Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.10463 OF 2017

Ms. Z ... Appellant(s)

Versus

The State of Bihar and Others ...Respondent(s)

J U D G M E N T

Dipak Misra, J.

An interlocutory application being I.A. No. 64980 of 2017 has been filed seeking certain directions. Having heard learned counsel for the parties, it is directed that name of the appellant in the cause title be substituted with Ms. Z so that her identity is not revealed; the Registry of the Court shall substitute the name of the appellant with Ms. Z in all records, including on the official website of this Court, and the Registry of the High Court of Patna shall substitute the name of the appellant with Ms. Z in all records, including the official

website of the High Court. Leave is granted to the appellant to seek substitution of her name with Ms. Z on all search engines such as google.com, legal websites such as indiakanoon.org as well as legal journals. Interlocutory application is accordingly allowed.

2. The factual score that has been depicted in the instant appeal is reflective of a retardant attitude and laxness to the application of the provisions of law at the appropriate time by the authorities that can cause a disastrous affect on the mind of a hapless victim. And the victim here is a destitute woman, who was brought to a shelter home from the footpath, as she was not wanted by her husband and her family, living in abject poverty and being scared of social stigma could not afford her a home. Sans a sense of belonging, she was brought to 'Shanti Kutir', a shelter home, run by an organization named Youth Mobilization for National Advancement (YMNA) under the Mukhyamantri Bhikshavriti Nivaran Yojna a scheme floated by the Government of Bihar for destitute women. The woman, a destitute, was found to be pregnant by the functionaries of the home and further

being aware of the fact that she had been condemned to that condition because of rape committed on her, the competent authority of the home took her to the hospital for termination of pregnancy with her consent. Though the steps taken by the shelter home were prompt, yet delay was caused by the authorities of the hospital. The delay in such a situation has the seed that can cause depression to a woman, who is already in despair. And this despair has the potentiality to drive one on the path of complete distress. In such a situation, the victim in a state of anguish may even think of surrendering to death or live with a traumatic experience which can be compared to have a life that has been fragmented at the cellular level. It is because the duty cast on the authorities under the Medical Termination of Pregnancy Act, 1971 (for brevity, 'the Act') is not dutifully performed, and the failure has ultimately given rise to a catastrophe; a prolonged torment. That is the sad narrative of the victim appellant.

3. The appellant, a thirty-five year old woman, was living on the footpath in Phulwarisharif, Patna. On

25th January, 2017, she was brought to Shanti Kutir. The medical test done by Shanti Kutir showed that she was pregnant. On 2nd February, 2017, she was taken to Patna Medical College Hospital, Patna (PMCH), for medical examination. On 8th February, 2017, an ultrasound test was done at PMCH, and it was found that she was 13 weeks and 6 days pregnant. On 4th March, 2017, she expressed her desire to terminate the pregnancy and, accordingly, she was taken to PMCH for further medical examination. At that juncture, the appellant revealed that she had been raped and, therefore, the pregnancy should be terminated. On 14th March, 2017, she was taken to PMCH for termination and her father and brother were called and made to sign a consent form, which they duly signed. However, the hospital authorities did not proceed with the termination of the pregnancy. It is worthy to mention here that on 18th March, 2017, an F.I.R. under Section 376 of the Indian Penal Code (IPC) was registered with Mahila Police Station, Patna as Case No.13 of 2017. The Home Superintendent, Shanti Kutir wrote to the Superintendent of Patna Medical College and

Hospital, Patna, stating, *inter alia*, that the pregnancy is more than 17 weeks and a divorce petition had been filed by the husband, and the father and the brother of the appellant expressed their inability to take her with them because of social and financial constraints. On 3rd April, 2017, she was again taken to PMCH, but the termination was not carried out and, by that time, her pregnancy was 20 weeks old. As the factual narration would reveal, the appellant was found to be HIV+ve.

4. As the pregnancy was not carried out, the appellant approached the High Court in C.W.J.C. No. 5286 of 2017 with the prayer to ascertain the physical condition including the stage of pregnancy and to direct for termination of pregnancy as she had been sexually assaulted and further she was HIV+ve. The High Court, on 10th April, 2017, permitted the counsel for the victim to implead the husband and her father and the Director of Indira Gandhi Institute of Medical Sciences, Patna (IGIMS). Thereafter, the learned single Judge directed for constitution of a Medical Board at IGIMS, Patna, to assess the physical and mental condition of the writ

petitioner therein and the fetus. On that day, the High Court also directed the Home Superintendent, Shanti Kutir, a Women Rehabilitation Centre, to file a counter affidavit. Similar direction was issued to the State of Bihar and Superintendent of PMCH. A further direction was given by the High Court to the Senior Superintendent of Police, Patna, to submit an interim report with regard to the progress of investigation in Mahila P.S. Case No.13 of 2017.

5. It is apt to note here that the Director, IGIMS, Patna was directed to constitute a Multi Disciplinary Medical Board consisting of Heads of Department of Gynecology, Neurology and Forensic Medicine. Liberty was granted to the Director, IGIMS to nominate one or more doctors as members of the Multi Disciplinary Medical Board to examine the victim with regard to physical and mental state and the condition of the fetus. The writ petitioner was directed to make herself present before the Director, IGIMS, on 11th April, 2017 at 10.30 a.m. The IGIMS examined the victim and submitted a report in a sealed cover.

6. As the factual matrix would further uncurtain, on 18th April, 2017, the High Court took note of the fact that the name of the appellant's husband had been wrongly mentioned and a direction was issued to make *dasti* service on the husband and the father through the Officer In-charge of the local police station and the matter was fixed for 20th April, 2017. On 20th April, 2017, the matter could not be taken up and stood adjourned to 21st April, 2017. On the adjourned date, the father of the appellant prayed for time to file counter affidavit. The High Court expressed its displeasure that despite the specific direction, the Senior Superintendent of Police, Patna, had not filed any counter affidavit, although a submission was made by the learned Additional Advocate General that he had been intimated by the Senior Superintendent of Police that the investigation was in progress and likely to be over within six months. Thereafter, the High Court proceeded to determine the issue whether the victim, who is HIV+ve and is carrying a pregnancy of 24 weeks could be allowed to have medical termination of pregnancy under the Act.

