



2024/KER/32175

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

SATURDAY, THE 4TH DAY OF MAY 2024 / 14TH VAISAKHA, 1946

WP(C) NO. 16366 OF 2024

PETITIONERS:

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XXXXXXXXXX XXXXXXXXXXXX
BY ADV SHAMEENA SALAHUDHEEN

RESPONDENTS:

- 1 UNION OF INDIA, REPRESENTED BY SECRETARY , MINISTRY OF WOMEN AND CHILD DEVELOPMENT, SASTHRI BHAVAN , NEWDELHI, PIN - 110001
- 2 STATE OF KERALA
REP BY SECRETARY TO GOVERNMENT, DEPARTMENT OF WOMEN AND CHILD DEVELOPMENT, SECRETARIAT, THIRUVANANTHAPURAM, PIN - 695001
- 3 DIRECTOR OF MEDICAL EDUCATION
DIRECTORATE OF MEDICAL EDUCATION, MEDICAL COLLEGE P.O, MEDICAL COLLEGE, KUMARAPURAM ROAD, CHALAKKUZHI, THIRUVANANTHAPURAM, PIN - 695011
- 4 STATION HOUSE OFFICER
AYIROOR POLICE STATION, THIRUVANANTHAPURAM RURAL, PIN - 671313
- 5 THE SUPERINTENDENT, PARIYARAM MEDICAL COLLEGE, PARIYARAM , KANNUR DISTRICT, PIN - 670502
- 6 KERALA MAHILA SAMAKHYA SOCIETY
URUVACHAL, MATTANNUR, KANNUR, PIN - 670702

OTHER PRESENT:

SR. GP. SMT DEEPA NARAYANAN. SR. PANEL COUNSEL
SRI. T.C KRISHNA

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 30.04.2024, THE COURT ON 04.05.2024 DELIVERED THE FOLLOWING:



J U D G M E N T

A 16-year-old rape victim who does not want to give birth to the child of a man who sexually assaulted her has approached this court through her mother seeking permission for medical termination of her pregnancy.

2. It is alleged that the victim while studying in the XIth standard was sexually abused by her 19-year-old lover and became pregnant. A crime was registered as Crime No.210/2024 of Edakkad Police Station, Kannur City based on the intimation from the Doctor at Pariyaram Medical College under Section 376 IPC and Sections 4(1), 3(a), 3(b), 6(1), 5(j)(ii) of the POCSO Act, 2019 and Sections 3(1)(w)(i) and 3(2) (v) of the SC/ST(PoA) Act.

3. The victim is now in her 28th week of pregnancy. Permission to terminate the pregnancy has been sought on the ground that the continuation of the same would adversely affect the mental and physical well-being of the victim as well as the child.

4. I have heard Smt.Shameena Salahudeen, the learned



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counsel for the petitioner, Sri.T.C.Krishna, the learned senior panel counsel appearing for the 1st respondent and Smt.Deepa Narayanan, the learned Senior Government Pleader appearing for respondents 2 to 5.

5. Until 1960's, abortion was illegal in India. The Shantilal Shah Committee was formed in the mid-1960s to examine the need for regulations governing abortion. As a result, the Medical Termination of Pregnancy Act, 1971 (for short, MTP Act) was enacted legalising safe abortions and protecting women's health. The law is an exception to the criminalisation of abortion under the Indian Penal Code. MTP Act permits licenced medical professionals to perform abortions in specific predetermined situations as provided under the legislation – such as, when there is danger to the life or risk to the physical or mental health of the pregnant women, when pregnancy arises from sex crime or rape or intercourse with lunatic women etc., and when there is substantial risk that the child when born would suffer from deformities and diseases. The MTP Act was amended in 2021 to allow abortions up to 24 weeks of gestation, raising it from the previous 20 weeks for “certain categories of women”. These are



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listed under Rule 3B of the MTP Rules notified under the MTP Amendment Act and include survivors of rape, incest, minors, women experiencing a change of marital status (widowhood or divorce), women with disabilities, women with foetal anomaly and those living in emergency, disaster or humanitarian crisis. The Amendment Act allows termination of pregnancies beyond 24 weeks only in cases of foetal anomalies of the child. It sets up State Level Medical Boards to decide if the pregnancy may be terminated after 24 weeks in cases of substantial foetal abnormalities. The MTP Act also provides for the protection of women's privacy, confidentiality and dignity in accessing safe abortion services.

