(2009) 9 Supreme Court Cases 1 : (2009) 3 Supreme Court Cases (Civ) 570 : 2009 SCC OnLine SC 1562

(BEFORE K.G. BALAKRISHNAN, C.J. AND P. SATHASIVAM AND DR B.S. CHAUHAN, JJ.)

SUCHITA SRIVASTAVA AND ANOTHER . . Appellants;

Versus

CHANDIGARH ADMINISTRATION . . Respondent.

Civil Appeal No. 5845 of 2009[†], decided on August 28, 2009

A. Medical Termination of Pregnancy Act, 1971 — Ss. 3(4)(a), 3(4)(b) and 2(b) — Pregnant woman's consent for termination of her pregnancy — Woman with mild mental retardation — Consent of, if necessary — Held, her consent is also necessary, for the reason that S. 3(4)(a) excludes consent of "mentally ill" woman but not "mentally retarded" woman — "Mentally ill" person, according to definition in S. 2(b) [as amended in 2002], is different from "mentally retarded" person — Hence consent of mentally retarded woman is necessary — Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Ss. 2(i), (q) and (r) — National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 — Ss. 10 and 11 — United Nations Declaration on the Rights of Mentally Retarded Persons, 1971 — Principle 7

B. Medical Termination of Pregnancy Act, 1971 — Ss. 3(4)(a), 3(4)(b), 3(2)(i), 3(2)(ii) and 5(1) — Termination of pregnancy — Necessity of pregnant woman's consent — Held, consent is necessary even when pregnancy is to be terminated in the circumstances mentioned in Ss. 3(2)(i) and 3(2)(ii) — The only exceptions to this rule are S. 3(4)(a) which prescribes for guardian's consent (instead of woman's consent) where the woman is a minor or mentally ill, and S. 5(1) where registered medical practitioner has to form an emergency opinion to save pregnant woman's life

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C. Medical Termination of Pregnancy Act, 1971 — Ss. 4 to 5 — Abortion — Reasonability of restrictions on reproductive choices of a woman under MTP

Act — Held, the Act imposes reasonable restrictions — Constitution of India, Arts. 21, 19(1)(a) and 19(2)

D. Constitution of India — Arts. 21, 19(1)(a) and 25 — Right to abortion — Scope of, in Indian law, explained — Medical Termination of Pregnancy Act, 1971 — Ss. 3 to 5

E. Human and Civil Rights — Disabled persons — "Mentally ill person" and "mentally retarded person" — Distinction between — When to be maintained and when to be collapsed — Held, said distinction can be collapsed for benefiting the said persons, but not when it would be to their detriment — Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Ss. 2(i), (q) and (r)

An orphan woman of the age 19-20 years, who was also suffering from mild mental retardation, was found pregnant (allegedly on having been raped), while staying in a Government-run welfare institution (the victim). The respondent Administration approached the High Court seeking order for termination of her pregnancy. The High Court after calling for reports from two Expert Committees, ordered termination of the victim's pregnancy. First Expert Committee recommended termination of pregnancy while the second committee recommended continuation of pregnancy. By the time the appeal was heard by the Supreme Court, the victim's pregnancy had reached 19 weeks as against limit of 20 weeks prescribed in Section 3(2)(*b*) of the Medical Termination of Pregnancy Act, 1971 (the MTP Act), for termination of pregnancy. The victim too had desired for continuation of her pregnancy.

The issues before the Supreme Court were, (*i*) whether it was legally permissible to terminate the victim's pregnancy even when she had not given consent for it, and (*ii*) whether it was in the victim's best interest to terminate her pregnancy or to continue it.

Reversing the High Court order for termination of pregnancy, the Supreme Court *Held* :

When the MTP Act was first enacted in 1971, it was largely modelled on the Abortion Act, 1967 of the United Kingdom. Indian law allows abortion only if specified conditions are met. The legislative intent is to provide qualified "right to abortion", and termination of pregnancy has never been recognised as a normal recourse for expecting mothers. There is also a "compelling State interest" in protecting life of prospective child. Termination of pregnancy is therefore permitted only when conditions specified in the Act are fulfilled. Provisions of the MTP Act can be viewed as reasonable restrictions that have been placed on exercise of reproductive choices. Though termination of pregnancy is permissible in the circumstances laid down in Sections 3(2)(*i*) and 3(2)(*ii*), yet in all such circumstances, consent of pregnant woman is an essential requirement for proceeding with termination of pregnancy. However, Sections 3(4)(*a*) and 5(1) create exceptions to the rule of pregnant woman's consent, namely, when pregnant woman is below 18 years or is mentally ill, guardian's consent is required, or when a registered medical practitioner forms an opinion in good faith that

termination of pregnancy is immediately necessary to save the life of pregnant woman. However, none of the exceptions apply in the present case.

(Paras 20, 21 and 22 to 26)

The State could claim that it is guardian of the pregnant victim since the victim is an orphan and has been placed in a government-run welfare institutions. However, the State's claim to guardianship cannot be mechanically extended in order to make decisions about termination of her pregnancy because the victim is not a minor. Though she suffers from "mild mental retardation" yet she is not a "mentally ill person" as contemplated by Section 3(4)(*a*) of the MTP Act.

(Para 27)

The 2002 Amendment to the MTP Act replacing the word "lunatic" with "mentally ill person" indicates that the legislative intent was to narrow down the class of persons on behalf of whom their guardians could make decisions about termination of pregnancy. It is apparent from the definition of the expression "mentally ill person" that the same is different from that of "mental retardation". A similar distinction can also be found in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. This legislation treats "mental illness" and "mental retardation" as two different forms of "disability". These legislative provisions show that persons who are in a condition of "mental retardation" should ordinarily be treated differently from those who are found to be "mentally ill". While a guardian can make decisions on behalf of a "mentally ill person" as per Section 3(4)(*a*) of the MTP Act, the same cannot be done on behalf of a person who is in a condition of "mental retardation". It must be emphasised that while the distinction between these statutory categories can be collapsed for the purpose of empowering the respective classes of persons, the same distinction cannot be disregarded so as to interfere with the personal autonomy that has been accorded to mentally retarded persons for exercising their reproductive rights. The State must respect the personal autonomy of a mentally retarded woman with regard to decisions about terminating a pregnancy. While explicit consent of woman is not a necessary condition for continuing pregnancy, such consent is an essential condition for proceeding with termination of pregnancy.

