

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE THE CHIEF JUSTICE MR.S.MANIKUMAR

&

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

TUESDAY, THE 09TH DAY OF JUNE 2020 / 19TH JYAISHTA, 1942

WP(C).No.10130 OF 2013(S)

PETITIONERS:

- 1 CRY FOR LIFE SOCIETY,
REGISTRATION NO.R-197/12, HAVING ITS OFFICE AT
ELUVATHINGAL HOUSE, KANIMANGALAM, KAIMANGALAM P.O.,
THRISSUR-680027 REPRESENTED BY ITS PRESIDENT,
SRI.E.C.GEORGE, SON OF LATE SRI.CHERIAN.
- 2 JIJO GEORGE, AGED 46 YEARS,
SON OF SRI.M.D.GEORGE, MUTTICHUKKARAN HOUSE,
CHEVOOR VILLAGE, P.O.CHERPU, THRISSUR-680561.
- 3 DR.JAMES JOSEPH,
SON OF LATE SRI.C.C.JOSEPH, CHETTIMATTAM, 119,
WEST HILL, KURIYACHIRA, THRISSUR-680006.

BY ADVS.SRI.ANIL S.RAJ
SMT.ANILA PETER
SMT.C.PRABITHA
SMT.K.N.RAJANI
SRI.J.VIVEK GEORGE

RESPONDENTS:

- 1 UNION OF INDIA,
REPRESENTED BY THE CABINET SECRETARY,
NEW DELHI-110001.
- 2 MINISTRY OF HEALTH AND FAMILY WELFARE,
REPRESENTED BY ITS SECRETARY, NIRMAN BHAWAN,
C-WING, NEW DELHI-110 001.

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ADDL. THE PRESIDENT,
R3 KERALA FEDERATION OF OBSTETRICIANS AND GYNECOLOGISTS,
KOTTAYAM MEDICAL COLLEGE GANDHI NAGAR, KOTTAYAM.

- IS IMPLEADED AS ADDITIONAL RESPONDENT NO.3 VIDE
ORDER DATED 27.06.2013 IN I.A. NO.8237 OF 2013.

* ADDL. ASSOCIATION OF GYNAECOLOGISTS AND OBSTETRICIANS
R4 P.O KADUPPASSERY, THRISSUR, KERALA, PIN-680698
REPRESENTED BY ITS SECRETARY, DR. FINTO FRANCIS,
M.B.B.S DND (OBG) AGED 35 YEARS, SON OF SRI.FRANCIS.

ADDITIONAL 4TH RESPONDENT IS IMPEADED VIDE ORDER
DATED 31.03.2106 IN I.A. 4060/2016.

R1 & R2 BY ASSISTANT SOLICITOR GENERAL
SRI. P. VIJAYAKUMAR
BY SRI.JAISHANKAR V.NAIR, CGC
R3 BY ADV. SMT.S.KARTHIKA
R4 BY ADV. SMT.K.MOYA KURIAKO

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
06-02-2020, THE COURT ON 09-06-2020 DELIVERED THE FOLLOWING:

"C.R"

JUDGMENT

Dated this the 9th day of June, 2020

S.Manikumar, CJ.

Instant public interest writ petition is filed for the following reliefs:

- i) Writ, order or direction in the nature of Mandamus or such other appropriate Writ, order or direction, declaring that Section 3(2)(ii) and Explanations I and II thereof, of the Medical Termination of Pregnancy Act, 1971 is unconstitutional for violating Article 21 of the Constitution of India.
- ii) Writ, order or direction in the nature of Mandamus or such other appropriate Writ, order or direction, declaring that "grave injury" in Section 3(2)(1) of the Medical Termination of Pregnancy Act, 1971 does not mean or include any anguish occasioned due to unwanted pregnancy caused by failure of any device or method used by any man or woman for the purpose of limiting number of children.
- iii) Writ, order or direction in the nature of Mandamus or such other appropriate Writ, order or direction declaring that medical termination of pregnancy other than in the circumstances wherein the life of the pregnant women is in grave and imminent danger is unconstitutional for violating Article 21 of the Constitution of India.

