

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

Monday, the 26th day of September 2022 / 4th Aswina, 1944

WP(C) NO. 29402 OF 2022(A)

PETITIONER:

RESPONDENTS:

1. UNION OF INDIA REPRESENTED BY ITS SECRETARY, MINISTRY OF WOMEN AND CHILD DEVELOPMENT, SASTHRI BHAVAN, NEW DELHI-110001.
2. THE STATE OF KERALA REPRESENTED BY ITS SECRETARY TO GOVERNMENT, DEPARTMENT OF WOMEN AND MINISTRY OF CHILD WELFARE, GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM-695 001.
3. THE DIRECTOR OF HEALTH SERVICES, GENERAL HOSPITAL JUNCTION, THIRUVANANTHAPURAM-695 035.
4. THE DIRECTOR OF MEDICAL EDUCATION, MEDICAL COLLEGE, KUMARAPURAM ROAD, CHALAKUZZHI, THIRUVANANTHAPURAM-695 015.
5. THE DISTRICT MEDICAL OFFICER KOTTAYAM, OFFICE OF THE DISTRICT MEDICAL OFFICER, COLLECTORATE, KOTTAYAM- 686001.
6. THE SUPERINTENDENT, MEDICAL COLLEGE HOSPITAL, GANDHI NAGAR, KOTTAYAM-686008.
7. SURYANARAYANAN, AGED 26 YEARS, S/O. ASHOKAN N., KALAYIL PARAMBIL, CHERUVALLY P.O., CHERUVALLY, KOTTAYAM - 686543.

Writ petition (civil) praying inter alia that in the circumstances stated in the affidavit filed along with the WP(C) the High Court be pleased to direct the respondent Nos.3 to 5 to constitute a Medical Board to examine the petitioner and her foetus so as to enable her to do the Medical Termination of Pregnancy at the earliest, pending disposal of the Writ Petition (Civil).

This petition again coming on for orders upon perusing the petition and the affidavit filed in support of WP(C) and this Court's order dated 15-09-2022 and upon hearing the arguments of M/S.LIJI.J.VADAKEDOM, REXY ELIZABETH THOMAS & TOM E. JACOB, Advocates for the petitioner, DEPUTY SOLICITOR GENERAL OF INDIA for R1, GOVERNMENT PLEADER for R2 to R6 and of M/S.ANEESH.K.R., ROOPREKHA D.KAMATH, SAURAV.B. & BENITA ALPHONSA, Advocates for R7, the court passed the following:

V.G.ARUN, J.

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W.P. (C) No.29402 of 2022

Dated this the 26th day of September, 2022

ORDER

A hapless 21 year old girl is before me, seeking medical termination of her pregnancy. Her story, as narrated in the writ petition, unfolds in the following manner;

The petitioner did her B.A in Economics, but lost one paper. While preparing for the supplementary examination, she joined for a Computer Course. While so, the petitioner fell in love with the 7th respondent, a bus conductor. As the petitioner's family was against her marrying the 7th respondent, she eloped with him on 30.11,2021. Thereafter, the petitioner entered into a customary marriage with the 7th respondent on 11.03.2022. To the petitioner's dismay, the 7th respondent and his mother started ill-treating her demanding dowry. In the meanwhile,

the petitioner became pregnant, which fact was realised by her in April, 2022. Adding to the petitioner's woes, the 7th respondent raised suspicion regarding the paternity of the unborn baby and on that excuse, refused to provide any sort of support, either financial or emotional, to the petitioner. The cruel behaviour of her husband and mother-in-law worsened day by day, leaving the petitioner with no alternative but to return to her paternal house on 22.08.2022. The psychological impact of the cruelty, the ignominy of having to go back to her parents, and the lack of emotional and psychological support made the stress and strain of the pregnancy unbearable. Therefore, the petitioner decided to terminate her pregnancy. For this purpose, she approached the Family Planning Clinic at the Kottayam Medical College on 31.08.2022. The Doctors at the Clinic refused to terminate the pregnancy as there were no legal documents to prove

separation/divorce of the petitioner with the 7th respondent. The petitioner therefore filed a complaint against the 7th respondent and his mother before the Kanjirappally Police Station on 04.09.2022. Based on the complaint, Crime No.1226 of 2022 was registered for the offence punishable under Section 498A r/w 34 of IPC. Thereafter the petitioner approached the Family Planning Clinic on 07.09.2022, but the doctors once again refused to relent to her request, as the pregnancy was of 21 weeks 2 days gestation and there was no indication of fetal anomaly or maternal illness. The other reason being the absence of legal documents evidencing legal separation/divorce. Hence, this writ petition seeking the following reliefs;