The stand of the Government before the High Court was that the victim was being provided with all facilities to survive in rehabilitation centre and the pregnancy could not be terminated because the identity of the father of the victim was not established and he had refused to swear an affidavit in this regard and subsequently escaped from the scene. The stand of the father of the victim before the High Court was that he did not have any objection for getting the pregnancy terminated. The husband, the respondent No. 8 before the High Court, admitted that he had entered into wedlock with the victim and in the said wedlock two children were born, but the victim had deserted him in March, 2007, and the said circumstances led him to file Matrimonial Suit No. 984 of 2015 before the Principal Judge, Family Court, Patna, seeking dissolution of marriage.

7. The High Court perused the report submitted by IGIMS, which suggested that the pregnancy was 20 to 24 weeks old and the termination of pregnancy would require major surgical procedure along with the subsequent consequences such as bleeding, sepsis and

anesthesia hazards. The report that was filed by IGIMS, which has been referred to by the High Court, needs to be reproduced:

Issues	Opinion
1. Examination report of the patient (petitioner) with regard to her physical and mental stage (Physical Medical examination of all system will be desirable: Respiratory, CVS, Neurology etc.	Physical Examination: Pulse – 100/min regular, BP-114/80 mmHg, Pallor-Mild, lcerus-NIL, edema-Nil, Cyanosis & clubbing-Nil, JVP – normal, Chest – B/L clear no added sound; CVS-S1 & S2 – Normal, no added sound; P/A exam-fundal height corresponds to 22-24 wk pregnancy; CNS – Higher mental function intact, no focal neurological deficit. Mentally alert, well oriented with time, place & person (Annexure I)
2. Stage of Pregnancy.	2nd trimester of approximately 23 wks (as per 1st USG report of whole abdomen on 08.02.2017 of PMCH. And IGIMS, USG on dated 11.04.2017 shows 21 wks fetus.....(Annexure-II) According to recommendations 1st i.e., earliest USG is to be used for Gestational age calculation.
3. Overall condition of foetus	Normal single alive intra-uterine foetus (As per Physical examination and USG report)
4. How far the termination of pregnancy will be detrimental to the petitioner.	Termination of Pregnancy at this stage sometimes may need major surgical procedure along with the subsequent consequences such as Bleeding, Sepsis and Anesthesia hazards.
5.How far it will be detrimental, if the petitioner is allowed to complete full term	The patient can continue pregnancy according to NACO guidelines. Still there is

of pregnancy.	likelihood that fetus may be HIV+ve. But definitive diagnosis can only be given when the child is 18 months old.
6 How far it will be detrimental to the petitioner and foetus, particularly in view of the fact that she is mentally abraised and HIV+VE.	As per the clinical assessment & documentary evidence, the patient is diagnosed to have Psychiatry illness, provisionally Schizophrenia with Mild Mental Retardation. She is currently on medications and behaviourally stable and will require long term psychiatry treatment.
7. Investigation reports	Reports which are made available before the Board Members are….. Annexure-III. Some investigation reports which are not available at IGIMS like CD4 +T Lymphocyte count, Serum HIV RNA level (Viral load) and Triple Marker Maternal Blood test advised by concerned members are still awaited, after which progression of HIV and through marker congenital abnormality of foetus can be assessed.

8. The learned Single Judge, after referring to the provisions of the Act, observed thus:

> "In the present case, the medical report does not suggest that the foetus is suffering from any abnormality. It further does not suggest that the foetus has already been infected with HIV+ve. It only predicts that any definite opinion can be given only when the child attains the age of 18 months. The Medical report further does not suggest that if the victim is allowed to carry the pregnancy to its

> full course, then she will suffer any risk of life or grave injury to her physical or mental health. Explanation 1 of Sub-Section 2 of Section 3, provides that such pregnancy which is alleged to have been caused by rape shall be presumed to constitute grave injury to the mental health of the pregnant woman. In the present case, the victim has alleged that she had been ravished, but her conduct of not disclosing the incident of rape for more than 13 weeks and deciding not to get the pregnancy terminated for more than 20 weeks, as the writ application has been filed after 20 weeks of pregnancy i.e. on 07.04.2017, prima facie, does not suggest that such alleged conceivement has really caused grave injury to the mental health of the victim. Moreover, the termination, as contemplated under Section 3 of the Act, 1971, is only permissible up to 20 weeks of pregnancy. Definitely the effort for termination was made on behalf of the victim in the 17th week of pregnancy, but the present writ application has been filed before this Court after 20 weeks of her pregnancy."

9. After so stating, the High Court adverted to Sections 3 to 5 of the Act and opined that the provisions are not applicable to the writ petitioner. The learned Single Judge also referred to Section 10 of the Human Immunodeficiency Virus and AIDS (Prevention and Control) Act, 2017 and distinguished the decisions rendered in ***Meera Santosh Pal v. Union of India***[1], ***X v. Union of India and others***[2] and ***X v. Union of***

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1 AIR 2017 SC 461
2 AIR 2017 SC 1055

India and others[3]. He placed reliance on ***Sheetal Shankar Salvi and another v. Union of India***[4], wherein this Court has declined termination of 20 weeks of pregnancy. The High Court, thereafter, adverted to the statement of law in ***Suchita Srivastava and another v. Chandigarh Administration***[5] and reproduced certain paragraphs and took note of the concept that in the case of a pregnant woman and 'compelling State interest' and further adverted to the doctrine of '*parens patriae'* where in certain situations the State must make decisions in order to protect the interest of those persons who are unable to take care of themselves. Thereafter, the learned single Judge adverted to the two standards, namely, 'best interests' test and 'substituted judgment' test as laid down in ***Suchita Srivastava*** (supra). The High Court also dwelled upon the role of the court that it must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim.