6. The right of a woman or a girl to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy. Reproductive rights include the right to choose whether and when to have children, the right to choose the number of children and the right to access to safe and legal abortions. The constitutional right of women to make reproductive choices as a part of personal liberty under Article 21 of the Constitution of



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India was firmly recognized by the Supreme Court in the landmark judgment in *K.S.Puttaswamy v. Union of India* [(2017) 10 SCC 1]. The Constitution Bench reiterated the position adopted by the three-judge Bench in *Suchita Srivastava v. Chandigarh Administration* [(2009) 9 SCC 1] which held that the right of a woman to have freedom to reproductive choice is an inseparable part of her personal liberty, as envisaged under Article 21 of the Constitution and that she has sacrosanct right to her bodily integrity. Following *Puttaswamy* (supra), the three-judge Bench of the Supreme Court, recognizing the importance of women's autonomy over her reproductive choices, in *X v. Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi* (AIR 2022 SC 4917) held that every woman has an inherent right to secure safe and legal abortions thereby ruling out any sort of discrimination based on marital status. It was held that the rights of reproductive autonomy, dignity and privacy under Article 21 give a woman, both married and unmarried, the right to choose whether to bear a child or not. It was observed that decisional autonomy is an integral part of the right to privacy and the decision to carry the pregnancy to its



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full term or terminate it is firmly rooted in the right to bodily autonomy and decisional autonomy of the pregnant woman. This ruling recognizes unwanted pregnancy as a life-altering reproductive choice. More recently, a two-judge Bench of the Apex Court in *XYZ v. State of Gujarat* & Others (2023 Livelaw SC 680) took the view that the woman alone has the right over her body and is the ultimate decision maker on the question of whether she wants to undergo an abortion.

7. Coming to the facts of the case, when the victim was medically examined on 25/4/2024, by a medical board constituted by the Government Medical College Hospital, Kannur as per the direction of this Court, she was found to be carrying a pregnancy of 27 weeks. It is relevant to note at this juncture that as per Section 3 of the MTP Act, termination of pregnancy of a woman where it exceeds 20 weeks but does not exceed 24 weeks can only be allowed in special categories, and where the medical practitioners are of the opinion that continuance of such pregnancy would either involve a risk to the life of a woman or cause grave injury to her physical or mental health. The categories under which pregnancy can be terminated where



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pregnancy is between 20 to 24 weeks, have been prescribed by the MTP Rules, 2021. Clause (a) of the Rules relate to victims of sexual assault, rape or incest and clause (b) relates to minors. In this case, the victim falls under both, i.e., clauses (a) and (b) as she is a minor aged 16 years who is alleged to have been raped. Though the MTP Act does not provide for termination of pregnancies over the gestational age of 24 weeks except in cases of detection of substantial foetal abnormalities while exercising power under Article 226, this Court has wider powers than what is specified under Section 3(2) of the MTP Act. The extraordinary powers of the constitutional courts in this regard have been recognized by the Supreme Court and exercised several times by the High Courts including this Court to allow termination of pregnancies even in cases where pregnancy has exceeded the limit of 24 weeks. In *A. v. Union of India and Others* [(2018) 14 SCC 75], the Supreme Court permitted termination in a case where gestational age was 25-26 weeks. In *Meera Santosh Pal v. Union of India* [(2017) 3 SCC 462], permission for medical termination of pregnancy was granted when the pregnancy crossed 24 weeks based on the medical reports pointing out the



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risk involved in the continuation of pregnancy. In *Sarmishtha Chakraborty v. Union of India* [(2018) 13 SCC 339], termination of pregnancy was permitted even when the gestational age was 26 weeks in view of the recommendations of the Medical Board. In *XYZ v. State of Gujarat* (supra), the age of the foetus was almost 27 weeks when the court examined the plea of termination of pregnancy.