2. Shorts facts leading to the filing of the writ petition are as under:

Petitioner No.1 is a charitable society registered under the provisions of Travancore-Cochin Literary, Scientific and Charitable Societies Registration Act, 1955, engaged in espousing social causes, particularly those relating to violation of human rights and foeticide under the cover of Medical Termination

of Pregnancy. 2nd petitioner apart from being a member of the 1st petitioner society, is also engaged in the promotion of pro-life activities and has worked extensively in the field, by providing and directing a documentary film on the value of life and agony of the unborn child in a abortion. 3rd petitioner is a member of the 1st petitioner society and a medical professional working against female foeticide. The petitioners are challenging the constitutionality of Section 3(2)(ii) and the explanation thereof of Medical Termination of Pregnancy Act, 1971.

According to the petitioners, when a spermatozoon enters the ovum, fertilization takes place, which marks the beginning of a biological life of an individual. Formation of a child has to be considered from this stage whereafter it obtains all rights of a human being and is entitled to protection afforded to every citizen of India, including right to life and property. The only exception is when it becomes a risk or threat to the life of the mother. Thus, according to the petitioners, permitting abortion for the reason that the yet to be born is handicapped or that the pregnancy caused as a result of failure of device or method used by any married women or her husband for the purpose of limiting the number of children can be presumed to constitute grave injury to the mental health of the women and hence, she can be permitted to undergo abortion, which violates the right to life. Hence, they seek to declare

that the said section is bad in law and violates right to life guaranteed under Article 21 of the Constitution of India.

3. Petitioners have contended that abortion is a deliberate ending of life. Every fertilized embryo has got a right of life and it should be protected as that of its mother. However, loose ends of the MTP Act causes termination of large number of "unwanted" pregnancies especially, the tendency for female foeticide in the mother's womb. According to the petitioners, in India, a large number of abortions are carried out for getting rid of girl children. Despite the fact that unborn child, especially the girl child, is given a special protection through Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, it does not serve any purpose. Due to the enabling provisions contained in the Act, female foetus are identified and killed in large numbers, which is obvious from the decline in sex ratio in the latest census report.

4. The grounds raised are that,- an unborn child should be regarded as one of the weakest, the most vulnerable and most defenseless forms of humanity and should be protected accordingly and that the nature designs the child at the stage of fertilization itself; that the laws regulating MTP Act is prepared with a misconception that life begins only at the stage when the foetus can survive outside the womb, which is totally incorrect, and there

cannot be a standard age for that. Survival of foetus depends on the state of medical science, available medical facilities in a particular location, and the competence or willingness of the mother/care giver; that the MTP Act permits killing the child inside mother's womb where there is substantial risk if the child is born. It put forth the principle that death is better than suffering. As per the prevailing laws of India, Euthanasia - mercy killing of human being is not sanctioned under any circumstances.

5. It is further contended that, according to the provisions of the Hindu Succession Act, the unborn child of a daughter in the uterus is also entitled to a share in the property of the Hindu undivided family. There can be no right to property without an attached right, to life. Thus, our law since time immemorial respects the rights of the unborn child. That apart, it is contended that the right to life implies a correlative duty on all other persons not to take the life of the unborn child except in two cases, namely, (i) if the child commits aggression against the life of another person and (ii) if the continued life of the child and continued life of another person are mutually incompatible because of the existential circumstances. These cases involve (i) Privilege of self defence, permitting a victim of aggression to defend his own life even if that defense takes the aggressor's life, and (ii) Privilege of self preservation, which permits an innocent individual to take the life of another innocent

individual in an emergency situation in which both cannot survive and the survival of one depends on the denial to the other of the means of survival. It is further stated that abortions do not get the privilege of self defense since the unborn is not an aggressor. Secondly, aggression involves an act of will or an act of negligence. It can never arise from an act that is caused by existential forces beyond the control of an individual. There cannot be aggression if the human action does not involve a purposeful behavior or action. Creation of the fertilized egg and its attachment to the uterine wall are not due to the act of unborn child. That is only a result of existential biological forces independent and beyond the control of the child which is brought to play by the combined acts of the father and mother. Since, the unborn child cannot rationally be held responsible for its own creation, it cannot rationally be held to have committed aggression by coming into (being brought into) existence. Aggression implies responsibility. No human being is responsible for its own creation. Since the unborn child is not an aggressor, the mother cannot invoke the privilege of self defense against its continued existence in the place where its development as a human being is logically and biologically appropriate for it. Even in cases where the father is guilty of rape, his guilt cannot rationally be imputed to the child.