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3 AIR 2016 SC 3525
4 2017(5) SCALE 428
5 (2009) 9 SCC 1

10. After so stating, the learned Single Judge delved into the factual score projected in the writ petition and opined thus:

> "In the present case also, in the 'best interest' of the victim and the foetus, this Court finds no reason to exercise the jurisdiction under Article 226 of the Constitution of India for directing the pregnancy to be terminated in its 23-24 weeks, particularly such termination of pregnancy, as per the Medical Board report would be hazardous to the life of the victim. However, keeping in view the fact that the victim was leading a life of destitute and she has been almost deserted by her husband, her father, her brother and her sister, as none of them in their counter affidavit have stated that they are ready to take her to their house, this Court feels that she will be safe if she is allowed to remain in rehabilitation centre, Shanti Kutir so long she desires.
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> Mr. Kaushal Kumar Jha, learned AAG-8 submits that the rehabilitation center is run by the Government and the Government is ready to provide all medical facilities, as well as amenities of day to day life to the victim.
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> In the circumstances, it is expected from the Superintendent, PMCH to get the victim medically examined every month or so and provide all medicines or other medical facilities required for carrying the pregnancy to its full term and bringing up the child after its birth, till the child attains the age of five years. The Superintendent, PMCH would ensure to provide the victim with necessary medical cover in light of the direction made above.

> This Court is hopeful that the NGO will take care of the victim and provide all the facilities for the post-natal care.
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> In the circumstances, in the interest of justice and in the interest of victim and foetus/prospective child, this Court is not inclined to permit the medical terminaton of pregnancy of the victim."

11. After so holding, the learned Single Judge issued certain directions, which are to the following effect:

> (i) Respondent No.4 will get the bank account of the victim opened within a period of one week, if she does not have one.
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> (ii) Respondent Nos.7 and 8, the father and the husband of the victim will deposit Rs.1,000 and Rs.1,500/-, respectively, per month in the account of the victim from May, 2017.
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> (iii) If respondent Nos.7 and 8 make default in payment on three consecutive occasions, of the installment of the aforesaid amount, then any of the concerned parties would be at liberty to file an application before this Court and respondent Nos.7 and 8 will be answerable to this Court, in this regard.
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> (iv) Respondent Nos.7 and 8 will provide their mobile number to the respondent No.4 and shall visit the victim every month.
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> (v) Respondent No.4 shall allow the relatives and husband of the victim to meet her.
> (vi) One copy of the report of the Medical Board will be kept with the records of the present case and one copy of the conclusive medical report will be transmitted to

> respondent No.4 by the Director of IGIMS, Patna.
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> (vii) The Director, IGIMS, Patna will transmit the awaited medical report of the victim, as mentioned in Clause-7 of the report of the Medical Board, to respondent No.4."

12. The High Court decided the matter on 26th April, 2017. When the said order was challenged, the present appeal was taken up on 3rd May, 2017. The learned counsel for the appellant referred to the facts as asserted in the special leave petition which is evincible from the order of the High Court. Though the Union of India is not a party, Mr. P.S. Narasimha and Mr. Tushar Mehta, learned Additional Solicitors General were asked as to whether arrangements could be made for the appellant to come to Delhi to be examined by a Medical Board at All India Institute of Medical Sciences (AIIMS), New Delhi. Learned counsel for the appellant, after obtaining instructions, stated that she is inclined to be examined by the Medical Board at AIIMS. Taking note of the same, the Court directed as follows:

> "Mr. P.S. Narasimha and Mr. Tushar Mehta have submitted that a member from the Non Governmental Organization, namely,

> Koshish-TISS, the respondent No.5 hereing, should accompany the petitioner to Delhi. As far as the travel is concerned, Mr. Narasimha and Mr. Mehta spoke in unequivocal voice that the arrangements shall be made for the petitioner and the accompanying member so that they can come to Delhi where further arrangements shall be made for their stay and the petitioner can be examined by the Medical Board at AIIMS latest by 6th May, 2017.
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> The report of the Medical Board shall be produced before this Court and we would also request Mr. Narasimha and Mr. Mehta to assist the Court on the issue and also to have some discussion with the doctors, for we are concerned with saving a life of a destitute woman. As we are inclined to think that a woman, who has already become a destitute being sexually assaulted and suffering from a serious medical ailment, not to go through further sufferings. The quientessential purpose of life, be it a man or a woman, is the dignity of life and all efforts are to be made to sustain it."

13. In pursuance of the order passed by this Court, the Medical Board at AIIMS examined the appellant. The opinion of the Medical Board was that the procedure involved in termination of the pregnancy is risky to the life of the appellant and the fetus in the womb. It has suggested that she should be advised to continue HAART therapy and routine antenatal care to reduce the risk of HIV transmission to the fetus. In view of the said report, the Court on 9th May, 2017, directed as follows:

"In view of the aforesaid opinion, it is the accepted position at the Bar that there cannot be termination of pregnancy. Learned counsel for the petitioner would submit that the petitioner along with the companion be sent back to Patna and for the said purpose appropriate arrangements be made by the Union of India to which Mr. Tushar Mehta, learned Additional Solicitor General concedes. We appreciate the stand taken by the Union of India in this regard.

Learned counsel for the petitioner submitted that the doctors at AIIMS may give the appropriate treatment graph for the petitioner so that she can survive the health hazard that she is in. Mr. Tushar Mehta, learned Additional Solicitor General submitted that she will be given the treatment graph by 10.05.2017.

The controversy does not end here. Learned counsel for the petitioner would submit that because of the delay caused, she is compelled to undergo the existing miserable situation and, therefore, she is entitled to get compensation and that apart, she is also entitled to get compensation under the Victim Compensation Scheme as framed under Section 357-A of the Code of Criminal Procedure by the State of Bihar.

Apart from the above submission, we are obligated to direct the State of Bihar to provide all the medical facilities to the petitioner as per the treatment graph given by the doctors who are going to examine the petitioner at AIIMS through the Indira Gandhi Institute of Medical Sciences at Patna. The Indira Gandhi Institute of Medical Sciences shall work in coordination with AIIMS, New Delhi so that the health

condition of the petitioner is not further jeopardized.

Learned counsel for the petitioner is granted liberty to file an additional affidavit with regard to the facet of compensation within six weeks hence. The State of Bihar, who is represented by Ms. Abha R. Sharma, learned counsel shall file a reply to the special leave petition as well as to the additional affidavit within four weeks therefrom.