- "a. issue a writ of mandamus or any other appropriate writ, direction or order directing the respondent Nos. 1 to 6 to allow the petitioner to undergo Medical Termination of Pregnancy at the earliest.*
- b. issue a writ of mandamus or any other*

appropriate writ, direction or order directing the respondent Nos. 3 to 5 to take immediate steps to examine the petitioner and to permit her to undergo Medical Termination of Pregnancy at the earliest.

c. To dispense with the filing of English translation of vernacular documents produced with the Writ Petition (Civil)."

2. When the writ petition came up for admission on 15.09.2022, the Superintendent, Medical College Hospital, Kottayam was directed to constitute a Medical Board for examining the petitioner and submitting its opinion. Accordingly, the petitioner was examined on 17.09.2022 and the following opinion furnished by the Medical Board;

"Pediatrixian Opinion

Fetus has no anomalies to suggest MTP now.

Psychiatry Opinion:

No past history of Psychiatry disorder. No family history of mental illness. H/o poor psychosocial support and alleged history of domestic violence present. O/E she is conscious, oriented. Her intelligence on clinical assessment is average and her judgment is intact. Continuation of pregnancy

may have a negative impact on her mental health.

Radio Diagnosis Opinion.

Single live intrauterine fetus of 21 weeks 3 days in variable presentation with adequate liquor no obvious congenital anomalies noted.

Cardiology Opinion:

Antenatal USG shows no congenital heart disease in the fetus. No Cardiac indications for MTP at present.

Impression.

Continuation of pregnancy may have a negative impact on her mental health. So the board is of Opinion that MTP may be done."

3. Adv.Liji J.Vadakedom, learned Counsel for the petitioner submitted that the pregnancy is causing extreme stress to the petitioner, which may ultimately impact her mental health. It is contended that, rather than a restrictive interpretation, the provisions of the Medical Termination Pregnancy Act, 1971 and the Rules thereunder calls for liberal interpretation, recognising the woman's reproductive choice to either procreate or to abstain from procreating. It is submitted that, as per Section 3(2) (b) (i)

of the MTP Act, pregnancy up to 20 weeks can be terminated by a Medical Practitioner if he is of opinion that continuance of the pregnancy would involve risk to the life of the pregnant woman or grave injury to her physical or mental health. Reference is made to sub-section (3) of Section 3 which stipulates that in determining whether continuance of the pregnancy would involve such risk or injury to the health, account ought to be taken of the pregnant woman's actual or reasonably foreseeable environment. It is contended that there is only limited emotional and financial support to the petitioner and hence, taking into account the environment in which she is now placed also, the petitioner's pregnancy is liable to be terminated.

4. It is contended that the Medical Board has opined that, continuance of the petitioner's pregnancy may have a negative impact on her mental health. Therefore, the request for

termination cannot be turned down for absence of legal documents evidencing divorce or separation of the petitioner with the 7th respondent. In support of this contention, reliance is placed on the decision of the Apex Court in **x v. Principal Secretary, Health and Family Welfare Department and another [2022 SCC OnLine SC 905]**. Therein, in spite of the statute providing for inclusion of only widowed or divorced women in the category of women eligible for termination of pregnancy up to 24 weeks under Rule 3B(C) of the MTP Rules, the Apex Court had permitted a girl, who was pregnant from consensual relationship and separated from her partner, to undergo MTP. It was held that there is no basis to deny an unmarried woman the right to medically terminate her pregnancy when the same choice is available to the other categories of women. It is contended that, being a married woman whose marital status had changed during the course of her pregnancy,

the petitioner stands on a better footing.

5. Learned Counsel appearing for the 7th respondent submitted that, except denying the allegation that he had raised suspicion regarding the paternity of the unborn child, the 7th respondent has nothing further to submit.

6. Learned Government Pleader submitted that the petitioner being a married woman, there has to be a joint decision by the spouses regarding termination of pregnancy. This being the purpose behind Rule 3B(c), there cannot be any interpretation to the contrary.

