

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

FRIDAY, THE 29<sup>TH</sup> DAY OF SEPTEMBER 2023 / 7TH ASWINA, 1945

WP(CRL.) NO. 723 OF 2023

AGAINST THE ORDER/JUDGMENT SC 365/2007 OF ADDITIONAL DISTRICT  
COURT (ADHOC), THRISSUR

**PETITIONER/S:**

ABHAYA V VENU

BY ADVS.  
AJEESH K.SASI  
P.M.RAFIQ  
M.REVIKRISHNAN  
SRUTHY N. BHAT  
SRUTHY K.K  
NIKITA J. MENDEZ  
RAHUL SUNIL

**RESPONDENT/S:**

- 1 STATE OF KERALA  
REPRESENTED BY THE SECRETARY TO HOME DEPARTMENT,  
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM, PIN -  
695001
- 2 THE ADDITIONAL CHIEF SECRETARY (HOME)  
DEPARTMENT OF HOME AFFAIRS, GOVERNMENT SECRETARIAT,  
THIRUVANANTHAPURAM, PIN - 695001
- 3 THE DIRECTOR GENERAL OF PRISONS AND CORRECTIONAL  
SERVICES  
JAIL HEADQUARTERS, POOJAPURA, THIRUVANANTHAPURAM,  
PIN - 695012
- 4 THE SUPERINTENDENT  
CENTRAL PRISON & CORRECTIONAL HOME, VIYYUR, PIN -  
680010

**OTHER PRESENT:**

HRITWICK CS PP

THIS WRIT PETITION (CRIMINAL) HAVING COME UP FOR  
ADMISSION ON 29.09.2023, THE COURT ON THE SAME DAY DELIVERED  
THE FOLLOWING:

**P.V.KUNHIKRISHNAN, J.**

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**W.P.(Crl.) No.723 of 2023**  
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**Dated this the 29<sup>th</sup> day of September, 2023**

**JUDGMENT**

There is a divine moment in our lives when we all become one. It is called procreation. Procreation is when a man and a woman create a child together. Can it be said that procreation is a right of every man and woman?

2. The petitioner herein, who is a post-graduate in Mathematics and who has been working as a teacher approaches this Court seeking indulgence, on behalf of her husband, Unni, who is undergoing imprisonment for life as Convict No.3226 in the Central Prison & Correctional Services, Viyyur, with the following prayers:

- i. "Issue a writ of mandamus or any other appropriate writ, order or direction to the 3rd Respondent to grant parole to petitioner's husband (Unni Convict No. 3226) who is undergoing incarceration at Central Prison & Correctional Home, Viyyur in accordance with law;*
- ii. Issue a writ of mandamus or any other appropriate*

*writ, order or direction to the 2nd and 3rd Respondent to consider and pass orders on Exhibit P2 and P3 request/representation made by the petitioner.*

*iii. To grant any such other and further relief as this Hon'ble Court may deem fit in the facts and circumstances of the case, so as to meet the ends of justice." (SIC)*

3. The petitioner's husband was convicted by the court below and sentenced to undergo imprisonment for life. The petitioner's husband preferred criminal appeal and the same was confirmed by the High Court and a special leave petition has been preferred by the petitioner's husband before the Apex Court. It is the case of the petitioner that her husband has been undergoing imprisonment for the last 7 years. The petitioner married Convict No.3226 - Unni on 31/08/2012 and there are no issues born out of the wedlock. It was their dream to have a child in their relationship. It is the case of the petitioner that she and her husband have been undergoing treatment under different branches of medicine, but nothing was fruitful. Hence the petitioner and her husband started treatment under Allopathy when the petitioner's husband got ordinary leave from prison. Further, it is the case of the petitioner that, now the petitioner and her husband are under treatment at Sabine Hospital and Research Centre Pvt. Ltd at Muvattupuzha. The

doctor who is treating the petitioner and her husband had suggested them to undergo IVF/ICSI (In Vitro Fertilization / Intracytoplasmic Sperm Injection) Procedure. It is submitted that for effective treatment, the petitioner's husband's presence along with the petitioner for 3 months is highly necessary. Ext.P1 is the letter issued from the Hospital.

4. It is submitted that, stating the above facts, the petitioner approached respondents 2 and 3 by making a representation requesting to invoke Section 73 of the Kerala Prisons and Correctional Services (Management) Act, 2010, for the grant of parole to her husband for a period of 3 months for the continuation of treatment as mentioned in Ext.P1. Ext.P2 is the representation submitted to the 2nd respondent and Ext.P3 is the representation submitted to the 3rd respondent. But so far, the petitioner did not receive any positive response from the respondents. Hence this writ petition.