We have stated about the grant of compensation hereinbefore. The one facet of granting compensation pertains to negligence and delay which come within the domain of public law remedy. The other aspect of the compensation comes under the scheme dated 24.3.2014 framed under Section 357-A of the Code of Criminal Procedure. Needless to say, the petitioner is eligible to get the compensation under the said Scheme and, therefore, the petitioner shall be paid a sum of Rs.3,00,000/- (Rupees three lac only) by the State of Bihar as she has been a victim of rape. Needless to say, we have determined the compensation regard being had to clause 4 of the Scheme. The said amount shall be paid to her within four weeks hence and compliance report thereof shall be filed before the Registry of this Court. As far as the other aspect of compensation is concerned, the said aspect shall be considered on 9.8.2017."

14. We have narrated the facts in *extenso* so that the controversy can be appreciated in proper perspective and further the laxity on the part of the authorities and also the approach of the High Court can be appositely

deliberated upon. It is submitted by Ms. Vrinda Grover, learned counsel for the appellant that she is entitled to get compensation from the State under the public law remedy as the authorities under the State have not acted with quite promptitude in terminating the pregnancy and procrastinated the matter, as a consequence of which, the appellant is compelled to lead a life of terrible agony and anguish, and constant state of uncertainty. It is her submission that as the appellant was a destitute staying in a shelter home and neither the father or her siblings had shown any concern because of social stigma and their own impecuniosity and the husband had abandoned her to her fate and preferred a divorce petition, there was no justification to obtain the consent of the father or the husband for termination of pregnancy. That apart, she contends that the approach of the High Court is wholly fallacious since it seeds more concerned with the future of the foetus but not the life of the victim. It is canvassed by the learned counsel that the appellant was thirty-five years old when she had gone to the hospital and expressed her willingness in no

uncertain terms to terminate her pregnancy as she had been raped and an F.I.R. has been lodged, it was the obligation of the competent authorities of the PMCH to proceed with the termination and not to cause delay which invited complications. According to her, when her case fell squarely within the statutory framework, there was no reason to show slackness. She also contends that the High Court has completely failed to appreciate the spirit of the Act and has treated it as an adversarial litigation and passed the order which not only unsustainable in law but also projects total lack of sensitivity.

15. Pyramiding the submission for grant of compensation from the State, learned counsel would contend that when the appellant had gone to the PMCH, it was obligatory on the part of the authorities to proceed with the termination and that apart, the State had, in a way, contested the writ petition. Learned counsel would further propound that the concept of 'compelling State interest' is not applicable to the case at hand but the said concept was unnecessarily highlighted. She would

canvass that when the statutory function is not carried out and the fundamental choice which is available to the appellant in law is totally curtailed and scuttled, the victim is entitled for compensation, for the entire action has caused her immense mental torture. She has drawn our attention to the affidavit filed by the respondent-State, where the State has taken a stand that the consent of the father and the husband was necessary, which was not the statutory warrant in the case of the appellant. Structuring the submission pertaining to grant of compensation, Ms. Grover would submit that her choice not to exercise her reproductive rights in the factual matrix has been completely shattered in contravention of the statutory provisions and the pronouncements of this Court as a consequence of which she is being compelled to carry the pregnancy to its full term that has caused incalculable harm and irreversible injury giving rise to emotional trauma. She would contend, with all the humility at her command, that when there is violation of such right because of the negligence of the State functionaries, the victim is

entitled to get compensation. To buttress the said submission, she has commended us to the authorities in ***Nilabati Behera v. State of Orissa***[6], ***D.K. Basu v. State of West Bengal***[7] and ***Chairman, Railway Board and others v. Chandrima Das (Mrs.) and others***[8].

16. Ms. Abha R. Sharma, learned counsel appearing for the State of Bihar, contends that the State has taken care of the appellant as directed by this Court and there has been no negligence on the part of the authorities of the State and, therefore, the State cannot be held liable to pay compensation. She has further urged that before the High Court, the State has shown an affirmative attitude and if any delay has been caused, it is because of the expression of the view by the High Court for which the State cannot be found fault with. In essence, her submission is that the maxim, *actus curiae neminem gravabit*, shall protect the action of the State and it cannot be blamed for any procrastination.

17. To appreciate the rivalized submissions advanced at the Bar, it is necessary to understand the background in

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6 (1993) 2 SCC 746
7 (1997) 1 SCC 416
8 (2000) 2 SCC 465

which the Act was enacted by the Parliament. The Statement of Objects and Reasons of the Act reads as follows:

> "The provisions regarding the termination of pregnancy in the Indian Penal Code which were enacted about a century ago were drawn up in keeping with the then British Law on the subject. Abortion was made a crime for which the mother as well as the abortionist could be punished except where it had to be induced in order to save the life of the mother. It has been stated that this very strict law has been observed in the breach in a very large number of cases all over the country. Furthermore, most of these mothers are married women, and are under no particular necessity to conceal their pregnancy.
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> 2. In recent years, when health services have expanded and hospitals are availed of to the fullest extent by all classes of society, doctors have often been confronted with gravely ill or dying pregnant women whose pregnant uterus have been tampered with a view to causing an abortion and consequently suffered very severely.
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> 3. There is thus avoidable wastage of the mother's health, strength and, sometimes, life. The proposed measure which seeks to liberalise certain existing provisions relating to termination of pregnancy has been conceived (1) as a health measure–when there is danger to life or risk to physical or mental health of the woman; (2) on humanitarian grounds–such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc.; and (3) eugenic grounds–where there is substantial risk that the child, if born, would suffer from deformities and diseases."

18. The aforesaid makes it absolutely clear that the Legislature intended to liberalize the existing provisions relating to termination of pregnancy keeping in view the danger to life or risk to physical or mental health of the woman; on humanitarian grounds, such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, and eugenic grounds where there is substantial risk that the child, if born, would suffer from deformities and diseases.

19. Section 2, which is the dictionary clause, defines the term "guardian" to mean a person having the care of the person of a minor or a mentally ill person. "Mentally ill person" has been defined to mean a person who is in need for treatment by reason of any mental disorder other than mental retardation. The dictionary clause also defines the terms 'minor' and 'registered medical practitioner'.