6. It is also contended that abortion cannot be taken as an exercise of

privilege of self preservation, since in the usual case, the mother's life is not endangered by pregnancy. The privilege of self preservation can be exercised only when the lives of two or more equally innocent persons are in jeopardy and not all of them can be saved. But in normal case, pregnancy is not such a situation. In such extra ordinary cases, the mother would have a privilege to defend her own life through abortion or to choose to give up her life to save the child (if that is possible medically). In such situations, neither the State nor even the father of the child would have any right or privilege to interfere with mother's decision. Hence, abortion does not come within the recognized exception to the right to life. Abortion itself is a form of aggression against the child. It can be said that rather than by law, abortion is supported for an overwhelming practical considerations even though there are differing views internationally in this aspect.

7. It is pointed out that according to the Vienna Convention on the Law of Treaties, the rule regarding protection of life before birth could be considered as 'jus cogens' (final norm of general international law). The right to life of all human beings has the nature of an intransgressible norm already contained in the Universal Declaration of Human Rights 1948, the International covenant on Civil and Political Rights 1966 and the Declaration of the Rights of the Child 1959. Under International law, the unborn child is

protected, and it was not permissible at this late stage to attempt to allow a liberal abortion agenda under the Convention for the Rights of the Child. Explicit protection is extended to the unborn child in the International Covenant on Civil and Political Rights 1966, and in the convention on the Prevention and Punishment of the Crime of Genocide 1948. The text (of the Universal Declaration of Human Rights 1948) clearly states that everyone has the right to life, and that what is meant by everyone is 'every member of the human family' - that is all human beings.

8. It is further contended that right of an unborn child is not spelled out anywhere in the laws. But, it is left to the medical profession to adjudicate between a woman's right to an abortion and the child's right to be born, which is illegal, and that it is illegal and inhuman to treat abortion as a casual form of birth control as it would cause danger to both mother and unborn child.

9. Under Secretary, Ministry of Family and Welfare, New Delhi, respondent No.2, has filed a counter affidavit contending that,- the Medical Termination of Pregnancy (MTP) Act in India came into existence in 1971 and before this, abortions were governed by Indian Penal Code, 1862 and Code of Criminal Procedure, 1898. The Act recognizes importance of providing safe, affordable, accessible and acceptable abortion services to women, who need to terminate an unwanted pregnancy, and legalizes abortion on therapeutic,

eugenic, humanitarian or social grounds. It also aims to regulate and ensure access to safe abortion care for women and also defines 'when', 'where' and 'by whom' abortion can be performed; that the overall aim of this Act is to provide safe abortion services within a legal framework and enhance access and availability of these services, in order to prevent women from approaching unsafe, backstreet abortion providers and protect them from the attendant risks, including that to life; that the objectives of the Act and define situations & circumstances in which safe abortion can be legally performed; empowers medical practitioners & institutions delivering these services. Furthermore, the MTP Act recognises certain conditions for abortions, incorporated in Section 3(2) and permitted, if continuation of pregnancy:

- Can cause injury to mental/ physical health of woman.
- Results in birth of child with physical/ mental deformity.
- Pregnancy due to Rape, Incest or Contraceptive Failure among married women.

10. It is also stated that rights of an unborn foetus have been a matter of intense debate with differing opinions on the subject and as such the 2nd respondent has no definite opinion on this. However, in all the countries where there is a legislative framework for providing MTPs, these issues have been taken into account before framing laws on abortions. The current MTP law in India was framed and passed by Parliament and involved the consensus of a broad range of stakeholders who also took into account the legislation on

abortion framed by other countries including countries like the United Kingdom where there is considerable regard for human rights and rights of women as such and further that the petitioners have adopted a biased one-sided view and have not taken into account the issues surrounding women's rights with regard to their own health and to life. On the above grounds, the 2nd respondent sought for dismissal of the writ petition with costs.