5. Heard the learned counsel for the petitioner and the learned Public Prosecutor.

6. The learned counsel for the petitioner submitted that the right of procreation of the couple is their fundamental right and even if the husband of the petitioner is undergoing

imprisonment, for the purpose of treatment of IVF/ICSI procedure the husband of the petitioner is entitled to leave.

7. The counsel relied on the order dated 05.04.2022 in D.B. CRWP No.10/2022 of the Rajasthan High Court. The counsel also relied on an interim order passed by this Court in Crl.M.A. No.1/2022 in Crl.Appeal No.269/2016 by the Division Bench of this Court. The Public Prosecutor on the other hand opposed the prayer. The Public Prosecutor submitted that the petitioner is not eligible for leave as of today.

8. This Court considered the contentions of the petitioner and the Public Prosecutor. The husband of the petitioner is undergoing imprisonment in jail. It is stated that it is the dream of the petitioner and her husband to see a child in their relationship. They are continuing treatment in that regard and for completing the treatment, the presence of the husband of the petitioner is necessary. Can this Court shut its eye to such a request on technicalities and rules, if the claim is genuine?

9. To prove the claim, the petitioner produced a certificate issued by Sabine Hospital and Research Centre Private Limited. It will be better to extract the above certificate

issued by the Hospital.

**“SABINE HOSPITAL & RESEARCH CENTRE Pvt. Ltd.**  
**NABH Accrediation Entry Level Certified**

**Dr.SABINE S.**

Consultant in Infertility & Laparoscopic Surgeon  
Member Society of Reproductive Surgeons  
American Society of Reproductive Medicine,  
American Association of Gynaecological Laparoscopists.  
European Society of Human Reproduction and Embryology,  
Reg.No. 21955

Pezhakkappilly P.O.  
Muvattupuzha  
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E-mail: drsabines@yahoo.com

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**For Appointments Phone : 0485-2838100 (100 Lines), Mobile 9947088777, 7594044724**

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**04/06/2023**

**TO WHOM SO EVER IT MAY CONCERN**

**This is to certify that MRS. ABHAYA V VENU W/O MR.UNNI PATIENT ID: 240323, under my care in our hospital for infertility treatment from 23/05/2023. Both have been taking medicine for treatment since then and still continuing the treatment. Now she is undergoing IVF/ICSI procedure. During that course of treatment, the couple should be together and needs frequent visits to the hospital for 3 months for the successful treatment.**

**DR.SABINE S**

**SABINE HOSPITAL AND RESEARCH CENTRE PVT. LTD.”**

10. From the above, it is clear that the petitioner and her husband are undergoing treatment for IVF/ICSI procedure at

Sabine Hospital and Research Centre Private Limited at Muvattupuzha. There is no dispute from the side of the prosecution about the genuineness of Ext.P1 certificate. Therefore, the genuineness of the claim of the petitioner is clear from Ext.P1 certificate.

11. The next question is whether this Court can issue directions to the 3<sup>rd</sup> respondent to grant leave to the petitioner's husband who is undergoing incarceration at Central Prison & Correctional Home, Viyyur for undergoing IVF /ICSI procedure.

12. The Rajasthan High Court in the order dated 05.04.2022 in D.B. CRWP No.10/2022 considered a similar request and issued certain directions. It will be better to extract the relevant portion.

*“11. Having referred to prevalent religious philosophies, now we come to the sociological aspect of the right of progeny and preservation of lineage. As regards the right of convict is concerned, connecting the same with Hindu philosophy, there are four Purusharths, object of human pursuit which refer to four proper goals or aims of a human life. The four purushuarths are Dharma (righteousness, moral values) Artha (prosperity, economic values), Kama (pleasure, love, psychological values) and Moksha (liberation, spiritual values, self-actualization).*

12. When a convict is suffering to live in prison, he/she is deprived to perform the abovementioned purusharths, among them, 3 of four purusharths, i.e. Dharma, Artha and Moksha are to be performed alone, however, in order to perform/exercise/pursue the fourth Purushartha, i.e. Kama, the convict is dependent on his/her spouse in case he/she is married. At the same time, the innocent spouse of the convict is also deprived to pursue the same. In a case where the innocent spouse is a woman and she desires to become a mother, the responsibility of the State is more important as for a married woman, completion of womanhood requires giving birth to a child. Her womanhood gets magnified on her becoming a mother, her image gets glorified and becomes more respectful in the family as well in the society. She should not be deprived to live in a condition wherein she has to suffer living without her husband and then without having any children from her husband for no fault of her.