20. Section 3 stipulates that when pregnancy may be terminated by the registered medical practitioners. It reads as follows:

"**Section 3. When pregnancies may be terminated by registered medical practitioners**.—(1) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

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

(a) where the length of the pregnancy does not exceed 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.
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> (3) In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken to the pregnant woman's actual or reasonable foreseeable environment.
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> (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 C1ause (a), no pregnancy shall be terminated except with the consent of the pregnant woman."
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> [Emphasis added]

21. We have underlined the relevant part of the provision for the purpose that where length of pregnancy exceeds 12 weeks but does not exceed 20 weeks, two registered medical practitioners, after forming an opinion in good faith, that 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 and that there is substantial risk that if the child were born, it would suffer from physical or mental abnormalities as to

be seriously handicapped, may terminate the pregnancy. Explanation 1 to sub-section (2) of Section 3 to which our attention has been drawn postulates that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the same has to be presumed to constitute a grave injury to the mental health of the pregnant woman. Once such a statutory presumption is provided, the same comes within the compartment of grave injury to mental health. Sub-Section (4) of Section 3 requires consent of the guardian of a minor, or a major who is mentally ill person. The opinion to be formed by the medical practitioners is to be in good faith.

22. In the instant case, the gravamen of the submission of the learned counsel for the appellant is that negligence and delay have been caused by the authorities of the State. Be it noted, learned counsel for the appellant has filed a chart giving various dates to highlight the chronology of events. On a perusal of the same, it is demonstrable that after the appellant was brought to Shanti Kutir, it was noticed that she was pregnant. She

was taken to PMCH. At that time, she was 13 weeks and 6 days pregnant. In the midst of 18th week, she expressed her desire to terminate her pregnancy and that was communicated by the Shanti Kutir to the hospital and, thereafter, she was taken to PMCH, where she made an allegation that she had been raped and expressed her desire to terminate her pregnancy. Though she was taken to the hospital for termination of pregnancy, yet the hospital authorities instead of proceeding with the termination, called the father of the appellant to sign the consent form. According to the learned counsel for the appellant, while she had gone to the government hospital and clearly stated that she had been raped and further she was taken by the persons from the Shanti Kutir, which is a Women Rehabilitation Centre, and further there was no material that she was suffering from any mental illness, it was obligatory on the part of the hospital to terminate the pregnancy. Had that been done at the right time, the grave mental torture that she has been going through could have been avoided. Learned counsel also criticized the approach of the High Court in

not dealing with the matter with required amount of sensitivity and not adhering to the statutory provision that when there is an allegation of rape, the pregnancy can be terminated. The High Court directed for a Medical Board to be constituted and after receipt of the report of the Medical Board some time was consumed and, thereafter, also the High Court required the father of the appellant to file an affidavit giving his consent.

23. We have already anlaysed in detail the factual score and the approach of the High Court. We do not have the slightest hesitation in saying that the approach of the High Court is completely erroneous. The report submitted by the IGIMS stated that termination of pregnancy may need major surgical procedure along with subsequent consequences such as bleeding, sepsis and anesthesia hazards, but there was no opinion that the termination could not be carried out and it was risky to the life of the appellant. There should have been a query in this regard by the High Court which it did not do. That apart, the report shows that the appellant, who was a writ petitioner before the High Court, was suffering

from mild mental retardation and she was on medications and her condition was stable and she would require long term psychiatry treatment. The Medical Board has not stated that she was suffering from any kind of mental illness. The appellant was thirty-five year old at that time. She was a major. She was able to allege that she had been raped and that she wanted to terminate her pregnancy. PMCH, as we find, is definitely a place where pregnancy can be terminated. For the said purpose, we may usefully reproduce Section 4 of the Act:

> "**Section 4.—Place where pregnancy may be terminated**.-No termination of pregnancy shall be made in accordance with this Act at any place other than,-
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> (a) a hospital established or maintained by Government, or
>
> (b) a place for the time being approved for the purpose of this Act by Government or a District Level Committee constituted by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee.
>
> Provided that the District Level Committee shall consist of not less than three and not more than five members including the Chairperson, as the Government may specify from time to time."

24. The Medical Termination of Pregnancy Regulations, 2003 (for short, 'the Regulations') deals with various aspects. Regulation 3 provides for form of certifying opinion or opinions. It stipulates that where one registered medical practitioner forms or not less than two registered medical practitioners form such opinion as is referred to in sub-section (2) of Section 3 or 5, he or she shall certify such opinion in Form I. It further provides that every registered medical practitioner who terminates any pregnancy shall within three hours from the termination of the pregnancy certify such termination in Form I. Regulation 4 deals with custody of forms. Sub-Regulation (1) of Regulation 4 provides that the consent given by a pregnant woman for the termination of her pregnancy, together with the certified opinion recorded under Section 3 or Section 5, as the case may be and the intimation of termination of pregnancy shall be placed in an envelope which shall be sealed by the registered medical practitioner or practitioners by whom such termination of pregnancy was performed and until that envelope is sent to the head of the hospital or owner

of the approved place or the Chief Medical Officer of the State, it shall be kept in the safe custody of the concerned registered medical practitioner or practitioners, as the case may be. Be it noted that Section 5 is an exception to Sections 3 and 4, for it provides that Sections 3 and 4 would not apply to certain circumstances as enumerated in Section 5. In the present case, we are concerned with Regulation 3 only.

25. The Form No. I has been provided under Regulation 3 and that covers sub-section (2) of Section 3 and Section 5. The relevant part of the said Form is reproduced below:

> "*I/We hereby give intimation that *I/We terminated the pregnancy of the woman referred to above who bears the serial No. ……. in the Admission Register of the hospital/approved place.
>
> Place…… Signature of the Registered Medical Practitioner
>
> Date….. .. Signature of the Registered Medical Practitioner
>
> Strike out whichever is not applicable.
>
> ** of the reasons specified items (i) to (v) write the one which is appropriate:-

(i) in order to save the life of the pregnant woman,

(ii) in order to prevent grave injury to the physical and mental health of the pregnant woman,

(iii) in view of the substantial risk that if the child was born it would suffer from such physical or mental abnormalities as to be seriously handicapped,

(iv) as the pregnancy is alleged by pregnant woman to have been caused by rape,

(v) as the pregnancy has occurred as result of failure of any contraceptive device or methods used by married woman or her husband for the purpose of limiting the number of children

Note. – Account may be taken of the pregnant woman's actual or reasonably foreseeable environment in determining whether the continuance of her pregnancy would involve a grave injury to her physical or mental health.

