

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE MR. JUSTICE A. K. JAYASANKARAN NAMBIAR
&
THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

SATURDAY, THE 4th DAY OF APRIL, 2020/15TH CHAITHRA, 1942

W.P.C. TMP - 9/2020

PETITIONER:

ABC

By Adv. Sri. Rajit

RESPONDENTS:

1. Union of India, represented by Secretary,
Ministry of Women and Child Development,
Shastri Bhavan, New Delhi-110001.
2. State of Kerala, represented by the Secretary, Ministry of Child welfare,
Thycaud, Thiruvananthapuram, Pin 695014
3. Station House Officer/Inspector of Police, Viyyoor Police Station,
Thrissur-Kundukad Road, Mannumkad,
Ramavarmapuram, Thrissur, Kerala 680001
4. Director of Medical Education, Medical College Kumarapuram Rd, Chalakkuzhi,
Thiruvananthapuram, Kerala 6950115.
5. Superintendent, Medical College Hospital,
Thrissur, M. G. Kavu, Kerala 680596.

By Sri. Jaishanker V. Nair, CGC for R1
Sri. Manu Vijayakumaran, Government Pleader for R2, R3, R4 & R5

This writ petition having come up for orders on 04/04/2020, the Court on the same day passed the following:

**A.K. JAYASANKARAN NAMBIAR, J.
&
SHAJI P. CHALY, J.**

WP(C).TMP-9/2020

Dated this the 4th day of April, 2020

J U D G M E N T

Shaji P. Chaly, J.

We are, in this writ petition, confronted with a difficult and disheartening situation. The father of a minor girl is before us praying for an order permitting his daughter (hereafter called 'Y') to medically terminate her pregnancy, which has now progressed to the 24th week. It would appear that 'Y' had eloped with her paramour, a married man, and the efforts of her parents to trace her did not meet with any success till almost five months later, when the police authorities managed to trace her location to Mangalore. The paramour was arrested and charged under various provisions of the Indian Penal Code and the Protection of Children from Sexual Offences Act, and 'Y' was restored to the custody of her parents. By that time, however, the pregnancy of 'Y' had already advanced considerably.

2. Although the petitioner approached the Sessions Court seeking permission to terminate the pregnancy, the said court did not entertain the petition citing jurisdictional reasons. The court was apparently of the view that the maximum permitted period for termination of a pregnancy, based on the opinion of two registered medical practitioners, under the Medical Termination of Pregnancy Act, 1971, viz. twenty weeks, had already expired by then. It is therefore that the petitioner is before us through the present writ petition.

3. The learned counsel for the petitioner, mentioned the case at the special sitting on 01.04.2020, organized through video conferencing on account of the outbreak of the COVID-19 Pandemic. On sensing the urgency, we permitted the petitioner to move the writ petition the very next day viz. 02.04.2020. On the said date, we deemed it necessary to have 'Y' examined by a Medical Board duly constituted for the purpose, with the inclusion of a psychiatrist therein to ascertain the wishes of 'Y' as regards the continuation of her pregnancy, as also her overall mental state and maturity level. The order passed by us on 02.04.2020 reads as under:

"Admit.

2. The learned Central Government Counsel Shri Jaishanker V. Nair takes notice for the first respondent. The learned Government Pleader Shri Manu Vijayakumaran takes notice for respondents 2 to 5.

3. After hearing submissions on behalf of respondents 2 to 5 and after hearing the submissions of Shri Rajit, the learned counsel appearing for the petitioner, we direct the fifth respondent to constitute a medical board comprising of the regular doctors, who are included in a medical board to examine the stage of pregnancy of minor girls and, in addition to that, a Psychiatrist as well. The medical board so constituted shall examine the minor daughter of the petitioner herein on 3/4/2020 and submit a report before this Court on the following aspects:

- i. Whether the continuance of the pregnancy would involve risk to the life of the pregnant woman or of grave injury to her physical and mental health;
- ii. Whether there is substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped;
- iii. Whether having regard to the advanced stage of pregnancy, there is any danger (other than the usual danger which arises even in spontaneous delivery or at the end of the full term) if the pregnant mother is permitted to terminate her pregnancy;
- iv. The medical process best suited to terminate the pregnancy and the possibility of the child be born alive in the process;
- v. The wishes of the minor child as regards the future course of action with respect to her pregnancy shall also be ascertained by the Psychiatrist on the medical board;
- vi. Any other issues the medical board regards as relevant in such matters.

