

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 19.01.2021

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P.(MD)No.659 of 2021

Mahalakshmi

... Petitioner

Vs.

1. The District Collector,
Virudhunagar,
Virudhunagar District.

2. The District Social Welfare Officer,
The District Social Welfare Office,
Virudhunagar.

3. The Dean,
Government Hospital,
Virudhunagar,
Virudhunagar District.

4. The Inspector of Police,
All Women police station,
Rajapalayam,
Virudhunagar District.

... Respondents

Prayer: Writ petition is filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus, to direct the third respondent to terminate the pregnancy of the petitioner's minor niece, namely J, D/o.Late Kaaliappan, aged about 15 within the time frame fixed by this Court.

For Petitioner : Mr.Samuel Gunasingh,
for Mr.C.Vanchinathan
For Respondents : M/s.B.Bhagavathi,
Government Advocate.

* * *

ORDER

Heard the learned counsel on either side.

2. The writ petitioner is the defacto complainant in Crime No.663 of 2020 registered on the file of the Rajapalayam South police station. The petitioner brought to the notice of the fourth respondent vide complaint dated 02.11.2020 that her niece Minor J was missing from the previous day. Steps were taken by the investigation officer to secure the minor. At this stage on 27.11.2020, the writ petitioner appeared before the fourth respondent along with the kidnapped minor. It was revealed that J was on friendly terms with one Muthukumar. Muthukumar came to be arrested in some case. Without being aware of the same, J called on his mobile phone. His friend Sundar @ Sundareswaran attended the call. He enticed J and kidnapped

her. Sundar had physical intimacy with J several times from 02.11.2020 to 24.11.2020. After coming to know of her whereabouts, the petitioner brought her back and produced her before the police.

3. J's father Kaliyappan had died in the year 2012 and her mother is mentally unstable. J was with her aunt and uncle but she was not willing to go with them. Therefore, she was admitted to a social welfare home. Since J had become pregnant, the petitioner wants this Court to direct the official respondents to terminate her pregnancy.

4. Considering the urgency of the matter, this Court ordered notice to the respondents. Dr.R.Rajalakshmi, Assistant Surgeon, Virudhunagar Government Medical College and Hospital, after examining the minor girl, categorically opined that her gestational age is about 10-11 weeks and that continuing the pregnancy may endanger her physical and mental health. In her report, she cited the risks involved in continuing pregnancy and called upon this Court to permit termination of pregnancy on medical grounds.

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5. The report filed by the police reveals that Sundar is involved in more than 10 cases. The details are as follows:-

Crime No.	Offence u/s.	Name of the police station
385 of 2013	109 of Cr.P.C.	Rajapalayam South police station
12 of 2012	27(1) Arms Act & 395 of I.P.C.	Rajapalayam South police station
716 of 2019	505(2) of I.P.C. and Section 3 of TNPPDL Act	Rajapalayam South police station
606 of 2014	75(1)(c) of TNCP Act	Rajapalayam North police station
538 of 2015	294(b), 323, 324, 341 and 506(ii) of I.P.C.	Rajapalayam North police station
502 of 2013	302 of I.P.C.	Anuppurpalayam police station, Tirupur
9 of 2012	379 of I.P.C.	Eraniel police station, Kanyakumari District.
83 of 2019	379 of I.P.C.	Annur police station, Coimbatore District.
358 of 2019	302 of I.P.C.	Sivakasi Town police station
763 of 2017 & 722 of 2019	Theft cases	Sivakasi Town police station

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6. The law of the subject is set out in Section 3 of the Medical Termination of Pregnancy Act, 1971 which reads as follows:-

“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 I.-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 II.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed

to constitute a grave injury to the mental health of the pregnant woman.

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

(4)(a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a [mentally ill person], shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman."

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Livlaw has recently reported a decision of the High Court of Kerala (W.P.(C)No.29209 of 2020(A) dated 04.01.2021) in which the learned Judge held as follows:-

"6. This court has in the judgments

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in ABC V Union of India & others: 2020(4) KLT 279, Ms. X v. State of Kerala and Others: 2016 (4) KLT 745, etc, have ordered termination of pregnancy exceeding 20 weeks in the case of rape victims who were not mentally prepared to deliver the child, in order to save their lives. The Apex court has in the judgment in A V. Union of India: (2018)4 SCC 75 permitted termination in a case where the gestational age was 25-26 weeks. In Murugan Nayakkar V Union of India: 2017 SCC online SC 1092 allowed termination of pregnancy in the case of 13 year old child and in Sarmishtha Chakraborty v. Union of India: (2018) 13 SCC 339, permitted termination of pregnancy when the gestational age was 26 weeks, in view of the recommendation of the medical board and the medical report revealing the threat of severe mental injury to the woman and to the multiple complex problems to the child, if born alive, involving complex cardiac corrective surgery stage by stage after birth,

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in the event of continuation of the pregnancy.