11. The President, Kerala Federation of Obstetricians and Gynecologists, Medical College, Kottayam, respondent No.3, has filed a counter affidavit basically contending that,- the provisions of the Medical Termination of Pregnancy Act do not confer or recognize any right on any person to cause an abortion or termination of pregnancy. Even a pregnant woman cannot terminate pregnancy except under the circumstances set out in the MTP Act. The provisions of the MTP Act are invoked by responsible registered medical practitioners strictly following the conditions laid down in Sections 3 to 5 of the Act. Medical Termination of Pregnancy Regulation, 2003, ensure that all the cases of medical termination of pregnancy are properly documented and the Chief Medical Officer of each State also oversee the implementation of the Act; that the refusal on the part of a registered medical practitioner to give assistance in medical termination of pregnancy when there is medical indication on religious ground alone is 'misconduct' under clause 7.15 Chapter

7 of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation 2002. Clause 7.6 of the said Regulation prohibits sex determination test with intention to terminate the life of a female foetus. Any such act is considered as a professional misconduct, for which the said registered medical practitioner will be liable to criminal proceedings and penal actions.

12. Further, the legal basis of the Medical Termination of Pregnancy Act, 1971 is the concern for maternal health i.e., to reduce maternal death due to abortion done by quacks or persons without professional medical training. Statistics show that great number of women lose their lives, while undergoing illegal abortions either under coercion or volition. After the introduction of the Medical Termination of Pregnancy Act, maternal deaths due to septic abortion have come down significantly. Section 3 of the MTP Act contemplates four situations, wherein a woman can exercise her right to terminate pregnancy not exceeding 20 weeks, provided two registered medical practitioners shall certify the given conditions. The 1st condition is when pregnancy threatens the life of the mother. Even though a woman may normally be safe during pregnancy, certain patients develop symptoms like high blood pressure, cardiac distress etc., which can not only threaten the foetal health, but also the maternal health. The 2nd condition is when there is substantial risk of the child being born with serious physical and mental abnormalities as to be seriously handicapped: with the development of pre-natal diagnostic methods like ultra

sound scan, Chorion Villus Sampling (CVS) amniocentesis etc., it is possible to diagnose serious physical and mental abnormalities at very early stage of pregnancy. In the prevailing conditions in India, as there is no mechanism by which the safety and welfare of persons with serious physical and mental abnormalities are ensured, such children are very often abandoned at birth and live a life of uncertainties and exploitation. The third condition is, when the pregnancy is a result of rape: rape by itself exposes the woman concerned to great physical and mental trauma. In most cases, woman's mental health is disturbed by the act of rape and pregnancy that results from it can cause serious mental distress to her. The 4th condition is when pregnancy occurs due to failure of contraception: an unwanted pregnancy can cause mental stress to the mother and in turn, affect her physical and mental well being.

13. It is also pointed out that Section 4 of the MTP Act, 1971 ensures that it is done only in Government and approved hospitals. Section 5 of the Act contemplates termination of pregnancy to save the life of the mother. The Act ensures that the assessment of the conditions done by registered medical practitioners, who are trained professionals bound by Regulations 2002 and other laws.

14. Heard learned counsel for the parties and perused the material available on record.

15. Medical Termination of Pregnancy Act, 1971 is an act provided for termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. The Act legalises termination of pregnancy on various socio-medical grounds and it aimed at eliminating abortion by untrained persons and in unhygienic conditions, thus reducing maternal morbidity and mortality. Taking into consideration, the suggestions of National Commission for Women and experience gained in the implementation of this Act, the expert group recommended certain amendments to the Act. Accordingly, Medical Termination of Pregnancy (Amendment) Bill, 2002 was framed and the Act was amended. Section 3 of the MTP Act reads thus:

“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 practitioner 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 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 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 clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman."

16. In exercise of the powers conferred by Section 6 of the MTP Act, 1971 (34 of 1971), Central Government have made the Medical Termination of Pregnancy Rules, 2003. Rule 4 of the MTP Rules reads thus:

"4. Experience and training under clause (d) of Section 2:-

For the purpose of clause (d) of section (2), a registered medical practitioner shall have one or more of the following experience or training in gynaecology and obstetrics, namely;

(a) In the case of a medical practitioner, who was registered in a State Medical Register immediately before the commencement of the Act, experience in the practice of gynaecology and obstetrics for a period of not less than three years;

(b) In the case of a medical practitioner, who is registered in a State Medical Register:-

(i) if he has completed six months of house surgency in gynaecology and obstetrics; or

(ii) unless the following facilities are provided therein, if he had experience at any hospital for a period of not less than one year in the practice of obstetrics and gynaecology ; or

(c) if he has assisted a registered medical practitioner in the performance of twenty-five cases of medical termination of pregnancy of which at least five have been performed independently, in a hospital established or maintained or a training institute approved for this purpose by the government.