4. The medical board shall make the report available before this Court on the aforesaid aspects on 4/4/2020.

5. Considering the present period of lockdown in the State, the District Police Chief, Thrissur City, is directed to facilitate the travel of the petitioner and his family to the Medical College Hospital, Thrissur, on 3/4/2020 by also ensuring the safety to the said family in the course of travel to and from the hospital. Shri Manu Vijayakumaran, the learned Government Pleader undertakes to communicate the said direction to the District Police Chief, Thrissur, forthwith.

Post on 4/4/2020 at 10.30 am.”

4. A medical report has since been produced before us through the learned Government Pleader. The report is extracted herewith and reads as under:

MEDICAL BOARD REPORT

“The Medical Board examined the minor daughter of the petitioner ABC, Cheroor P.O., Thrissur-680008 as per the order of The High Court of Kerala, W.P.C.TMP - 9/2020, on 03.04.2020 and the following suggestions are submitted.

On obstetric examination she was found to be 24 weeks pregnant with the blood pressure of 100/60. There was evidence of previous laparoscopic surgery for ovarian cyst. The laboratory test showed normal results.

- (i) The continuation of pregnancy at 14 years definitely would involve risk to the life of the pregnant woman as there is an increased risk of all obstetric complications including gestational hypertension, anaemia, risk of operative delivery and obstetric haemorrhage. It also affects the mental health adversely.

She was evaluated by the psychiatrist in detail and the observations are as follows. History was obtained from her parents and was reliable and adequate. There is no family history or past history of any psychiatric disorders. There is history suggestive of emotionally unstable personality traits. There is no history of any substance abuse. There is no history of significant mood, psychotic, anxiety, symptoms. Mental status examination showed that the patient was co-operative and attentive. Rapport could be established. Eye contact, psycho motor activity and speech were normal. There were no abnormalities in the thought process. There were no hallucinations or suicidal ideas. Higher mental functions were within normal limits.

From the available history and mental status examination, there is possibility of emotionally unstable personality traits in the patient. Hence continuing the pregnancy would involve risk of mental health issues in the patient. The patient also does not appear to have the maturity required from that of a mother-to-be.

- (ii) As per the Obstetric Ultra Sound Scan report on 19.03.2020 there were no gross anomalies identified. But if the pregnancy continues there is substantial risk for the physical and mental abnormalities to the baby if prematurity and growth restriction occurs as it is a teenage pregnancy. If the pregnancy is terminated now and the baby survives there is a substantial risk for physical and mental abnormalities as to be seriously handicapped.
- (iii) As the termination is in the second trimester, it has got more risks than full term delivery. There is more chance for prolonged induction, premature rupture of membrane, infection, haemorrhage, retained placenta, genital tract injuries, which may endanger the life of the minor.
- (iv) We plan to start induction with medical methods and depending on the progress we may switch over to mechanical methods. She should get contractions adequately and expel the foetus spontaneously. If everything fails we may have to resort to hysterotomy. There is a possibility that the child be born alive.
- (v) On evaluation by the psychiatrist the minor doesn't want to continue the pregnancy and she wishes to get terminated at the earliest.
- (vi) If decision is for termination of pregnancy, it should be done immediately. The Medical Board invoke the Honourable Court to issue necessary guidelines if the baby is born alive.

1. Dr.Ambujam. K

Professor & Head of the Department of Obstetrics and Gynaecology.

2.Dr.Nishi Roshni .K

Additional Professor of Department of Obstetrics and Gynaecology.

3.Dr.Sebind Kumar

Assistant Professor of Department of Psychiatry.

4.Dr.Sreejith Kumar. K.C

Assistant Professor of Department of Pediatrics.