Place….
Date…..

Signature of the Registered
Medical Practitioner/Practitioners"

26. Thus, the opinion has to be formed by the registered practitioners as per the Act and they are required to form an opinion that continuance of pregnancy would involve a grave mental or physical harm to her. We have already

referred to Explanation 1 which includes allegation of rape. As is perceivable, the appellant had gone from a women rehabilitation centre, had given consent for termination of pregnancy and had alleged about rape committed on her, but the termination was not carried out. In such a circumstance, we are obliged to hold that there has been negligence in carrying out the statutory duty, as a result of which, the appellant has been constrained to suffer grave mental injury.

27. In such a situation, submits Ms. Grover, the State is bound to compensate the appellant under public law remedy. It is her proponement that the appellant was suffering from mental retardation, but not from mental illness and the distinction is clear from the language of sub-section (4) of Section 3 of the Act. That apart, her contention is that the victim was a destitute and in such a situation, impleadment of her husband and father for obtaining their consent was wholly unwarranted and, in a way, allow time to 'rule'.

28. In ***Suchita Srivastava*** (supra), the High Court of Punjab & Haryana ruled that it was in the best interests

of a mentally retarded woman to undergo an abortion. The victim had become pregnant as a result of an alleged rape that took place when she was an inmate at a government-run welfare institution located in Chandigarh and after discovery of her pregnancy, the Chandigarh Administration, 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. The High Court perused the preliminary medical opinion and constituted an expert body and, eventually, directed the termination of pregnancy in spite of the expert body's findings which show that the victim had expressed her willingness to bear a child. In that context, the Court adverted to the distinction between the 'mental illness' and 'mental retardation'. It also noted that the expert body's findings were in favour of continuation of pregnancy and took note of the fact that the victim had clearly given her willingness to bear a child. In that context, the Court stated:

"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."

And again:

"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."

29. Explaining the provision of the Act, the Court opined that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a continuance of the pregnancy would involve risk to the life of the pregnant woman or of grave injury to her physical or mental health 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. 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.

30. The Court also took note of the provision that termination of the pregnancy has been contemplated 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. The Court emphasized that in all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. The three-Judge Bench referred to the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short, '1995 Act') and opined that in the said Act also "mental illness" has been defined as mental disorder other than mental retardation. The Court also took note of the definition of "mental retardation" under the 1995 Act. The definition read as follows:

> "2(*r*) 'mental retardation' means a condition of arrested or incomplete development of mind of a person which is specially characterised by subnormality of intelligence."

31. The Court also apprised itself that the same definition of "mental retardation" has also been incorporated under Section 2(g) of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. Analysing the provision of Act. The Court opined that while a guardian can make decisions on behalf of a "mentally ill person" as per Section 3(4)(a) of the 1971

Act, the same cannot be done on behalf of a person who is in a condition of "mental retardation". Thus, the difference between the 'mental illness' and 'mental retardation' as recognized in law, was emphasised.

32. The three-Judge Bench proceeded to address the 'best interest' of the victim and invocation of the doctrine of *parens patriae.* In that context, it held:

> "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."

33. After so stating, the Court adverted to the facts of the case and came to hold that though the victim had been described as a person suffering from mild mental retardation, that did not mean that she was entirely incapable of making decision for herself. It discarded the

'substituted judgment' test, which 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. The Court observed that it 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. The Court noted that there are 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.

34. The Court referred to the United Nations Declaration on the Rights of Mentally Retarded Persons,

1971 [GA Res 2856 (XXVI) of 20-12-1971] and relied on principle No.7 of the same. Principle No. 7 reads as follows:

> "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."

35. Placing reliance on the same, it observed thus:

> "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.
>
> x x x x
>
> 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.
>
> 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."

36. On the basis of the aforesaid analysis, the Court concluded:

> "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."

37. In the said case, the Court took note of the fact that the expert body which had examined the victim indicated that the continuation of the pregnancy did not pose any grave risk to the physical and mental health of the victim and that there was no indication that the prospective child was likely to suffer from a congenital disorder. Regard being had to the totality of the facts and circumstances of the case, it was directed 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 the post-natal care.

38. In a recent decision in ***Ms. Eera Thr. Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) and another***[9], the distinction between the mental illness and mental retardation, keeping in view the statutory provisions and the concept of purposive interpretation, has been accepted.

39. In the case at hand, the appellant is a victim of rape. She suffers from mild mental retardation and she

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is administered psychiatry treatment, but she is in a position to express her consent. Under the statutory framework, she was entitled to give her consent for termination of pregnancy. As is evident, she did not desire to bear a child. This is a reverse situation what has been portrayed in ***Suchita Srivastava*** (supra). The principle set out in ***Suchita Srivastava*** (supra) emphasizes on consent. As the facts would unfurl, the appellant had given consent for termination and she had categorically alleged about rape. In such a circumstance, we perceive no fathomable reason on the part of the PMCH not to have proceeded for termination of the pregnancy because there was nothing on record to show that there was any danger to the life of the victim.

40. In this context, we may refer with profit to the recent decision rendered in ***X v. Union of India*** (supra) wherein the Court laying stress on a woman's right to make reproductive choices and further taking into consideration the report of the Medical Board directed as follows:

> "Though the current pregnancy of the petitioner is about 24 weeks and endangers

> the life and the death of the foetus outside the womb is inevitable, we consider it appropriate to permit the petitioner to undergo termination of her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971. We order accordingly."