8. Pregnancy outside marriage, in most cases, is injurious, particularly after sexual abuse and is a cause for trauma affecting both physical and mental health of the pregnant woman, the victim. Sexual assault or abuse of a woman is itself distressing and the resultant pregnancy compounds the injury. This is because such a pregnancy is not a voluntary or mindful pregnancy. [see *XYZ v. State of Gujarat* (supra)]. Section 3(2) of the MTP Act provides that if the continuance of the pregnancy would cause grave injury to the physical or mental health of the pregnant woman, the pregnancy can be terminated. Explanation 2 of section 3 (2) says that where the pregnancy was caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant



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woman. Hence, a rape victim cannot be forced to give birth to a child of a man who sexually assaulted her. Declining permission to a rape victim to medically terminate her unwanted pregnancy would amount to forcing her with the responsibility of motherhood and denying her human right to live with dignity which forms a significant part of the right of life guaranteed under Article 21 of the Constitution.

9. In the report of the Medical Board, it was pointed out that continuance of pregnancy may be detrimental to the physical and mental health of the victim. The psychiatrist who was part of the Medical Board opined that the continuation of the pregnancy may result in severe psychological trauma to the victim. The adverse impact of the continuance of the pregnancy on the victim's mental health and the resultant trauma could very well be inferred as she is a rape survivor. The family of the victim girl belongs to a scheduled caste community. It is stated in the writ petition that poor family members including the victim girl are in a state of shock over the turns of events. The victim is now housed at the Childcare Home and it is stated that she is not mentally prepared to accept the state of affairs and deliver the



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child. Moreover, the social isolation of a minor girl before the SC/ST community who is subjected to sexual assault and giving birth to a child at such a young age cannot be ruled out. For all these reasons, I deem it appropriate to grant the relief sought and permit the petitioner's minor daughter/victim to undergo medical termination of pregnancy at the Pariyaram Medical College, Pariyaram, Kannur District, in the following manner:-

(i) On production of this judgment, the 5th respondent shall take immediate measures for constituting a medical team to conduct the procedure and carry out the termination of pregnancy of the victim.

(ii) The petitioner shall file an appropriate undertaking, authorising to conduct the surgery at her risk.

(iii) After terminating the victim's pregnancy, the 5th respondent shall preserve the foetus for carrying out the medical test for the purpose of criminal case pending against the accused in Crime No.210/2024 of Edakkad Police Station,

(iv) If the foetus is found to be alive at birth, the hospital shall give all necessary assistance including incubation either in that hospital or any other hospital where incubation facility is



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available in order to ensure that the foetus survives. Further, the baby is to be offered the best medical treatment available so that it develops into a healthy child.

(v) If the petitioner is not willing to assume the responsibility of the baby, the State and its agencies shall assume full responsibility and offer medical aid to the child, as may be reasonably feasible, keeping in mind the best interest of the child and the statutory provisions in the Juvenile Justice (Care and Protection of Children) Act, 2015.

(vi) The Child Welfare Committee, Kannur District shall render all possible assistance to the victim and the petitioner during the period of their stay in the hospital.

The writ petition stands disposed of as above.

Sd/-

DR. KAUSER EDAPPAGATH

JUDGE

Rp



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APPENDIX OF WP(C) 16366/2024

PETITIONER EXHIBITS

Exhibit P1	A TRUE COPY OF THE FIR IN CRIME NO.0210/2024 OF EDAKKAD POLICE STATION OF KANNUR CITY
Exhibit P2	TRUE COPY OF THE SCAN REPORT DATED 10.4.2024.
Exhibit P3	A TRUE COPY OF THE JUDGMENT IN W.P© 26546/2021 DATED 25.11.2021 OF THIS HON'BLE COURT