(i) This training would enable the Registered Medical Practitioner (RMP) to do only 1st Trimester terminations (up to 12 weeks of gestation).

(ii) For terminations up to twenty weeks the experience or training as prescribed under sub rules (a), (b) and (d) shall apply .

(d) In case of a medical practitioner who has been registered in a State Medical Register and who holds a post-graduate degree or diploma in gynaecology and obstetrics, the experience or training gained during the course of such degree or diploma."

17. We have considered the rival submissions made by the learned counsel on either side. On a deeper analysis of the provisions discussed above, it is clear and evident that all pregnancies are not allowed to be terminated. What are permitted for termination are exceptional circumstances that are recited to in Section 3(2) of the MTP Act, 1971. The circumstances made for termination of pregnancy make it clear that there is an object sought to be achieved by termination of pregnancy, that is to save and protect the life of pregnant women. Therefore, it is clear that the legislation is brought out to satisfy the requirements of certain category of pregnancies and said provisions of law have an object sought to be achieved. The provisions are also brought out with the intention of preventing termination of pregnancies illegally by the unqualified persons and in an unscientific manner, thus eliminating the threat to life of the woman. The provisions will also have to be considered dispassionately and without any predilection, and the attempt of the court should be to find out the purpose and purport of the legislation and any particular provisions of law. Therefore, looking at any angle, the impugned provisions cannot be said in any manner drastic, unethical, discriminatory, unreasonable or arbitrary, justifying interference.

18. A woman also has the choice to terminate pregnancy, however, in accordance with the procedure established by law, which is a right recognized

under Article 21 of the Constitution of India by the Hon'ble Apex Court as well as the High Courts. The privacy guaranteed under Article 21 of the Constitution entitles a woman to decide as to whether she should continue with an unwanted pregnancy. The exceptions carved out for termination of pregnancy would show that it is on account of adverse consequences to the life of a women, such a course of action is permitted and, therefore, the parliament in its wisdom, has introduced such provisions under MTP Act, 1971, and amended from time-to-time with good intention. So much so, the wisdom of the parliament on account of such intentions and object sought to be achieved by introducing such a provision cannot be said to be a thoughtless and insignificant one. True the constitutional courts can entrench upon the legislation, but such power should be exercised with utmost circumspection, since the framers of law have brought out the legislation with a real purpose to be achieved after taking into consideration various factual and other circumstances. But, at the same time, if any illegal circumstances like forcible termination etc., comes to the notice of the authorities, they are at liberty to proceed in accordance with law. That apart, the provisions of Section 3 of the MTP Act, 1971 make it clear that it only permits a voluntary action at the Will of a pregnant woman and in the case of pregnancy of a woman who has not attained the age of 18 or who has attained majority is a mentally ill person with the consent in writing of her guardian. Hence, it is clear that it is taking

into account the choice of the woman or the guardian in any adverse circumstances that can occur on delivery and on being fully satisfied in accordance with the Rules, 2003 by a qualified medical practitioner, the medical termination of pregnancy is possible to be done. Considering all these aspects, we could safely come to a conclusion that the provisions so made for the medical termination of pregnancy is proportionate to the object sought to be achieved.

19. In **Suchita Srivastava and Another v. Chandigarh Administration** reported in (2009) 9 SCC 1, the Hon'ble Apex Court had considered the question of a pregnant woman's consent for termination of her pregnancy with mild mental retardation and held that her consent is also necessary for reasons that Section 3(4)(a) excludes consent of mentally ill woman, but not mentally retarded woman. The Court further held that consent is necessary even when pregnancy is to be terminated in the circumstances mentioned in Section 3(2)(i) and 3(2)(ii) of the MPT Act, 1971, and that the only exception to the said rule is contained under Section 3(4)(a) which prescribes for guardian's consent (instead of woman's consent) where the woman is a minor or mentally ill. In the above said decision, the Hon'ble Apex Court has also considered the right of a woman to make reproductive choices and held that reproductive choices is a dimension of personal liberty

as understood under Article 21 of the Constitution of India. Paragraph 22 of the judgment is relevant to this context, which reads thus:

“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 sterilization 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.”

