In the evolution of the law towards promoting equality in the society, the interpretation of the MTP Act and MTP Rules must consider the social realities of today and not be restricted by societal norms of an age which has passed into the archives of history. As society changes and evolves, so must our mores and conventions. A changed social context demands a readjustment of our laws. Law must not remain static and its interpretation should keep in mind the changing

¹⁴ See Section 6, The Hindu Succession Act, 1956.

¹⁵ See Section 8, The Hindu Adoptions and Maintenance Act 1956.

social context and advance the cause of social justice which seeks the inclusion of unmarried and single woman when it comes to grant the right to abortion.

✓ **OBJECT OF THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971:**

The Medical Termination of Pregnancy Act, 1971, came into force on 25th March, 2021, with the intent to “liberalise some of the restrictions under section 312¹⁶ of the IPC.” The MTP Act was enacted by Parliament as a “health” measure, “humanitarian” measure and “eugenic” measure.

Further, it can be said that the whole tenor of the MTP Act is to provide access to safe and legal medical abortions to women. The MTP Act is primarily a beneficial legislation, meant to enable women to access services of medical termination of pregnancies provided by a Registered Medical Practitioner (RMP). To uphold the said objective, courts in the country have permitted women to terminate their pregnancies where the length of the pregnancy exceeded twenty weeks (the outer limit for the termination of the pregnancy in the unamended MTP Act) by expansively interpreting Section 5, which permitted RMPs to terminate pregnancies beyond the twenty-week limit when it was necessary to save the life of the woman. In *X v. Union of India*¹⁷, *Mamta Verma v. Union of India*¹⁸, *Meera Santosh Pal v. Union of India*¹⁹, *Sarmishtha Chakraborty v. Union of India*²⁰, Hon’ble SC permitted the termination of post twenty-week pregnancies after taking into account the risk of grave injury to the mental health of a pregnant woman by carrying the pregnancy to term.

Moreover, the **MTP Amendment Act 2021** extends the benefit of the legal presumption of a grave injury to the mental health of a woman on account of the failure of contraception, to all women and not just married women. In the unamended MTP Act, Explanation II of Sec. 3 provided that the anguish caused by a pregnancy resulting from a failure of any device or method used by any “married woman or her husband” for the purpose of limiting the number of children may be presumed to constitute a grave injury to the mental health of the woman. Post **MTP Amendment Act 2021**, Explanation I provides that the anguish caused by a pregnancy (up to

¹⁶ **Section 312:** Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

¹⁷ (2017) 3 SCC 458.

¹⁸ (2018) 14 SCC 289.

¹⁹ (2017) 3 SCC 462.

²⁰ (2018) 13 SCC 339.

twenty weeks) arising from a failure of a contraceptive device used by “any woman or her partner” either for limiting the number of children or for preventing pregnancy can be presumed to constitute a grave injury to a woman's mental health. By eliminating the word “married woman or her husband” from the scheme of the MTP Act, the legislature intended to clarify the scope of Section 3 and bring pregnancies which occur outside the institution of marriage within the protective umbrella of the law.

✓ CONSTRUING RULE 3B OF THE MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) RULES, 2021

By framing Rule 3B, the legislature intended to solve the mischief, so to speak, of women being unable to access abortions when their lives underwent significant changes impacting their physical and mental health, and their decision to have a child was impacted after the length of the pregnancy exceeded twenty weeks.

The Minutes of the Meeting of the Expert Committee held on 22 June 2021 for deliberating upon and drafting the MTP Rules dealt with, inter alia, category of women under Rule 3B. The members of the Expert Committee suggested different categories of women eligible for termination of pregnancy up to twenty-four weeks but the conflict arises when it is seen that the categories made under Rule 3(B) are exhaustive in order to extend the right to abortion beyond the stipulated period.

Per contra, the **MTP Amendment Act 2021**, Explanation I of Sec. 3 provides that the anguish caused by a pregnancy (up to twenty weeks) arising from a failure of a contraceptive device used by “any woman or her partner” either for limiting the number of children or for preventing pregnancy can be presumed to constitute a grave injury to a woman's mental health. By inclusion of word “any women” the legislature intends to extend the benefit of the legislation to all women irrespective of their marital status.

However, Rule 3B does not enumerate all the potential changes that a woman's material circumstances may undergo. It merely specifies some of the potential changes to a woman's material circumstances, in sub-rules (c), (f) and (g). From the object and purpose of the MTP Act, its overall scheme, and the categories of women specified in Rule 3B, it is evident that it was not the intention of the legislature to restrict the benefit of Section 3(2)(b) and Rule 3B only to women who may be confronted with a material alteration in the circumstances of their lives in the limited situations enumerated in Rule 3B. Rather, the benefit granted by Rule 3B must be understood as

extending to all women who undergo a change of material circumstances. It is not possible for either the legislature or the courts to list each of the potential events which would qualify as a change of material circumstances. Suffice it to say that each case must be tested against this standard with due regard to the unique facts and circumstances that a pregnant woman finds herself in but on the same hand, categorizing women for granting the right to abortion beyond 24 weeks, in an exhaustive manner, is not justified rather the said rule must be left inclusive.

CONCLUSION

It can categorically be said that the discussed judgment would be path-breaking in evolving the jurisprudence of abortion laws in a more progressive manner. Even Article 21 has time and again put forth the significant value of “Personal freedom” & “Bodily Autonomy” which is efficaciously upheld by this judgment.

Additionally, the judgment holds significant value in general because:

- It is pronounced at a time when women's access to abortion remains a contentious issue across the world.
- It would help to bring about a decrease in the number of maternal and infant deaths that result from unsafe abortions.
- Legal restrictions that compel women to continue carrying an undesired pregnancy might have far-reaching consequences for future generations. The judgment would open the scope of extension of rights.
- A pregnant woman, regardless of her marital status, should have the option to terminate the pregnancy at any time. Abortion is a fundamental human right and a crucial part of women's healthcare.
- Legalisation of abortions will also discourage the illegal practice of abortions done through untrained, unauthorised paramedics which are hazardous for the health and future fertility of the child bearer.²¹

²¹ <https://journalsofindia.com/supreme-court-judgment-on-abortion/>.