41. In ***Sheetal Shankar Salvi*** (supra), a two-Judge Bench declined termination of pregnancy after perusal of the report of the Medical Board. The observations and the conclusion of the Court are to the following effect:

> "However, having regard to the fact that there is no danger to the mother's life and the likelihood that 'the baby may be born alive and may survive for variable period of time, we do not consider it appropriate in the interests of justice to direct the respondents to allow petitioner no. 1 to undergo medical termination of her pregnancy. In fact, the aforesaid Medical Board has itself stated that it does not advise medical termination of pregnancy for petitioner no. 1 on medical grounds.
>
> The only other ground that appears from the observations made in the aforesaid medical report apart from the medical grounds, is that petitioner no. 1 is anxious about the outcome of the pregnancy. We find that the termination of pregnancy cannot be permitted due to this reason."

On a careful reading of the aforesaid decision, we do not have slightest hesitation in our mind that the facts in

the said cases and the observations made therein have no application to the facts of the instant case.

42. In ***Meera Santosh Pal*** (supra), the Court noted the fact that the foetus is without a skull and would, therefore, not be in a position to survive. The Court adverted to the fact that the petitioner therein was a woman of average intelligence and with good comprehension and she had understood that her foetus was abnormal and the risk of foetal mortality was high. She had also the support of her husband in her decision-making. The Court allowed the termination of pregnancy despite the pregnancy having gone into 24th week. What weighed with the Court was danger to the life of the woman and the certain inability of the foetus to survive extra-uterine life. Emphasis has been laid on the aspect that the overriding consideration is that she has a right to take all such steps as necessary to preserve her own life against the avoidable danger to it.

43. In the case at hand, we have noted, termination of pregnancy could have been risky to the life of the appellant as per the report of the Medical Board at AIIMS

which was constituted as per the direction of this Court on 3rd May, 2017. This situation could have been avoided had the decision been taken at the appropriate time by the government hospital at Patna. For the negligence and carelessness of the hospital, the appellant has been constrained to suffer. The mental torture on certain occasions has more grievous impact than the physical torture.

44. In ***Mehmood Nayyar Azam v. State of Chhattisgarh***[10], the Court has observed that the word "torture" in its denotative concept includes mental and psychological harassment. It has the potentiality to cause distress and affects the dignity of a citizen. Under the present Act, the appellant is covered by the definition. In such a situation, there was no justification to push back her rights and throw her into darkness to corrode her self-respect and individual concern. She had decided to exercise her statutory right, being a victim of rape, not to bear the child and more so, when there is possibility of the child likely to suffer from HIV+ve, the authorities of the State should have been more equipped to assist the

10 (2012) 8 SCC 1

appellant instead of delaying the process. That apart, as is seen, the State in a way contested the matter before the High Court on the foundation of State interest. The principle of State interest is not at all applicable to the present case. Therefore, the concept of grant of compensation under public law remedy emerges.

45. In ***Nilabati Behera*** (supra), Justice J.S. Verma, (as His Lordship then was), opined thus:

> "'a claim in public law for compensation' for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law

under the Constitution by recourse to Articles 32 and 226 of the Constitution."

46. Dr. A.S. Anand, (as His Lordship then was), in his concurring opinion, expressed that:

> "The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by the Supreme Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Articles 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the

> aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."

47. In ***Sube Singh v. State of Haryana***[11], a three-Judge Bench, after referring to earlier decisions, held:

> "It is thus now well settled that the award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 of the Code of Criminal Procedure."

48. In ***Hardeep Singh v. State of M.P.***[12], though the High Court had granted compensation of Rs. 70,000/-, this Court, while concurring with the opinion that related to justification of compensation, enhanced the compensation by holding thus:

> "Coming, however, to the issue of compensation, we find that in the light of the

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11 (2006) 3 SCC 178
12 (2012) 1 SCC 748

> findings arrived at by the Division Bench, the compensation of Rs 70,000 was too small and did not do justice to the sufferings and humiliation undergone by the appellant. In the facts and circumstances of the case, we feel that a sum of Rs 2,00,000 (Rupees two lakhs) would be an adequate compensation for the appellant and would meet the ends of justice. We, accordingly, direct the State of Madhya Pradesh to pay to the appellant the sum of Rs 2,00,000 (Rupees two lakhs) as compensation. In case the sum of Rs 70,000 as awarded by the High Court, has already been paid to the appellant, the State would naturally pay only the balance amount of Rs 1,30,000 (Rupees one lakh thirty thousand)."

49. In ***Chairman, Railway Board*** (supra), the Court copiously adverted to the public law remedy and finding fault with the Railways and opined that:

> "Running of the Railways is a commercial activity. Establishing the Yatri Niwas at various railway stations to provide lodging and boarding facilities to passengers on payment of charges is a part of the commercial activity of the Union of India and this activity cannot be equated with the exercise of sovereign power. The employees of the Union of India who are deputed to run the Railways and to manage the establishment, including the railway stations and the Yatri Niwas, are essential components of the government machinery which carries on the commercial activity. If any of such employees commits an act of tort, the Union Government, of which they are the employees, can, subject to other legal requirements being satisfied, be held vicariously liable in damages to the person wronged by those employees. Kasturi Lal decision46 therefore, cannot be

> pressed into aid. Moreover, we are dealing with this case under the public law domain and not in a suit instituted under the private law domain against persons who, utilising their official position, got a room in the Yatri Niwas booked in their own name where the act complained of was committed."

50. On the aforesaid basis, this Court affirmed the judgment of the High Court and directed that the amount of compensation should be made over to the High Commissioner for Bangladesh in India for payment of the same to the victim as she was entitled to it.