20. In ***Suchita Srivastava*** (cited supra), the Hon'ble Apex Court has further held that the provisions make it clear that ordinarily, a pregnancy can be terminated only when a medical practitioner is satisfied that continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave

injury to her physical or mental health, or when there is substantial risk that if the child was born, it would suffer from such physical or mental abnormalities, has to be seriously handicapped. The other provision of Section 3 was also taken note of by the Hon'ble Apex Court and held that it is under specified circumstances, in order to protect the interest of the pregnant woman and to avoid substantial risk on the birth of the child that it would suffer from physical or mental abnormalities, and to be seriously handicapped, the medical termination of pregnancy can be undertaken by the medical practitioner. Taking into account the factual and legal circumstances involved in the case, it was finally held that the language of Medical Termination of Pregnancy Act, 1971 clearly respects the personal autonomy of mentally retarded persons who are above the age of majority.

21. In **Z v. State of Bihar and Others** reported in (2018) 11 SCC 572, the Hon'ble Apex Court had occasion to consider right to privacy of a woman *vis-a-vis* the provisions of Act, 1971. Taking into account the provisions of Drugs, Cosmetics, Medical Practice & Practitioners and Public Health - Abortion Norms and Infanticide Prohibition - Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 and the international obligation and statutory basis due to the ratification by India of the convention on the elimination of all forms of discrimination against woman in 1993, and

also undertaking a survey of the judgments rendered under MTP Act, 1971 and the concept of right to privacy, at paragraphs 60 & 61, the Hon'ble Apex Court held as follows:

“60. 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. Article 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.

61. 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 overemphasised.”

22. In **Tapasya Umesh Pisal v. Union of India** reported in (2018) 12 SCC 57, the Hon'ble Apex Court has considered the question of granting permission for termination of pregnancy of 24 weeks for saving life of a woman and held that when there is a grave danger to the pregnant woman's own physical and mental health and the foetus diagnosed that it would have to undergo surgeries associated with high morbidity and mortality after delivery, medical termination of pregnancy can be permitted to be done, taking into account the fact that if the foetus is allowed to born, would have a limited life span with serious handicaps which cannot be avoided, and since it appeared that the baby will not certainly grow into an adult.

23. In **Sarmishtha Chakraborty and Another v. Union of India, Secretary and Others** reported in (2018) 13 SCC 339, the Hon'ble Apex Court held that right of a woman to have reproductive choice is inseparable part of her personal liberty under Article 21 of the Constitution and she has sacrosanct right to have her bodily integrity. Paragraphs 11 and 12 are

relevant to the context, which read thus:

“In the instant case, as the report of the Medical Board, which we have produced, in entirety, clearly reveals that the mother shall suffer mental injury if the pregnancy is continued and there will be multiple problems if the child is born alive. That apart, the Medical Board has categorically arrived at a conclusion that in a special case of this nature, the pregnancy should be allowed to be terminated after 20 weeks.

In the case of *Suchita Srivastava & Anr. vs. Chandigarh Administration* [(2009) 9 SCC 1], the Court has expressed the view that the right of a woman to have reproductive choice is an inseparable part of her personal liberty, as envisaged under Article 21 of the Constitution. She has a sacrosanct right to have her bodily integrity. The case at hand, as we find, unless the pregnancy is allowed to be terminated, the life of the mother as well as that of the baby to be born will be in great danger. Such a situation cannot be countenanced in Court.”

24. In **A v. Union of India and Others** reported in (2018) 14 SCC 75, the Hon'ble Apex Court had occasion to consider grant of permission to medical termination of pregnancy, which has attained 25/26 weeks, and having found that the foetus was causing grave danger to mother's life and foetus is suffering from incurable medical conditions making it incompatible with life outside womb, granted permission with appropriate directions. Paragraph 6, which is relevant to this context, reads thus:

“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 over mental injury to the petitioner and no additional risk to the petitioner's life is involved if she is allowed to undergo termination of her pregnancy.”