In Meera Santosh Pal v. Union of India:

(2017) 3 SCC 462 also permission was

granted when the pregnancy crossed 24

weeks, in view of the medical reports pointing

out the risk involved. In the judgment

reported in Neethu Narendran V State of

Kerala: 2020(3)KHC 157 also this court

permitted termination of pregnancy when

gestational age crossed 23 weeks. As found in

those cases, the minor victim in this case is

also not prepared to deliver a child in the

situation. In view of the trauma that the

minor girl has undergone and taking note of

the opinion of the Psychiatrist coupled with

the report of medical board, I am of the view

that the writ petition can be allowed

permitting termination of pregnancy.”

7. Of course, the pregnancy of the minor girl cannot

be terminated without the consent in writing of her guardian.

In the present case, the minor's father died a long time back.

Her mother is mentally unsound. Her uncle Veluchamy, who

was taking care of the minor informed the Court that he wants the pregnancy to be terminated. Initially, the minor girl was unwilling to have her pregnancy terminated. She wanted to continue with the same and deliver the child. That was the stand taken by her, when Dr. Rajalakshmi initially examined her. The Madras High Court in the decision reported in (1994-1) 113 Mad.L.W.89 (V.Krishnan V. G.Rajan alias Madipu Rajan) had held that Section 3 (4)(a) can never be understood as dispensing with the consent of the pregnant woman even if she is a minor. In the said case, the father of the girl sought termination of pregnancy of his minor daughter. But the minor daughter was unwilling. Ultimately the Hon'ble Division Bench held that the termination of pregnancy cannot be ordered. The Hon'ble Division Bench felt that when the minor is matured, her wishes cannot be ignored. I wondered if the issue can be decided only going by the wishes of the victim and by ignoring the interests of the unborn child.

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8. While we do celebrate life, the foremost spiritual prayer is that there should be liberation from the cycle of births and deaths. Tamil Sage-poet Thiruvalluvar in Thirukural

wrote thus:

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“வேண்டுங்கால் வேண்டும் பிறவாமை மற்றுஅது

வேண்டாமை வேண்ட வரும்.”

(If anything is to be desired, it should be freedom from birth.)

Adi Shankara in “Bhaja Govindam” sang as follows:-

“Punarapi jananam punarapi maranam,

Punarapi janani jatare sayanam

Iha samsaare khalu dusthare,

Krupayaa pare pahi murare.”

Again and again one is born,

And again and again one dies,

And again and again one sleeps in the mother’s womb,

Help me to cross,

This limitless sea of life,

Which is uncrossable, my Lord “

The Court must put itself in the shoes of the unborn child and objectively decide if coming into this world would be in its best interest. An unborn child is also a person. In the case on hand, the father of the child has been shown to be involved in a host of criminal cases, some of which are very grave in

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nature. The minor is aged 15 years. She is not in a position to maintain herself. She cried before this Court that her uncle Veluchamy should take her back home. Though the minor might have accompanied the accused Sundar on her own volition, technically what has been committed is a non-compoundable offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012. If a choice is given to the foetus now in the womb of the minor, it would definitely proclaim that it would not wish to be born.

9. I am however spared the trouble of taking such a harsh decision, by overruling the stand of the minor because she had changed her mind in the meanwhile. She told me during Video Conference that she had agreed for termination of the pregnancy.

10. Taking note of the medical opinion and consent given by the minor, I direct the third respondent to terminate the pregnancy of minor J forthwith. Of course the safety and health of the victim is paramount and Doctors will bear in mind. The samples of foetus shall be preserved for carrying

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out of medical tests for the purpose of the criminal case.

11. That cannot be an end of the matter. The accused in Crime No.663 of 2020 has been arrested and he is presently confined in Central Prison, Madurai. This is a case which has to be necessarily fast tracked. I have come across a number of cases in which the accused come out on statutory bail because final report is deliberately not filed in time. The investigation officer will ensure that the final report is filed within the statutory period. It is not necessary for the investigation officer to wait for the results of the paternity test. Of course D.N.A. Samples from the foetus as well as the accused and the victim will be taken and sent for analysis. But the progress of the case or the filing of the final report need not depend on its outcome. It may probably become relevant and necessary if the victim does a somersault during the trial. After the fourth respondent files final report, the decision regarding taking cognizance will be taken by the Special Court within three days as mandated in the statutory rules. If cognizance is taken, the trial itself will be disposed of on merits and in accordance with law within a period of three months

thereafter.

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12. As and when the accused files petition for bail, the antecedents of the accused will be brought to the notice of the Court concerned. I am constrained to issue this direction because in many cases, the antecedents of the accused are conveniently suppressed and the Court considering the bail petition passes orders without being aware of the same.

13. Though from a common perspective, one may comment that J eloped with Sundar, in the eye of law she is a child. She is a victim of circumstances. The Protection of Children from Sexual Offences Act, 2012 contains beneficial provisions for payment of compensation. Section 33(8) of the Act reads as follows:-

सत्यमेव जयते
“In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child.”