13. Hindu philosophy also advocates the importance of pitra-rin, i.e. parental debt. Our lives are the consequence of the fact that ancestors have been carrying and forwarding the said pitra rin, it is because of this, life came to us and in order to maintain the continuity of life, we must pay off this debt.

14. Now coming to the legal aspect of the matter at hand, Article 21 of the Constitution guarantees that no person shall be deprived of his life and personal liberty except according to procedure established by law. It includes within its ambit the prisoners also. The Supreme Court in the case of *D. Bhuvan Mohan Patnaik and Others v. State of Andhra Pradesh and Others* MANU/SC/0038/1974 : AIR 1974 SC 2092 declared that convicts cannot be denied the protection of fundamental rights which they otherwise possess, merely



*because of their conviction.*

15. *In the case of Jasvir Singh and Another v. State of Punjab MANU/PH/2930/2014 : 2015 Cri LJ 2282. The case involved important questions of law regarding conjugal rights of the prisoners. The core issues in the case were (i) whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework? (ii) Whether penological interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration? (iii) Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)? And (iv) If question No. (iii) is answered in the affirmative, whether all categories of convicts are entitled to such rights?*

16. *The court had ruled that the "right to procreation survives during incarceration" and "is traceable and squarely falls within the ambit of Article 21 of our Constitution". It had then directed the Punjab government to constitute a Jail Reforms Committee, to be headed by a former high court judge. Among other things, this committee was to "formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and identify the categories of inmates entitled to such visits, keeping in mind the beneficial nature and reformatory goals of such facilities".*

17. *In view of the fact that the spouse of the prisoner is innocent and her sexual and emotional needs associated with marital lives are effected and in order to protect the same, the prisoner ought to have been awarded cohabitation period with his spouse. Thus, viewing from any angle, it can safely be concluded that the right or wish to have progeny is*

*available to a prisoner as well subject to the peculiar facts and circumstances of each case. Simultaneously, it is also found apposite to hold that the spouse of the convict-prisoner cannot be deprived of his or her right to get progeny.*

*18. As an upshot of the observations made herein above, we are of the considered view that though there is no express provision in the Rajasthan Prisoners Release On Parole Rules, 2021 for releasing the prisoner on parole on the ground of his wife to have progeny; yet considering the religious philosophies, cultural, sociological and humanitarian aspects, coupled with the fundamental right guaranteed by the Constitution of India and while exercising extraordinary power vested in it, this Court deem it just and proper to allow the instant writ petition.*

*19. Accordingly, the instant writ petition is allowed. The convict-petitioner Nand Lal S/o. Shri Arjun Lal shall be released on emergent parole for a period of fifteen days from the date of his release provided he furnishes a personal bond in the sum of Rs. 50,000/- along with two surety bonds of Rs. 25,000/- each to the satisfaction of the Superintendent, Central Jail, Ajmer on usual terms and conditions. The Superintendent, Central Jail, Ajmer shall be at liberty to impose other adequate and reasonable conditions to ensure return of the convict-prisoner to the custody after availing the parole. His term of parole shall be computed from the date of his actual release.*

*20. The parole writ petition is allowed accordingly."*

13. Similarly, while considering an application under Sec. 389(1) Cr.P.C. for temporary suspension of sentence for the

purpose of IVF/ICSI treatment, a Division Bench of this Court in the order dated 07.04.2022 in Crl.M.A. No.1/2022 in Crl.Appeal No. 269/2016 observed like this:

*“1. The petitioner/appellant is the 5th accused in S.C.No.1048/2014 of the Special Additional Sessions Court (Marad Cases), Kozhikkode. He, along with others, were found guilty of offences, inter alia, under Section 302 of the Penal Code and was sentenced to undergo imprisonment for life.*

*2. The instant application is preferred under Section 389(1) Cr.P.C seeking temporary suspension of sentence and interim release of the petitioner on bail on the premise that the petitioner's presence is inevitable for the I.V.F treatment to be undergone by his wife, Smt.Kshony M.S.*

*3. Heard Sri.Sunny Mathew, learned counsel for the petitioner/appellant and the learned Public Prosecutor. Perused the records.*

*4. Learned counsel for the petitioner submitted that the petitioner is presently aged 43 years and that his wife is having primary infertility. She is advised to undergo I.V.F treatment, for which the petitioner's presence is inevitable. In support of the above assertion, Annexure-AI certificate issued by a Gynaecologist is attached.*