7. The Medical Termination of Pregnancy Act, 1971 was introduced with intention to liberalise certain existing provisions relating to termination of pregnancy (i) as a health measure - when there is danger to the life or risk to the physical or mental health of the woman (ii) on humanitarian grounds - such as when pregnancy arises from sex crime or rape or

intercourse with lunatic woman etc and (iii) eugenic grounds - when there is substantial risk that the child if born would suffer from deformities and diseases. Going by Section 3(2) (a) of the Act, pregnancy can be permitted to be terminated by a registered Medical Practitioner. Section 3(2) (b) stipulates that, if the length of pregnancy exceeds 20 weeks, but does not exceed 24 weeks, such category of woman as prescribed by the rules made under the Act can be permitted to terminate their pregnancy, based on the opinion of two registered Medical Practitioners that, continuance of pregnancy would involve risk to the life of the pregnant woman or grave injury to her physical and mental health or that, if the child were born, it would suffer serious physical or mental abnormality. In the petitioner's case, the Medical Board has opined that MTP may be done since continuance of the pregnancy will have a negative impact on her

mental health. Another determining factor is the petitioner's environment. From the averments and the arguments, it has come out that the petitioner belongs to the weaker section of society and does not have the financial capacity to bring up the child on her own. The records also reveal that the petitioner's husband had refused to accompany her to the hospital from the initial stages of her pregnancy. As such, the petitioner is denied emotional support also.

8. The question therefore is whether the prayer for permission to terminate the pregnancy can be allowed, even if the petitioner does not fall within the category of women eligible for termination of pregnancy as per the rules. Being contextually relevant, Rule 3B, detailing the category of women eligible for termination of pregnancy up to 24 weeks, is extracted hereunder;

"3-B. Women eligible for termination of pregnancy up to twenty-four weeks.—The following categories of women shall be considered eligible

for termination of pregnancy under clause (b) of sub-section (2) Section 3 of the Act, for a period of up to twenty-four weeks, namely—

(a) survivors of sexual assault or rape or incest;

(b) minors;

(c) change of marital status during the ongoing pregnancy (widowhood and divorce);

(d) women with physical disabilities [major disability as per criteria laid down under the Rights of Persons with Disabilities Act, 2016 (49 of 2016)];

(e) mentally ill women including mental retardation;

(f) the foetal malformation that has substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities to be seriously handicapped; and

(g) women with pregnancy in humanitarian settings or disaster or emergency situations as may be declared by the Government."

A perusal of the rule shows that, women, whose marital status changed during the ongoing pregnancy (widowhood or divorce), are also included. Indisputably, the petitioner's matrimonial life has completely changed during

the pregnancy. She was allegedly ill treated compelling to leave the company of her husband and start residence at her parental house. Moreover, alleging cruelty meted by the 7th respondent and his mother, the petitioner has filed a criminal complaint. It is also pertinent to note that, even before this Court, the 7th respondent did not express any interest in taking back the petitioner. It is therefore to be considered whether, in spite of the above drastic changes in her matrimonial life, the petitioner could be denied permission for terminating her pregnancy, on the premise that she is not legally divorced and her marital status has therefore not changed.

9. As held in **Suchita Srivastava v Chandigarh Admn [2009 (9) SCC 11]**, a woman's right to make reproductive choice is also a dimension of her personal liberty, as understood under Article 21 of the Constitution of India. There

can be no restriction on a woman's right to exercise her reproductive choice to either procreate or to abstain from procreating. The Apex Court in **x v. Principal Secretary, Health and Family Welfare Department and another [2022 SCC OnLine SC 905]**, while dealing with a similar situation held as under;

"14. On the submission that Rule 3B, insofar as it excludes an unmarried woman, is violative of Article 14 of the Constitution, the High Court has issued notice on the writ petition. However, it held that as of the date of its order, it was not open to it to traverse beyond the provisions of Rule 3B in the exercise of the jurisdiction under Article 226 of the Constitution.

15. Prima facie, quite apart from the issue of constitutionality which has been addressed before the High Court, it appears that the High Court has taken an unduly restrictive view of the provisions of clause (c) of Rule 3B. Clause (c) speaks of a change of marital status during an ongoing pregnancy and is followed in parenthesis by the words "widowhood and divorce". The expression "change of marital status" should be given a purposive rather than a restrictive interpretation. The expressions "widowhood and

divorce" need not be construed to be exhaustive of the category which precedes it.