(Paras 28 to 30, 32 and 33)

Special emphasis should be placed on Principle 7 of the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971 which prescribes that a fair procedure should be used for the "restriction or denial" of the rights guaranteed to mentally retarded persons, which should ordinarily be the same as those given to other human beings.

(Para 50)

The language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority. The victim has not given consent for termination of pregnancy. The Supreme Court cannot permit dilution of the requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the victim's reproductive rights. The Court must also be mindful of the fact that any dilution of the requirement of consent contemplated by Section 3(4)(*b*) of the MTP Act is liable to be misused in a society where sex-selective abortion is a pervasive social evil.

(Paras 58 and 31)

Chandigarh Admn. v. *Nemo*, CWP No. 8760 of 2009, order dated 9-6-2009, *referred to*

Chandigarh Admn. v. *Nemo*, CWP No. 8760 of 2009, order dated 17-7-2009, *reversed*

F. Medical Termination of Pregnancy Act, 1971 — S. 3(4)(b) — Pregnant woman with mild to moderate mental retardation — Non-consent to abortion — Value of — Factors to be considered in determining whether to override such woman's choice — Held, her decision to carry pregnancy to

its full term should be respected — Human and Civil Rights — Disabled persons — Mentally retarded person — Respect for decisions/choices of — Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — S. 2(i)(r) — Words and Phrases — "Mentally retarded", "mental retardation" — What is

G. Medical Termination of Pregnancy Act, 1971 — Ss. 3(2)(b) and 3(4)(b) — Direction for abortion — Relevance of stage of pregnancy (whether it was close to the 20 weeks' statutory limit)

Held :

Persons with borderline, mild or moderate mental retardation are capable of living in normal social conditions even though they may need some supervision and assistance from time to time. A developmental delay in mental intelligence should not be equated with mental incapacity, and as far as possible, the law should respect decisions made by persons who are found to be in a state of mild to moderate "mental retardation".

(Paras 40 to 43 and 53)

A condition of "mental retardation" or developmental delay is gauged on the basis of parameters such as intelligence quotient (IQ) and mental age (MA) which mostly relate to academic abilities. It is quite possible that a person with a low IQ or MA may possess social and emotional capacities that will enable him or her to be a good parent. Hence, it is important to evaluate each case in a thorough manner

with due weightage being given to medical opinion for deciding whether a mentally retarded person is capable of performing parental responsibilities.

(Para 56)

In the present case, the victim has expressed her willingness to carry the pregnancy till its full term and bear a child. The expert body has found that she has a limited understanding of the idea of pregnancy and may not be fully prepared for assuming the responsibilities of a mother. As per the findings, the victim is physically capable of continuing with the pregnancy and the possible risks to her physical health are similar to those of any other expecting mother. There is also no indication that the prospective child may be born with any congenital defects. Even if it were to be assumed that the victim's willingness to bear a child was questionable since it may have been the product of suggestive questioning or because the victim may change her mind in the future, the High Court should have considered the fact that the victim had been pregnant for almost 19 weeks i.e. the statutory limit for abortions, of 20 weeks, was fast approaching when ordering the abortion.

(Paras 42 and 45)

H. Medical Termination of Pregnancy Act, 1971 — S. 3(2)(b) — Prohibition against termination of pregnancy at advanced stage (beyond 20 weeks) — Rationale for — Held, this prohibition is due to medical opinion that abortion performed during later stages of pregnancy may cause harm to physical health of woman who undergoes abortion

(Para 45)

Roe v. *Wade*, 410 US 113 : 35 L Ed 2d 147 (1973), *relied on*

I. Constitution of India — Arts. 21 and 25 — Personal liberty/Personal autonomy — Woman's right to make reproductive choices — Held, is a part of her personal liberty under Art. 21 — Reproductive choices can be to procreate or not to procreate, to adopt methods of birth control, to carry pregnancy to its full term, etc. — Human and Civil Rights — Right to make reproductive choices — Nature of — Medical Termination of Pregnancy Act, 1971, Ss. 3 to 5

Held :

A woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution. 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

exercise of reproductive choices such as woman's right to refuse participation in sexual activity or alternatively, insistence on use of contraceptive methods. Women are also free to choose birth control methods such as undergoing sterilisation procedures. Reproductive rights include a woman's entitlement to carry pregnancy to its full term, to give birth and to subsequently raise children.

(Para 22)

The victim's reproductive choice in the present case should be respected in spite of other factors such as lack of understanding of the sexual act as well as apprehensions about her capacity to carry pregnancy to its full term, and assumption of maternal responsibilities thereafter. This position has been adopted since the MTP Act contemplates that even a woman who is found to be "mentally retarded" should give her consent for termination of pregnancy.