25. In **Mamta Verma v. Union of India and Others** reported in (2018) 4 SCC 289, the Hon'ble Apex Court had occasion to consider the question of illegal termination of pregnancy, during the 25th week of a pregnant woman, apprehending danger to her life, after discovering that her foetus was diagnosed with a defect that leaves foetal skull bones unformed and both not treatable, certain to cause infant's death during or shortly after birth, and the condition also known to endanger mother's life, permitted to conduct medical termination of pregnancy after due medical check up. Paragraphs 6 and 7 are relevant to this context, which read thus:

“6. Upon evaluation of the petitioner, the aforesaid Medical Board has concluded that her current pregnancy is of 25 weeks and 1 day. The condition of the fetus 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 fetus would not be able to survive outside the uterus without a skull.

7. 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 to undergo termination of her pregnancy."

26. In the light of the factual discussion made above, the provisions of Medical Termination of Pregnancy Act, 1971, the Rules, 2003, and the proposition of law laid down by the Hon'ble Supreme Court in the aforementioned decisions, it can be deduced that the Hon'ble Apex Court had occasion to consider the relevance, validity and vires of Section 3(2) of MTP Act, 1971 though were not directly under challenge, and has even permitted termination of pregnancies, which have exceeded 20 weeks, prescribed under Section 3 of the Act. Thus, it means that, the reasonableness and importance of Section 3(2) of the MTP Act, 1971 were considered by the Hon'ble Apex Court and the same found to be incorporated in the Act, with a clear objective of protecting the life of a pregnant woman, and to control the birth of a child having severe mental ailments with a remote chance of survival. To put it otherwise, the validity of Section 3(2) of the Act is upheld by the Hon'ble Apex Court in its letter and spirit.

27. As discussed above, there is a laudable object to be achieved by terminating the pregnancy under certain specified circumstances. Moreover, it is the choice of the woman to have privacy and to protect her bodily integrity,

which are all facets conferred on her under Article 21 of the Constitution of India to decide as to whether continuance of pregnancy would be in the best interest of her life. So also, wherever there is an abuse of process of law, any person aggrieved can avail legal remedy. Hence, medical termination of pregnancy is possible only under the circumstances contained in Section 3 of the MTP Act, 1971. Therefore, it cannot be said that everyone, who is not interested to continue with the pregnancy, is entitled as of right, to seek medical termination of pregnancy on any grounds other than the one mentioned under Section 3 of the Act. Furthermore, it is clear and evident from the provisions of Prohibition of Sex Selection Act, 1994, that any medical termination of pregnancy, which is sought on the basis of sex, selection and determination, is punishable as per the provisions of the said Act. Therefore, sufficient and more safety measures and precautions are undertaken by the parliament, in order to ensure that unnecessary termination of pregnancies are not insisted upon or carried out by a pregnant woman or a medical practitioner respectively.

28. Taking into account all these aspects, we are of the considered view that the provisions of Section 3(2) of the MTP Act, 1971 are in accordance with law and it has no manner of illegality, arbitrariness or any other legal infirmity, which is liable to be interfered with by this Court, in exercise of

powers under Article 226 of the Constitution of India. Ultimately, the issue with respect to safety of the woman and condition of the foetus are all to be decided by the medical practitioners, in accordance with the provisions of the Medical Termination of Pregnancy, 1971 and the provisions of other laws, by which the medical practitioners are carrying out their duty and obligations conferred under the Act, 1971.

In view of the above, petitioners are not entitled to get any reliefs as sought for in the instant writ petition. Writ petition fails and accordingly, it is dismissed. No costs.

Sd/-
S.MANIKUMAR
CHIEF JUSTICE

Sd/-
SHAJI P. CHALY
JUDGE

krj

APPENDIX

PETITIONER'S/S EXHIBITS:

P1: COPY OF THE REGISTRATION CERTIFICATE BEARING NO.R-197/12 DATED 14.3.2012 ISSUED BY THE REGISTRAR UNDER THE TRAVANCORE COCHIN, LITERARY, SCIENTIFIC AND CHARITABLE SOCIETIES ACT.

P2: COPY OF THE ARTICLE BY EMINENT LIBERTARIAN MR.DIANNE N.IRVING MA, PH.D "WHEN DO HUMAN BEINGS BEGIN SCIENTIFIC MYTHS & SCIENTIFIC FACTS".

P3:- COPIES OF PHOTOGRAPHS SHOWING VARIOUS STAGES OF MEDICAL TERMINATION OF PREGNANCY.

RESPONDENTS' EXHIBITS:-NIL

//TRUE COPY//

P.A. TO CJ