51. In ***Rini Johar and another v. State of Madhya Pradesh and others***[13], the petitioners therein were arrested in violation of the mandate of law under Section 41A of the Code of Criminal Procedure and the judgment of this Court rendered in ***D.K. Basu*** (supra). The petitioners in the said case were a doctor and a practicing advocate. The arrest being illegal, the Court opined that their dignity had been absolutely jeopardized. Referring to the earlier decisions, the Court held as under:

> "In such a situation, we are inclined to think that the dignity of the petitioners, a doctor and a practising advocate has been seriously

13 (2016) 11 SCC 703

jeopardised. Dignity, as has been held in *Charu Khurana v. Union of India*, (2015) 1 SCC 192, is the quintessential quality of a personality, for it is a highly cherished value. It is also clear that liberty of the petitioner was curtailed in violation of law. The freedom of an individual has its sanctity. When the individual liberty is curtailed in an unlawful manner, the victim is likely to feel more anguished, agonised, shaken, perturbed, disillusioned and emotionally torn. It is an assault on his/her identity. The said identity is sacrosanct under the Constitution. Therefore, for curtailment of liberty, requisite norms are to be followed. Fidelity to statutory safeguards instil faith of the collective in the system. It does not require wisdom of a seer to visualise that for some invisible reason, an attempt has been made to corrode the procedural safeguards which are meant to sustain the sanguinity of liberty. The investigating agency, as it seems, has put its sense of accountability to law on the ventilator. The two ladies have been arrested without following the procedure and put in the compartment of a train without being produced before the local Magistrate from Pune to Bhopal. One need not be Argus-eyed to perceive the same. Its visibility is as clear as the cloudless noon day. It would not be erroneous to say that the enthusiastic investigating agency had totally forgotten the golden words of Benjamin Disraeli:

> "I repeat … that all power is a trust—that we are accountable for its exercise—that, from the people and for the people, all springs and all must exist."

We are compelled to say so as liberty which is basically the splendour of beauty of life and bliss of growth, cannot be allowed to

> be frozen in such a contrived winter. That would tantamount to comatosing of liberty which is the strongest pillar of democracy."

52. After so holding, the Court referred to the concept of public law remedy and awarded Rs. 5,00,000/- (Rupees five lakhs only) towards compensation to each of the petitioners to be paid by the State within a stipulated time.

53. In the instant case, it is luminescent that the appellant has suffered grave injury to her mental health. The said injury is in continuance. It is a sad thing that despite the prompt attempt made by this Court to get her examined so that she need not undergo the anguish of bearing a child because she is a victim of rape, it could not be so done as the medical report clearly stated that there was risk to the life of the victim. Therefore, we are inclined to think that the continuance of the injury creates a dent in the mind and the appellant is compelled to suffer the same. One may have courage or cultivate courage to face a situation, but the shock of rape is bound to chain and enslave her with the trauma she has faced and cataclysm that she has to go through. Her

condition cannot be reversed. The situation as is unredeemable. But a pregnant one, she has to be compensated so that she lives her life with dignity and the authorities of the State who were negligent would understand that truancy has no space in a situation of the present kind. What needed is promptitude.

54. This Court had earlier directed that she should be paid compensation under the Victims Compensation Scheme as framed under Section 357-A of the Code of Criminal Procedure. She has been paid Rs. 3,00,000/- as she has been a victim of rape. It may be clearly stated that grant of compensation for the negligence and the suffering for which the authorities of the State are responsible is different as it comes within the public law remedy and it has a different compartment. Keeping in view the mental injury that the victim has to suffer, we are disposed to think that the appellant should get a sum of Rs. 10,00,000/- (Rupees ten lakhs only) as compensation from the State and the same shall be kept in a fixed deposit in her name so that she may enjoy the interest. We have so directed as we want that money to

be properly kept and appropriately utilized. It may also be required for child's future. That apart, it is directed, that the child to be born, shall be given proper treatment and nutrition by the State and if any medical aid is necessary, it shall also be provided. If there will be any future grievance, liberty is granted to the appellant to approach the High Court under Article 226 of the Constitution of India after the birth of the child.

55. Having said so, it is necessary to state that the learned singe Judge should have been more alive to the provisions of the Act and the necessity of consent only of the appellant in the facts of the case. There was no reason whatsoever to implead the husband and father of the appellant. We say so as it is beyond an iota of doubt that the appellant was a destitute, a victim of rape and further she was staying in a shelter home. Calling for a medical report was justified but to delay it further was not at all warranted. It needs to be stated that the High Courts are required to be more sensitive while dealing with matters of the present nature.

56. We will be failing in our duty if we do not deal with the submission of the learned counsel for the State. According to her, State should not be made liable because of the fault of the Court. The principle of *actus curiae neminem gravabit* basically means an act of the court shall prejudice no man. Though such a principle has been advanced yet the same is not applicable to the facts of the case at hand. In ***A.R. Antulay v. R.S. Nayak***[14], Sabyasachi Mukharji, J. (as His Lordship then was), speaking for the majority for the Constitution Bench, quoted the following observation of Lord Cairns in ***Rodger v. Comptoir D'Escompte de Paris***[15]:

> "Now, their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

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14 (1988) 2 SCC 602
15 (1871) LR 3 PC 465 : 17 ER 120

The aforesaid principle despite its broad connotation is not attracted to the obtaining factual matrix inasmuch we have granted compensation because of the delay caused by the authorities of PMCH.

57. Before parting with the case, we must note that India has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1993 and is under an international obligation to ensure that the right of a woman in her reproductive choices is protected. Articles 11 of the said Convention provides that all State parties shall ensure the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. Article 12 of the Convention stipulates that State parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, accesses to health care services, including those related to family planning.

58. The legislative intention of 1971 Act and the decision in ***Suchita Srivastava*** (supra) prominently emphasise on personal autonomy of a pregnant woman to terminate the pregnancy in terms of Section 3 of the Act. Recently, Parliament has passed the Mental Healthcare Act, 2017 which has received the assent of the President on 7th April, 2017. The said Act shall come into force on the date of notification in the official gazette by the Central Government or on the date of completion of the period of nine months from 7th April, 2017. We are referring to the same only to highlight the legislative concern in this regard. It has to be borne in mind that element of time is extremely significant in a case of pregnancy as every day matters and, therefore, the hospitals should be absolutely careful and treating physicians should be well advised to conduct themselves with accentuated sensitivity so that the rights of a woman is not hindered. The fundamental concept relating to bodily integrity, personal autonomy and sovereignty over her body have to be given requisite respect while taking the decision and the concept of

consent by a guardian in the case of major should not be over emphasized.

59. In view of the aforesaid analysis, the appeal is allowed to the extent indicated above and the order passed by the High Court is set aside except for the direction pertaining to investigation carried out on the basis of the FIR lodged by the appellant. There shall be no order as to costs.

.....J.
[Dipak Misra]

.....J.
[Amitava Roy]

.....J.
[A.M. Khanwilkar]

New Delhi;
August 17, 2017.