(Para 19)

J. Constitution of India — Art. 14 — Equal protection of the laws — Forcible sterilisation or abortion of mentally retarded person (eugenics theory) — Held, such measures are anti-democratic and violative of Art. 14

(Para 54)

Elizabeth C. Scott:"Sterilization of Mentally Retarded Persons : Reproductive Rights and Family Privacy", Duke Law Journal 806-65 (November 1986), *referred to*

K. Constitution of India — Arts. 39(e), 39(f), 45 and 47 — Care of a child expected to be born to an orphan woman with mild mental retardation — Directions issued for proper care of mother and child during pre-natal and post-natal period — Human and Civil Rights — Children's rights — National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 — Ss. 10 and 11

L. Constitution of India — Pts. III and IV — Parens patriae doctrine — Explained — State's responsibility to take decisions to protect interests of those who are unable to take care of themselves, such as minors and mentally incapable persons — Applicability of the doctrine to make reproductive decision in case of mentally retarded persons — "Best interests test" and "substituted judgment test" — Explained — Further held, "best interests test" to be followed in the present case (whether pregnancy of an orphan woman with mild mental retardation should be terminated) — Human and Civil Rights — Disabled persons — Role of State — Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Ss. 8, 18, 25 and 26 — National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 — Ss. 10 and 11 — Medical Termination of Pregnancy Act, 1971 — S. 4

Held :

There is need to look beyond social prejudices in order to objectively decide whether a person who is in a condition of mild mental retardation can perform parental responsibilities. Persons who are found to be in a condition of

borderline, mild or moderate mental retardation are capable of being good parents. Empirical studies have conclusively disproved the eugenics theory that mental defects are likely to be passed on to the next generation. However, as the present case concerns have been expressed about the victim's mental capacity to cope up with the demands of carrying pregnancy to its full term, the act of delivering a child and subsequent childcare, it is therefore directed that best medical facilities be made available so as to ensure proper care and supervision during the period of pregnancy as well as for post-natal care.

(Paras 50, 54, 59 and 60)

Susan Stefan:"Whose Egg is it Anyway? Reproductive Rights of Incarcerated, Institutionalised and Incompetent Women", 13 Nova Law Review 405-56 (November 1989), *referred to*

Since there is an apprehension that victim may find it difficult to cope with maternal responsibilities, the Chairperson of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities has stated in affidavit that the said Trust is prepared to look after the interests of the woman in question which will include assistance for childcare. In the said affidavit, it has been stated that the Trust would consult Chandigarh Administration as well as experts from Post Graduate Institute of Medical Education and Research (PGIMER) in order to ensure proper care and supervision.

(Para 61)

If any grievance arises with respect of the same subject-matter in future, the respondent can seek direction from the High Court under its writ jurisdiction.

(Para 62)

The doctrine of "parens patriae" has been evolved in common law and is applied in situations where the State must make decisions in order to protect interests of those persons who are unable to take care of themselves. Traditionally this doctrine has been applied in cases involving rights of minors and those persons who have been found to be mentally incapable of making informed decisions for themselves.

(Para 35)

Courts in other common law jurisdictions have developed two distinct standards while exercising "parens patriae" jurisdiction for the purpose of making reproductive decisions on behalf of mentally retarded persons. These two standards are the "best interests" test and the "substituted judgment" test.

(Para 36)

The "best interests" test requires the court to ascertain the course of action which would serve the best interests of person in question. In the present setting, this means that the court must undertake a careful inquiry of medical opinion on

feasibility of pregnancy as well as social circumstances faced by the victim. The court's decision should be guided by victim's interests alone and not those of other stakeholders such as guardians or the society in general. It is evident that the woman in question in the present case will need care and assistance which will in turn entail some costs. However, that cannot be a ground for denying exercise of reproductive rights.

(Para 37)

The application of "substituted judgment" test requires the court to step into shoes of a person who is considered to be mentally incapable and attempt to make decision which the said person would have made, if she was competent to do so. This is a more complex inquiry but this test can only be applied to make decisions on behalf of persons who are conclusively shown to be mentally incompetent.

(Para 38)

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In the present case the victim has been described as a person suffering from "mild mental retardation". This does not mean that she is entirely incapable of making decisions for herself. It is the "best interests" test alone which should govern inquiry in the present case and not the "substituted judgment" test.

(Para 39)

Lastly, the direction given by the High Court to terminate the victim's pregnancy was not in pursuance of her "best interests". Performing an abortion at such a late stage could have endangered the victim's physical health and the same could have also caused further mental anguish to the victim since she had not consented to such a procedure.

(Paras 48, 58 and 57)

M. Medical Jurisprudence — Determination of age — Ossification test (bone age) — Taken as conclusive proof that pregnant woman was 19-20 years old, and therefore not a minor — Age

(Para 27)

N. International Law — Effect of ratification of a Convention by India — If binding on Indian legal system — On facts held, Convention on the Rights of Persons with Disabilities (CRPD) has been ratified by India and therefore its contents are binding on Indian legal system — International Law — Convention of the Rights of Persons with Disabilities — Applicability in India

(Para 51)

K-D/43585/C

Advocates who appeared in this case:

Colin Gonsalves, Senior Advocate (Ms Tanu Bedi, D.P. Singh, Sanjay

Jain, Ms Suchita Srivastava, Ms Kamini Jaiswal, Anupam Gupta and Ashish Rawal, Advocates) for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. CWP No. 8760 of 2009, order dated 17-7-2009, *Chandigarh Admn.* v. *Nemo* — 7*f*, 8*b*, 10*d*-*e*, 13*e*-*f*, 20*a*, 21*a*
2. CWP No. 8760 of 2009, order dated 9-6-2009, *Chandigarh Admn.* v. *Nemo* — 7*f*, 8*a*, 10*a*, 10*d*-*e*, 21*b*
3. 410 US 113 : 35 L Ed 2d 147 (1973), *Roe* v. *Wade* — 20*b*-*c*, 20*d*

The Order of the Court was delivered by

K.G. BALAKRISHNAN, C.J.— Leave granted. A Division Bench of the High Court of Punjab and Haryana in *Chandigarh Admn.* v. *Nemo*, by orders dated 9-6-2009[1] and 17-7-2009[2], ruled that it was in the best interests of a mentally retarded woman to undergo an abortion.

2. The said woman (name withheld, hereinafter "the victim") had become pregnant as a result of an alleged rape that took place while she was an inmate at a government-run welfare institution located in Chandigarh. After the discovery of her pregnancy, the Chandigarh Administration, which is the respondent in this case, had approached the High Court seeking approval for the termination of her pregnancy, keeping in mind that in addition to being mentally retarded she was also an orphan who did not have any parent or guardian to look after her or her prospective child.