*5. This application is opposed by the learned Public Prosecutor pointing out that the petitioner/A5 was stood*

*enlarged on bail for a total period of 16 weeks commencing from July, 2021, in connection with the construction of a residential building, as also, to avail credit facility for the same. Learned Public Prosecutor pointed out that the petitioner was one among the persons hired by A6 and A7 to do a gruesome murder, after abducting the victim.*

*6. Although we find force in the submissions made by the learned Public Prosecutor, having regard to the peculiar need espoused by the petitioner/appellant, we are inclined to allow the instant Criminal Miscellaneous Application. We are convinced that the petitioner's presence is inevitable for the above stated purpose. We also take stock of the fact that the petitioner is aged 43 years and any delay may frustrate the earnest hope of the petitioner and his family to beget an offspring.*

*7. Resultantly, this Criminal M.A is allowed temporarily suspending the sentence and directing release of the petitioner on interim bail for a period of one month, with effect from the date of release, subject to the following conditions:*

*(i) The petitioner shall be released on bail on execution of a bond for Rs.50,000/- (Rupees fifty thousand only), with two solvent sureties, each for the like amount to the satisfaction of the trial court;*

*(ii) From the date of his release, he shall report before the S.H.O. concerned between 10.00 a.m. and 11.00 a.m. on every Friday starting from 15.4.2022.*

*(iii) On the date on which one month expires, he shall*

*report before the Superintendent of the Central Prison concerned at 10.00 a.m.*

*(iv) He shall not involve in any offence while on bail;*

*(v) If the conviction and sentence of the petitioner/appellant is upheld or even modified, the time during which he is so released shall be excluded in computing the term of his sentence as provided in Section 389(4) Cr.PC. "*

14. The order passed by the Rajasthan High Court is not interfered with by the Apex Court in SLP(Crl.) Diary No.21875/2022 dated 01.08.2022.

15. Considering the facts and circumstances of this case, I think the petitioner is entitled to the relief prayed. It is true that a convict is not entitled to all the fundamental rights available under the Constitution of India. But, the petitioner, the wife of the convict, is coming before this Court saying that she and her husband want to see a child of their own. The petitioner is aged 31 years. In such circumstances, I am of the considered opinion that when a wife comes before this Court with a request that she wants a child in the relationship with her husband who is undergoing imprisonment in Central Jail, this Court cannot ignore the same on technicalities. Conviction and sentence in criminal cases is mainly to reform and

rehabilitate the offenders. The state and society want to see the convict coming out of jail after rejuvenation as a reformed man/woman who will be part of our society. A person who has undergone a sentence in a criminal case need not be treated as a different person when he comes out. He has every right to lead a decent life just like any other citizen.

16. Therefore, I am of the opinion that the authorities should give a minimum of 15 days leave to the petitioner's husband for continuing IVF/ICSI procedure/treatment which has already started as evident from Ext.P1. But I make it clear that this need not be taken as a precedent in all cases. Each case has to be considered based on its merit. The genuineness of the claim is important. The convicts cannot make use of this to get out of jail. Each case has to be considered based on the genuineness of the claim.

Therefore, this Writ Petition (Crl.) is disposed of with the following directions:

The 3<sup>rd</sup> respondent is directed to grant leave in accordance with law for the purpose of IVF/ICSI procedure/treatment to the petitioner's husband, Unni (convict No.3226) who is undergoing incarceration at Central Prison & Correctional

Home, Viyyur as expeditiously as possible, at any rate, within two weeks from the date of receipt of a certified copy of this judgment.

JV/SKS

**Sd/-**  
**P.V.KUNHIKRISHNAN**  
**JUDGE**

APPENDIX OF WP(CRL.) 723/2023

PETITIONER EXHIBITS

- Exhibit P1 TRUE COPY OF THE LETTER ISSUED FROM SABINE HOSPITAL AND RESEARCH CENTRE PVT. LTD AT MUVATTUPUZHA BY DR. SABINE. S DATED 04-06-2023
- Exhibit P2 TRUE COPY OF THE REPRESENTATION DATED 19.06.2023 PREFERRED BY THE PETITIONER BEFORE THE 2ND RESPONDENT FOR THE GRANT OF PAROLE.
- Exhibit P3 TRUE COPY OF THE REPRESENTATION DATED 19.06.2023 PREFERRED BY THE PETITIONER BEFORE THE 3RD RESPONDENT FOR THE GRANT OF PAROLE.