Rule 7 of POCSO Rules 2012 reads as follows:-

7. Compensation - (1) The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.

(2) The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

(3) Where the Special Court, under sub-section (8) of section 33 of the Act read with subsections (2) and (3) of section 357A of the Code of Criminal Procedure, makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the following:-

(i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;

(ii) the expenditure incurred or likely to be incurred on his medical treatment for physical and/or mental health;

(iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;

(iv) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or

any other reason;

(v) the relationship of the child to the offender, if any;

(vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;

(vii) whether the child became pregnant as a result of the offence;

(viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;

(ix) whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;

(x) any disability suffered by the child as a result of the offence;

(xi) financial condition of the child against whom the offence has been committed so as to determine his need for rehabilitation;

(xii) any other factor that the Special Court may consider to be relevant.

(4) The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357A of the Code of Criminal Procedure or any other laws for the time being in force, or, where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

(6) Nothing in these rules shall prevent a child or his parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government. “

14. Applying the legal provisions to the facts of the case, I hold that the minor is entitled to interim compensation. The investigation officer is directed to take out an application for payment of interim compensation before the Special Court under the aforesaid provision. The Special Court will pass appropriate orders so that a sum of Rs.5,000/-(Rupees Five Thousand only) is credited every month to the bank account of Thiru.Veluchamy for the purpose of maintaining J. Such a remittance will be made for 36 months. This Court will make arrangements for providing the necessary funds for disbursement by the Special Court.

15. Veluchamy, the paternal uncle of the victim stated before this Court that he is not willing to take the child back and that she must continue to remain in the welfare home. I bluntly told Veluchamy that having filed the present writ petition, through his sister, he cannot wash his hands off. Veluchamy thereupon undertook that he would take the minor back after a period of four weeks. This undertaking of Veluchamy is recorded. I direct the welfare home to keep J for four more weeks in their custody after which she will be sent back to her natural home.

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16. With these directions, this writ petition stands allowed. No costs.

19.01.2021

Index : Yes / No
Internet : Yes/ No
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Note: 1. Issue order copy on 22.01.2021.

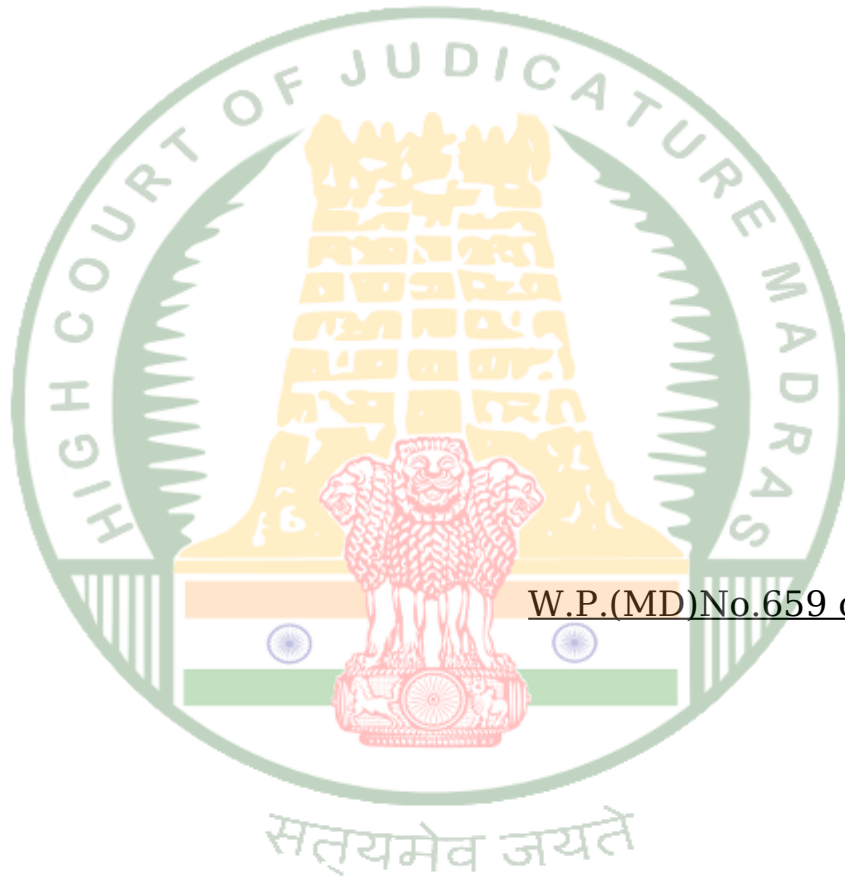
2. In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1. The District Collector,
Virudhunagar,
Virudhunagar District.
2. The District Social Welfare Officer,
The District Social Welfare Office,
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