3. The High Court had the opportunity to peruse a preliminary medical opinion and chose to constitute an expert body consisting of medical experts and a judicial officer for the purpose of a more thorough inquiry into the facts. In its order dated 9-6-2009[1], the High Court framed a comprehensive set of questions that were to be answered by the expert body. In such cases, the presumption is that the findings of the expert body would be given due weightage in arriving at a decision. However, in its order dated 17-7-2009[2] the High Court directed the termination of the pregnancy in spite of the expert

body's findings which show that the victim had expressed her willingness to bear a child.

4. Aggrieved by these orders, the appellants moved this Court and the second appellant, Ms Tanu Bedi, Advocate appeared in person on 20-7-2009 and sought a hearing on an urgent basis because the woman in question had been pregnant for more than 19 weeks at that point of time. We agreed to the same since the statutory limit for permitting the termination of a pregnancy i.e. 20 weeks was fast approaching.

5. We issued notice to the Chandigarh Administration, pursuant to which Mr Anupam Gupta, Advocate appeared before us and made oral submissions on behalf of the respondent. In the regular hearing held on 21-7-2009, both sides presented compelling reasons in support of their respective stands. Mr Colin Gonsalves, Senior Advocate also appeared on behalf of an intervenor in support of the Chandigarh Administration's stand.

6. After hearing the counsel at length we had also considered the opinions of some of the medical experts who had previously examined the woman in question. Subsequent to the oral submissions made by the counsel and the medical experts, we had granted a stay on the High Court's orders thereby ruling against the termination of the pregnancy.

7. The rationale behind our decision hinges on two broad considerations. The first consideration is whether it was correct on the part of the High Court to direct the termination of pregnancy without the consent of the woman in question. This was the foremost issue since a plain reading of the relevant provision in the Medical Termination of Pregnancy Act, 1971 clearly indicates that consent is an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer from any "mental illness". As will be explained below, there is a clear distinction between "mental illness" and "mental retardation" for the purpose of this statute.

8. The second consideration before us is that even if the said woman was assumed to be mentally incapable of making an informed decision, what are the appropriate standards for a court to exercise "parens patriae" jurisdiction? If the intent was to ascertain the "best interests" of the woman in question, it is our considered opinion that the direction for termination of pregnancy did not serve that objective. Of special importance is the fact that at the time of

hearing, the woman had already been pregnant for more than 19 weeks

and there is a medico-legal consensus that a late-term abortion can endanger the health of the woman who undergoes the same.

9. Before explaining both of the abovementioned considerations at length, it will be useful to present an overview of the fact situation which led to the present proceeding. The woman in question is an orphan who had been abandoned by her parents at an early age and subsequently she had been under the guardianship of Missionaries of Charity, New Delhi. Thereafter, she had been admitted in Government Institute for Mentally Retarded Children located in Sector 32, Chandigarh and was later on brought to the "Nari Niketan", a welfare institution in Sector 26, Chandigarh. On 13-3-2009, she was shifted to "Ashreya", a newly established welfare institution.

10. Both "Nari Niketan" and "Ashreya" are government-run institutions run by the Chandigarh Administration which fall under the administrative control of the Director, Social Welfare and the Director-Principal, Government Medical College and Hospital (GMCH), Sector 32, Chandigarh respectively.

11. On 16-5-2009, a medical social worker and a staff nurse working at "Ashreya" observed that the victim was showing signs of nausea and had complained about pain in her lower abdomen in addition to disclosing the fact that she had missed her last two menstrual periods. Acting on their own initiative, the medical social worker and the staff nurse conducted a pregnancy test with a urine sample and found it to be positive. Following this development, a Medical Board consisting of two gynaecologists and a radiologist was constituted on 18-5-2009. The gynaecologists then examined the victim in a clinical environment and concluded that she had been pregnant for 8-10 weeks at the time. The radiologist also confirmed the fact of pregnancy on the basis of an ultrasound examination and recorded a gestation of approximately 9 weeks on the same day.

12. After the discovery of the pregnancy, the authorities concerned had informed Chandigarh Police who filed FIR No. 155 (dated 18-5-2009) under Sections 376 and 120-B of the Penal Code, 1860 at the police station located in Sector 26, Chandigarh. Subsequently, an ossification test conducted on the victim on 20-5-2009 had indicated her bone age to be around 19-20 years.

13. The Director-Principal of GMCH thereafter constituted a three-member Medical Board on 25-5-2009 which was headed by the Chairperson of the Department of Psychiatry in the said hospital. Their task was to evaluate the mental status of the victim and they opined that the victim's condition was that of "mild mental retardation".

14. Thereafter another multi-disciplinary Medical Board was constituted by the same authority which consisted of a gynaecologist, a

radiologist, a paediatrician and a psychiatrist. This Board was asked "to submit its considered opinion as to the consequences of continuation of pregnancy and the capability of the victim to cope with the same". The Board's opinion was submitted on 27-5-2009, which recommended the termination of the victim's pregnancy. Since there was no clear statutory basis for proceeding with the

abortion, the Chandigarh Administration moved the High Court of Punjab and Haryana seeking a judicial opinion on the said matter.

15. In its order dated 9-6-2009[1] the High Court had taken note of the opinion given by the multi-disciplinary Medical Board on 27-5-2009. However, as a measure of abundant caution the High Court directed the authorities to constitute an expert body consisting of medical experts and framed a set of questions to be answered by this body. The High Court stressed on the need for ensuring that this expert body would be independent from the administrative control or any form of influence by the Chandigarh Administration. The intention was that the expert body's findings would enable the High Court to ascertain the "best interests" of the woman in question.

16. In pursuance of these directions, the Director of the Post Graduate Institute of Medical Education and Research (PGIMER), Chandigarh constituted an expert body comprising of (*1*) Dr. Ajit Awasthi, Department of Psychiatry; (*2*) Dr. Savita Kumari, Department of Internal Medicine; (*3*) Dr. Vanita Jain, Department of Obstetrics and Gynaecology; and (*4*) Dr. Meenu Singh, Department of Paediatrics. The High Court had also directed Smt Raj Rahul Garg, Additional District and Sessions Judge, Chandigarh to act as the member-cum-coordinator of the expert body.