Counter Signed

Chairman Medical Board

5. As can be seen from the medical report, there are substantial risks to the life of 'Y' as well as to her mental health, if she is allowed to continue with her pregnancy at the young age of 14 years. It is also evident that 'Y' does not possess the maturity required of a prospective mother. At any rate, she does not want to continue with her pregnancy. As far as her baby is concerned, the medical opinion is that there is a substantial risk of physical and mental abnormalities as it is a teenage pregnancy. Equally, if the baby survives the termination of pregnancy at this stage, then too there is a substantial risk of physical and mental abnormalities as to seriously handicap the baby.

6. Faced with the said situation, we thought it appropriate to confer with Dr. Ambujam K., Professor & Head of the Department of Obstetrics & Gynaecology, Medical College Hospital, Trichur, who was also a member of the Medical Board, through private video conferencing today.

7. The provisions of the Medical Termination of Pregnancy Act, 1971 enumerate the circumstances under which a pregnancy can be medically terminated. Sections 3 to 5 of the said Act which are relevant to the context, read 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 physical or mental health ;

or

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

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

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

(3) In determining whether the continuance of pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or 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 lunatic, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in C1.(a), no pregnancy shall be terminated except with the consent of the pregnant woman.

4. Place where pregnancy may be terminated.-*No termination of pregnancy shall be made in accordance with this Act at any place other than,-*

(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.

5. Sections 3 and 4 when not to apply.-

(1) The provisions of Sec.4 and so much of the provisions of sub-section (2) of Sec. 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioner, shall not apply to the termination of a pregnancy by the registered medical practitioner in case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of a pregnancy by a person who is not a registered medical practitioner shall be an offence punishable under that Code, and that Code shall, to this extent, stand modified."

8. Therefore the question, now significantly emerging for consideration, is whether it would be legal on the part of this court to direct termination of pregnancy which has attained 24 weeks duration. On a deeper analysis of the provisions of Act 1971 quoted above, it would be clear that Section 5(1) of MTP Act, 1971 is a stark exception to Section 3 of the Act, and therefore irrespective of the maximum period of limitation to terminate pregnancy prescribed under Section 3 of the Act, under exceptional circumstances specified under Section 5, the termination can be done. In the circumstances, taking into account the report of the Medical Board extracted above, it is explicit and evident that there is grave mental and physical danger to the life of 'Y'.

9. In this context, it would be worthwhile to refer to some of the judgments of the Apex Court and this court to arrive at a logical conclusion in the relief sought for by the petitioner.

9.1. In ***Murugan Nayakkar v. Union of India and others - 2017 SCC OnLine SC 1902***, Apex Court had considered a similar issue relating to a minor girl aged 13 years and a victim of alleged rape and sexual abuse. Paragraph 3 which is relevant to the context reads as follows:

"3. Considering the age of the petitioner, the trauma she has suffered because of the sexual abuse and the agony she is going through at present and above all the report of the Medical Board constituted by this court, we think it appropriate that termination of pregnancy should be allowed."

9.2. In ***A v. Union of India and others - (2018) 14 SCC 75*** , the Apex Court considered termination of 25/26 weeks of pregnancy which was posing grave danger to the mother's life , and foetus suffering from incurable medical conditions making it impossible with life outside womb and taking into account the factual background, termination of pregnancy was permitted. Paragraphs 5 and 6 which are relevant read as follows.

"5. We have been informed that the foetus is without a skull and would, therefore, not be in a position to survive . It is also submitted that the petitioner understands that her foetus is abnormal and the risk of foetal mortality is high . she also has the support of her husband in her decision making."

6. Upon evaluation of the petitioner, the aforesaid Medical Board has concluded that her current pregnancy is of 25 to 26 weeks. The condition of the foetus is not compatible with life. The medical evidence clearly suggests that there is no point in allowing the pregnancy to run its full course since the foetus would not be able to survive outside the uterus without a skull. importantly, it is reported that the continuation of pregnancy can pose severe mental injury to the petitioner, and no additional risk to the petitioner's life is involved if she is allowed termination of her pregnancy."