17. At this juncture, it would be pertinent to refer to the expert body's findings which were duly recorded by the High Court in its order dated 17-7-2009[2]. The text of the same is reproduced below:

Question framed by the High Court in its order dated 9-6-2009[1] in CWP No. 8760 of 2009	*Expert body's findings*
(*i*) The mental condition of the retardee.	She suffers from mild to moderate mental retardation.
(*ii*) Her mental and physical condition and ability for self-sustenance.	A case of mild to moderate mental retardation. Pregnant : Single live foetus

	corresponding to 13 weeks 3 days +/– 2 weeks, post-operative scars for spinal surgery, HbsAG positive. Her mental status affects her ability for independent socio-occupational functioning and self-sustenance. She would need supervision and assistance.
(*iii*) Her understanding about the distinction between the child born out of (sic from) and outside the wedlock as well as the social connotations attached thereto.	As per her mental status, she is incapable of making the distinction between a child born before or after marriage or outside the wedlock and is unable to understand the social connotations attached thereto.

(*iv*) Her capability to acknowledge the present and consequences of her own future and that of the child she is bearing.	She knows that she is bearing a child and is keen to have one. However, she is unable to appreciate and understand the consequences of her own future and that of the child she is bearing.
(*v*) Her mental and physical capacity to bear and raise a child.	She is a young primigravida with abnormalities of gait and spinal deformity and Hepatitis B surface antigen positive status. However, she has adequate physical capacity to bear and raise a child. She is a case of mild to moderate mental retardation which often limits the mental capacity to bear and raise a child in the absence of adequate social support and supervision.
(*vi*) Her perception about	She has grossly limited

bringing up a child and the role of an ideal mother.	perception about bringing up a child and the role of an ideal mother.
(*vii*) Does she believe that she has been impregnated through unvolunteered sex?	She has a limited understanding of the sexual act and relationship and even the concept of getting pregnant. She did not volunteer for sex and did not like the sexual act.
(*viii*) Is she upset and/or anguished on account of the pregnancy alleged to have been caused by way of rape/unwilling sex?	She has no particular emotions on account of the pregnancy alleged to have been caused by way of rape/unwilling sex. She is happy with the idea that she has a baby inside her and looks forward to seeing the same.
(*ix*) Is there any risk of injury to the physical or mental health of the victim on account of her present foreseeable environment?	Her internal environment of pregnancy does not pose any particular risk of injury to the physical health of the victim. Her mental health can be further affected by the stress of bearing and raising a child. Her external environment in terms of her place of stay and the support available thereof is difficult to comment on because of our lack of familiarity with the same. She definitely needs a congenial and supportive environment for her as well as for the safety of the pregnancy.

(*x*) Is there any possibility of exerting undue influence through any means on the decision-making capability of the victim?	Her mental state indicates high suggestibility because of her reliance on rote memory and imitative behaviour for learning. Being highly suggestible her decision-making can be easily

	influenced.
(*xi*) Do the overall surroundings provide reasonable space to the victim to indulge in independent thinking process and take firm decisions on the issues vital to her life prospects?	We are not familiar with her overall surroundings, hence unable to comment.
(*xii*) What is the possible nature of the major spinal surgery alleged to have been undergone by the victim during her childhood? Does it directly or indirectly relate to the bony abnormalities of the victim? Can such abnormalities have a genetic basis to be inherited by the baby?	As per the neurosurgeon, spinal surgery during childhood could have been due to neural tube defect or spinal cord tumour. This could have been confirmed by MRI tests, but the same could not be carried through as those were considered to be potentially hazardous for the foetus. There is no history/records available for the spinal surgery, hence, the safety profile issues relevant for the patient undergoing MRI like the possibility of use of any metal screws to fix the spine wherein MRI can be hazardous cannot be definitely commented upon in this case. The neural tube defect in the patient can lead to an increased chance of neural tube defect in the baby. However, these defects can be detected by blood tests of the mother and ultrasound. Presence of neural tube defect in the parent is not an indication for termination of pregnancy. It is not possible to comment on the inheritance of spinal cord tumours without knowing the exact nature of the tumour.
(*xiii*) Is there a genuine possibility of certain complications like chances of abortion, anaemia, hypertension,	The possibility of complications like abortion, hypertension, prematurity, low birth weight baby and foetal distress are

prematurity, low birth weight baby, foetal distress including chances of anaesthetic complications, if the victim in the present case is permitted to carry on the pregnancy?	similar to any pregnancy in a woman of this age group. Due to the spinal abnormality and gait defect she has a higher chance of operative delivery and associated anaesthetic complications. Spinal and gait abnormalities are not an indication for termination of pregnancy.

	Pregnancy in women with Hepatitis B surface antigen positive status is usually uneventful. The pre-natal transmission from mother to infant can be prevented by giving immunoprophylaxis to the neonate. Acute or chronic Hepatitis B infection during pregnancy is not an indication for termination of pregnancy.
(*xiv*) What can be the most prudent course to be followed in the best interest of the victim?	Her physical status poses no major physical contraindications to continue with the pregnancy. The health of foetus can be monitored for any major congenital defects. Her mental state indicates limited mental capacity (intellectual, social, adaptive and emotional capacity) to bear and raise the child. Social support and care for both the mother and the child is another crucial component. Therefore, any decision that is taken keeping her best interests in mind as well as those of her unborn

child, has to be based on the holistic assessment of physical, psychological and social parameters.

Termination of pregnancy cannot be permitted without the consent of the victim in this case

18. Even though the expert body's findings were in favour of continuation of the pregnancy, the High Court decided to direct the termination of the same in its order dated 17-7-2009[2]. We disagree with this conclusion since the victim had clearly expressed her willingness to bear a child.

19. The victim's reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter. We have adopted this position since the applicable statute clearly contemplates that even a woman who is found to be "mentally retarded" should give her consent for the termination of a pregnancy.

20. In this regard we must stress upon the language of Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter also referred to as "the MTP Act") which reads as follows:

"3. *When pregnancies may be terminated by registered medical practitioners*.—(1) Notwithstanding anything contained in the Penal Code, 1860, a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,—

(*a*) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(*b*) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are,

of opinion, formed in good faith, that—

(*i*) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or

mental health; or

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

Explanation 1.—Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.—Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or 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."

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

21. When the MTP Act was first enacted in 1971 it was largely modelled on the Abortion Act of 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified "right to abortion" and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers.

22. There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of

reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling State interest" in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

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

> "continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health"

[as per Section 3(2)(*i*)] or when

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

[as per Section 3(2)(*ii*)]. While the satisfaction of one medical practitioner is required for terminating a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period.

24. The Explanations to Section 3 have also contemplated the termination of pregnancy when the same is the result of a rape or a failure of birth control methods since both of these eventualities have been equated with a "grave injury to the mental health" of a woman.

25. In all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in Section 3 (4)(*b*) of the MTP Act, 1971.

26. The exceptions to this rule of consent have been laid down in Section 3(4)(*a*) of the Act. Section 3(4)(*a*) lays down that when the pregnant woman is below eighteen years of age or is a "mentally ill" person, the pregnancy can be terminated if the guardian of the pregnant woman gives consent for the same. The only other exception is found in Section 5(1) of the MTP Act which permits a registered medical practitioner to proceed with a termination

of pregnancy when he/she is of an opinion formed in good faith that the same is "immediately necessary to save the life of the pregnant woman". Clearly, none of these exceptions are applicable to the present case.

27. In the facts before us, the State could claim that it is the guardian of the pregnant victim since she is an orphan and has been placed in government-run welfare institutions. However, the State's claim to guardianship cannot be mechanically extended in order to make decisions about the termination of her pregnancy. An ossification test has revealed that the physical age of the victim is around 19-20 years. This conclusively shows that she is not a minor. Furthermore, her condition has been described as that of "mild mental retardation" which is clearly different from the condition of a "mentally ill person" as contemplated by Section 3(4)(*a*) of the MTP Act.

28. It is pertinent to note that the MTP Act had been amended in 2002, by way of which the word "lunatic" was replaced by the expression "mentally ill person" in Section 3(4)(*a*) of the said statute. The said amendment also amended Section 2(*b*) of the MTP Act, where the erstwhile definition of the word "lunatic" was replaced by the definition of the expression "mentally ill person" which reads as follows:

> "2. (*b*) 'mentally ill person' means a person who is in need of treatment by reason of any mental disorder other than mental retardation;"

The 2002 amendment to the MTP Act indicates that the legislative intent was to narrow down the class of persons on behalf of whom their guardians could make decisions about the termination of pregnancy. It is apparent from the definition of the expression "mentally ill person" that the same is different from that of "mental retardation". A similar distinction can also be found in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. This legislation treats "mental illness" and "mental retardation" as two different forms of "disability". This distinction is apparent if one refers to Sections 2(*i*), (*q*) and (*r*)[*] which define "disability", "mental illness" and "mental retardation" in the following manner:

> "2. (*i*) 'disability' means—
>
> (*i*) blindness;
>
> (*ii*) low vision;
>
> (*iii*) leprosy-cured;
>
> (*iv*) hearing impairment;

(*v*) locomotor disability;

(*vi*) mental retardation;

(*vii*) mental illness;

* * *

(*q*) 'mental illness' means any mental disorder other than mental retardation;

(*r*) 'mental retardation' means a condition of arrested or incomplete development of mind of a person which is specially characterised by subnormality of intelligence."

The same definition of "mental retardation" has also been incorporated in Section 2(*g*) of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

29. These legislative provisions clearly show that persons who are in a condition of "mental retardation" should ordinarily be treated differently from those who are found to be "mentally ill". While a guardian can make decisions on behalf of a "mentally ill person" as per Section 3(4)(*a*) of the MTP Act, the same cannot be done on behalf of a person who is in a condition of "mental retardation".

30. The only reasonable conclusion that can be arrived at in this regard is that the State must respect the personal autonomy of a mentally retarded woman with regard to decisions about terminating a pregnancy. It can also be reasoned that while the explicit consent of the woman in question is not a necessary condition for continuing the pregnancy, the MTP Act clearly lays down that obtaining the consent of the pregnant woman is indeed an essential condition for proceeding with the termination of a pregnancy.

31. As mentioned earlier, in the facts before us the victim has not given consent for the termination of pregnancy. We cannot permit a dilution of this requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim. We must also be mindful of the fact that any dilution of the requirement of consent contemplated by Section 3(4)(*b*) of the MTP Act is liable to be misused in a society where sex-selective abortion is a pervasive social evil.

32. Besides placing substantial reliance on the preliminary medical opinions presented before it, the High Court has noted some statutory provisions in the Persons with Disabilities (Equal Opportunities,

Protection of Rights and Full Participation) Act, 1995 as well as the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 where the distinction between "mental illness" and "mental retardation" has been collapsed. The same has been done for the purpose of providing affirmative action in public employment and education as well as for the purpose of implementing anti-discrimination measures. The High Court has also taken note of the provisions in IPC which lay down strong criminal law remedies that can be sought in cases involving the sexual assault of "mentally ill" and "mentally retarded" persons. The High Court points to the blurring of these distinctions and uses this to support its conclusion that "mentally ill" persons and those suffering from "mental retardation" ought to be treated similarly under the MTP Act, 1971. We do not agree with this proposition.

33. We must emphasise that while the distinction between these statutory categories can be collapsed for the purpose of empowering the respective classes of persons, the same distinction cannot be disregarded so as to

interfere with the personal autonomy that has been accorded to mentally retarded persons for exercising their reproductive rights.