9.3. Similarly, one of us (Shaji. P Chaly, J) had considered Section 3 vis-a-vis Section 5 MTP Act, 1971 in the case of a rape victim where the pregnancy exceeded 20 weeks, and held that, when the victim was neither mentally prepared to accept the state of affairs nor prepared to deliver the child , it amounts to innumerable mental stress and change of attitude in the normal life, and termination of pregnancy was ordered to save her life, in ***Ms.X v. State of Kerala and others - 2016 (5) KHC 673 = 2016 (4) KLT 745***. Paragraphs 9 and 10 which are relevant to the context read as follows:

"9. Therefore, on an evaluation of the said provisions, it is specific and clear, if it is in the opinion of two medical practitioners, formed in good faith, that the MTP is necessary to save the life of the pregnant woman, the stipulations contained under sub-section (2) of S.3 vanish.

10. When the situation in the present context is analyzed, petitioner is not mentally prepared to deliver a child and such situation can cause innumerable mental stress and change of attitude in the normal life of the petitioner. Moreover, the circumstances explained show that petitioner did not expect such conduct and behaviour from the person with whom she maintained intimate and affectionate relationship. The circumstances narrated will show, petitioner is and was not mentally prepared to accept the state of affairs at which she is now. The said circumstances, in my view is to be treated as one under S.5 of the Act."

10. Taking into account, the provisions of law and propositions of law as above, the findings of the Medical Board extracted above, and the opinion expressed by Dr. Ambujam during our interaction with her today, we are of the view that the 'Y's right to make reproductive choices is also a facet of her personal liberty as understood under Article 21 of our Constitution. The said choice would extend to deciding whether or not to carry her pregnancy to its full term. Although the said right is subject to the restrictions imposed under the MTP Act, in the instant case, we find that the report of the Medical Board justifies 'Y's decision and besides, she also has the consent of her parents to terminate her pregnancy. The report, however, indicates that there is a possibility that the baby may survive the medical

termination of pregnancy. We have to therefore strike a balance between the right of 'Y' to take all such steps as are necessary to preserve her own life against any danger to it, and the compelling State interest in protecting the life of the prospective child. In resolving the said dilemma, we choose to be guided by the recent decision of the Bombay High Court in **XYZ v. Union of India & Ors – 2019 (3) Bom.CR 400**, where it was observed that:

“If a child is born alive, despite attempts at the medical termination of pregnancy, the parents as well as the doctors owe a duty of care to such child. The best interests of the child must be the central consideration in determining how to treat the child. The extreme vulnerability of such child is reason enough to ensure that everything, which is reasonably possible and feasible in the circumstances, must be offered to such child so that it develops into a healthy child.”

11. We therefore allow this writ petition by permitting 'Y' to undergo medical termination of her pregnancy under the provisions of the MTP Act, 1971. The termination procedure will be performed by the doctors of the hospital where she has undergone the check up ie. the Trichur Medical College Hospital and in accordance with the provisions of the MTP Act 1971, its rules and all other attendant acts, rules and guidelines prescribed for the purpose. So also, the procedure shall be supervised by the Medical Board that submitted its report before this Court and the Medical Board shall maintain a complete record of the procedure which is to be performed on the 'Y' for termination of her pregnancy. There will be a further direction to the doctors to take the tissue of the foetus for DNA identification and to maintain the same intact for future purposes, especially due to the fact that a criminal case is pending against the paramour in the instant case. If the child is born alive, despite the attempts at medical termination of the pregnancy, the doctors shall ensure that everything, which is reasonably possible and feasible in the circumstances and in contemplation of the law prescribed for the purpose, is offered to such child so that he/she develops into a healthy child. The petitioner is accordingly directed to produce 'Y' before the doctor of the Thrissur Medical College today itself that is 04 .04.2020 or latest by 05.04.2020, enabling the doctors to start the procedure.

We also make it clear to the Registry of this court and all concerned, that while issuing the certified copy of the judgment or otherwise, absolute privacy shall be maintained with respect to the identity of the petitioner and that of 'Y'. So much so, it is directed that copy of the writ petition, affidavit, the documents annexed to it and the medical report shall not be issued to any third person to this writ petition without securing orders from this court or the judge concerned.

A.K.JAYASANKARAN NAMBIAR
JUDGE

SHAJI P. CHALY
JUDGE