Termination of pregnancy is not in the "best interests" of the victim

34. In the impugned orders, the High Court has in fact agreed with the proposition that a literal reading of Section 3 of the MTP Act would lead to the conclusion that a mentally retarded woman should give her consent in order to proceed with the termination of a pregnancy. However, the High Court has invoked the doctrine of "parens patriae" while exercising its writ jurisdiction to go beyond the literal interpretation of the statute and adopt a purposive approach. The same doctrine has been used to arrive at the conclusion that the termination of pregnancy would serve the "best interests" of the victim in the present case even though she has not given her consent for the same. We are unable to accept that line of reasoning.

35. The doctrine of "parens patriae" has been evolved in common law and is applied in situations where the State must make decisions in order to protect the interests of those persons who are unable to take care of themselves. Traditionally this doctrine has been applied in cases involving the rights of minors and those persons who have been found to be mentally incapable of making informed decisions for themselves.

36. Courts in other common law jurisdictions have developed two distinct standards while exercising "parens patriae" jurisdiction for the purpose of making reproductive decisions on behalf of mentally retarded persons. These two standards are the "best interests" test and the "substituted judgment" test.

37. As evident from its literal description, the "best interests" test requires the Court to ascertain the course of action which would serve the best interests of the person in question. In the present setting this means that the Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim. It is important to note that the Court's decision should be guided by the interests of the victim alone and not those of the other stakeholders such as guardians or the society in general. It is evident that the woman in question will need care and assistance which will in turn entail some costs. However, that cannot be a ground for denying the exercise of reproductive rights.

38. The application of the "substituted judgment" test requires the Court to step into the shoes of a person who is considered to be mentally incapable and attempt to make the decision which the said person would have made, if she was competent to do so. This is a more complex inquiry but this test can only be applied to make decisions on behalf of persons who are conclusively shown to be mentally incompetent.

39. In the present case the victim has been described as a person suffering from "mild mental retardation". This does not mean that she is entirely incapable of making decisions for herself. The findings recorded by the expert body indicate that her mental age is close to that of a nine-year-old

child and that she is capable of learning through rote memorisation and imitation. Even the preliminary medical opinion indicated that she had learnt to perform basic bodily functions and was capable of simple communications. In light of these findings, it is the "best interests" test alone which should govern the inquiry in the present case and not the "substituted judgment" test.

40. We must also be mindful of the varying degrees of mental retardation, namely, those described as borderline, mild, moderate, severe and profound instances of the same. Persons suffering from severe and profound mental retardation usually require intensive care and supervision and a perusal of academic materials suggests that

there is a strong preference for placing such persons in an institutionalised environment. However, persons with borderline, mild or moderate mental retardation are capable of living in normal social conditions even though they may need some supervision and assistance from time to time.

41. A developmental delay in mental intelligence should not be equated with mental incapacity and as far as possible the law should respect the decisions made by persons who are found to be in a state of mild to moderate "mental retardation".

42. In the present case, the victim has expressed her willingness to carry the pregnancy till its full term and bear a child. The expert body has found that she has a limited understanding of the idea of pregnancy and may not be fully prepared for assuming the responsibilities of a mother. As per the findings, the victim is physically capable of continuing with the pregnancy and the possible risks to her physical health are similar to those of any other expecting mother. There is also no indication that the prospective child may be born with any congenital defects. However, it was repeatedly stressed before us that the victim has a limited understanding of the sexual act and perhaps does not anticipate the social stigma that may be attached to a child which will be born on account of an act of rape.

43. Furthermore, the medical experts who appeared before us also voiced the concern that the victim will need constant care and supervision throughout the pregnancy as well as for the purposes of delivery and childcare after birth. Maternal responsibilities do entail a certain degree of physical, emotional and social burdens and it was proper for the medical experts to gauge whether the victim is capable of handling them.

44. The counsel for the respondent also alerted us to the possibility that even though the victim had told the members of the expert body that she was willing to bear the child, her opinion may change in the future since she was also found to be highly suggestible.

45. Even if it were to be assumed that the victim's willingness to bear a child was questionable since it may have been the product of suggestive questioning or because the victim may change her mind in the future, there is another important concern that should have been weighed by the High Court.

At the time of the order dated 17-7-2009[2], the victim had already been pregnant for almost 19 weeks. By the time the matter was heard by

this Court on an urgent basis on 21-7-2009, the statutory limit for terminating a pregnancy i.e. 20 weeks, was fast approaching. There is of course a cogent rationale for the provision of this upper limit of 20 weeks (of the gestation period) within which the termination of a pregnancy is allowed. This is so because there is a clear medical consensus that an abortion performed during the later stages of a pregnancy is very likely to cause harm to the physical health of the woman who undergoes the same.

46. This rationale was also noted in a prominent decision of the United States Supreme Court in *Roe* v. *Wade*[3], which recognised that the right of a woman to seek an abortion during the early stages of pregnancy came within the constitutionally protected "right to privacy". Even though this decision had struck down a statutory provision in the State of Texas which had criminalised the act of undergoing or performing an abortion (except in cases where the pregnancy posed a grave risk to the health of the mother), it had also recognised a "compelling State interest" in protecting the life of the prospective child as well as the health of the pregnant woman after a certain point in the gestation period.

47. This reasoning in *Roe* v. *Wade*[3] was explained in the majority opinion delivered by Blackmun, J., US at pp. 162-63:

> "In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and that it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling'.
>
> (internal citations omitted)
>
> With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact (internal citation omitted), that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."
>
> (emphasis in original)

48. In light of the abovementioned observations, it is our considered opinion that the direction given by the High Court (in its order dated

17-7-2009[2]) to terminate the victim's pregnancy was not in pursuance of her "best interests". Performing an abortion at such a late stage could have endangered the victim's physical health and the same could have also caused further mental anguish to the victim since she had not consented to such a procedure.

49. We must also mention that the High Court in its earlier order had already expressed its preference for the termination of the victim's pregnancy (see para 38 in order dated 9-6-2009[1]) even as it proceeded to frame a set of questions that were to be answered by an expert body which was appointed at the instance of the High Court itself. In such a scenario, it would have been more appropriate for the High Court to express its inclination only after it had considered the findings of the expert body.

50. Our conclusions in the present case are strengthened by some norms developed in the realm of international law. For instance one can refer to the principles contained in the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971 [GA Res 2856 (XXVI) of 20-12-1971] which have been reproduced below:

> "1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.
>
> 2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.
>
> 3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.
>
> 4. Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.
>
> 5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and

interests.

6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.

7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by

qualified experts and must be subject to periodic review and to the right of appeal to higher authorities."

Special emphasis should be placed on Principle 7 (cited above) which prescribes that a fair procedure should be used for the "restriction or denial" of the rights guaranteed to mentally retarded persons, which should ordinarily be the same as those given to other human beings.

51. In respecting the personal autonomy of mentally retarded persons with regard to the reproductive choice of continuing or terminating a pregnancy, the MTP Act lays down such a procedure. We must also bear in mind that India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) on 1-10-2007 and the contents of the same are binding on our legal system.

52. The facts of the present case indeed posed some complex questions before us. While we must commend the counsel for their rigorous argumentation, this case also presents an opportunity to confront some social stereotypes and prejudices that operate to the detriment of mentally retarded persons. Without reference to the present proceedings, we must admit to the fact that even medical experts and judges are unconsciously susceptible to these prejudices. [See generally : Susan Stefan, "Whose Egg is it anyway? Reproductive Rights of Incarcerated, Institutionalised and Incompetent Women", 13 Nova Law Review 405-56 (November 1989).]

53. We have already stressed that persons who are found to be in borderline, mild and moderate forms of mental retardation are capable of living in normal social conditions and do not need the intensive supervision of an institutionalised environment. As in the case before us, institutional upbringing tends to be associated with even more

social stigma and the mentally retarded person is denied the opportunity to be exposed to the elements of routine living. For instance, if the victim in the present case had received the care of a family environment, her guardians would have probably made the efforts to train her to avoid unwelcome sexual acts. However, the victim in the present case is an orphan who has lived in an institutional setting all her life and she was in no position to understand or avoid the sexual activity that resulted in her pregnancy. The responsibility of course lies with the State and fact situations such as those in the present case should alert all of us to the alarming need for improving the administration of the government-run welfare institutions.

54. It would also be proper to emphasise that persons who are found to be in a condition of borderline, mild or moderate mental retardation are capable of being good parents. Empirical studies have conclusively disproved the eugenics theory that mental defects are likely to be passed on to the next generation. The said "eugenics theory" has been used in the past to perform forcible sterilisations and abortions on mentally retarded persons. [See generally : Elizabeth C. Scott, "Sterilization of Mentally Retarded Persons : Reproductive Rights and Family Privacy", Duke Law Journal 806-65

(November 1986).] We firmly believe that such measures are anti-democratic and violative of the guarantee of "equal protection before the law" as laid down in Article 14 of our Constitution.

55. It is also pertinent to note that a condition of "mental retardation" or developmental delay is gauged on the basis of parameters such as intelligence quotient (IQ) and mental age (MA) which mostly relate to academic abilities. It is quite possible that a person with a low IQ or MA may possess the social and emotional capacities that will enable him or her to be a good parent. Hence, it is important to evaluate each case in a thorough manner with due weightage being given to medical opinion for deciding whether a mentally retarded person is capable of performing parental responsibilities.

Conclusion and directions

56. With regard to the facts that led to the present proceeding, the question of whether or not the victim was capable of consenting to the sexual activity that resulted in her pregnancy will be addressed in the criminal proceedings before a trial court. An FIR has already been filed in the said matter and two security guards from Nari Niketan are being

investigated for their role in the alleged rape.

57. The substantive questions posed before us were whether the victim's pregnancy could be terminated even though she had expressed her willingness to bear a child and whether her "best interests" would be served by such termination. As explained in the forementioned discussion, our conclusion is that the victim's pregnancy cannot be terminated without her consent and proceeding with the same would not have served her "best interests".

58. In our considered opinion, the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority. Since none of the other statutory conditions have been met in this case, it is amply clear that we cannot permit a dilution of the requirement of consent for proceeding with a termination of pregnancy. We have also reasoned that proceeding with an abortion at such a late stage (19-20 weeks of gestation period) poses significant risks to the physical health of the victim.

59. Lastly, we have urged the need to look beyond social prejudices in order to objectively decide whether a person who is in a condition of mild mental retardation can perform parental responsibilities.

60. The findings recorded by the expert body which had examined the victim indicate that the continuation of the pregnancy does not pose any grave risk to the physical or mental health of the victim and that there is no indication that the prospective child is likely to suffer from a congenital disorder. However, concerns have been expressed about the victim's mental capacity to cope with the demands of carrying the pregnancy to its full term, the act of delivering a child and subsequent childcare. In this regard, we direct that the best medical facilities be made available so as to ensure proper care and supervision during the period of pregnancy as well as for post-natal care.

61. Since there is an apprehension that the woman in question may find it difficult to cope with maternal responsibilities, the Chairperson of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities (constituted under the similarly named 1999 Act) has stated in an affidavit that the said Trust is prepared to look after the interests of the woman in question which will include assistance with childcare. In the said affidavit, it has been stated that this Trust will consult the Chandigarh Administration as well as experts from the Post Graduate Institute of Medical Education and

Research (PGIMER) in order to ensure proper care and supervision.

62. If any grievances arise with respect to the same subject-matter in the future, the respondent can seek directions from the High Court of Punjab and Haryana under its writ jurisdiction. The present appeal is disposed of accordingly.

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† Arising out of SLP (C) No. 17985 of 2009. From the Judgments and Orders dated 9-6-2009 and 17-7-2009 of the High Court of Punjab and Haryana at Chandigarh in CWP No. 8760 of 2009

[1] CWP No. 8760 of 2009, order dated 9-6-2009

[2] CWP No. 8760 of 2009, order dated 17-7-2009

* **Ed.** : Of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

[3] 410 US 113 : 35 L Ed 2d 147 (1973)