16. The fundamental principle of statutory interpretation is that the words of a statute must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act and the intent of the legislature. Parliament by amending the MTP Act through Act 8 of 2021 intended to include unmarried women and single women within the ambit of the Act. This is evident from the replacement of the word 'husband' with 'partner' in Explanation I of Section 3(2) of the Act."

If interpreted and understood in the above manner, the drastic change in the matrimonial life of a pregnant woman is equivalent to the 'change of her marital status.' The word 'divorce' cannot in any manner qualify or restrict that right. In arriving at such conclusion, I also take into account the petitioner's right to privacy, which, as held by the Constitution Bench in **K.S.Puttaswamy and another v. Union of India and other** [2017 (10)

SCC 11 is sacrosanct. Being of relevance, paragraph 298 of Puttaswamy is extracted here under;

"298. Privacy of the individual is an essential aspect of dignity. Dignity has both an intrinsic and instrumental value. As an intrinsic value, human dignity is an entitlement or a constitutionally protected interest in itself. In its instrumental facet, dignity and freedom are inseparably intertwined, each being a facilitative tool to achieve the other. The ability of the individual to protect a zone of privacy enables the realisation of the full value of life and liberty. Liberty has a broader meaning of which privacy is a subset. All liberties may not be exercised in privacy. Yet others can be fulfilled only within a private space. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern to life. Privacy has not been couched as an independent fundamental right. But that does not detract from the constitutional protection afforded to it, once the true nature of privacy and its relationship with those fundamental rights which are expressly protected is understood. Privacy lies across

the spectrum of protected freedoms. The guarantee of equality is a guarantee against arbitrary State action. It prevents the State from discriminating between individuals. The destruction by the State of a sanctified personal space whether of the body or of the mind is violative of the guarantee against arbitrary State action. Privacy of the body entitles an individual to the integrity of the physical aspects of personhood. The intersection between one's mental integrity and privacy entitles the individual to freedom of thought, the freedom to believe in what is right, and the freedom of self-determination. When these guarantees intersect with gender, they create a private space which protects all those elements which are crucial to gender identity. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognises an inviolable right to determine how freedom shall be exercised. An individual may perceive that the best form of expression is to remain silent. Silence postulates a realm of privacy. An artist finds reflection of the soul in a creative endeavour. A writer expresses the outcome of a process of thought. A musician contemplates upon notes which musically lead to silence.

The silence, which lies within, reflects on the ability to choose how to convey thoughts and ideas or interact with others. These are crucial aspects of personhood. The freedoms under Article 19 can be fulfilled where the individual is entitled to decide upon his or her preferences. Read in conjunction with Article 21, liberty enables the individual to have a choice of preferences on various facets of life including what and how one will eat, the way one will dress, the faith one will espouse and a myriad other matters on which autonomy and self-determination require a choice to be made within the privacy of the mind. The constitutional right to the freedom of religion under Article 25 has implicit within it the ability to choose a faith and the freedom to express or not express those choices to the world. These are some illustrations of the manner in which privacy facilitates freedom and is intrinsic to the exercise of liberty. The Constitution does not contain a separate article telling us that privacy has been declared to be a fundamental right. Nor have we tagged the provisions of Part III with an alpha-suffixed right to privacy: this is not an act of judicial redrafting. Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and

freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination."

In this context, it may also be apposite to read the following observations of the Bombay High Court in **High Court on its own Motion v. State of Maharashtra [(2016) SCC OnLine Bom 8426]**

"14.A woman's decision to terminate a pregnancy is not a frivolous one. Abortion is often the only way out of a very difficult situation for a woman. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child. These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and

aggravates her mental trauma which would be deleterious to her mental health."

Another crucial factor to be noted is that the Medical Termination of Pregnancy Act does not contain any provision requiring the woman to obtain her husband's permission for terminating the pregnancy. The reason being that it is the woman who bears the stress and strain of the pregnancy and the delivery.

In the circumstances, the following directions are issued as an interim measure;

(i) The petitioner is permitted to get her pregnancy terminated at the Medical College, Kottayam or any other Government Hospital.

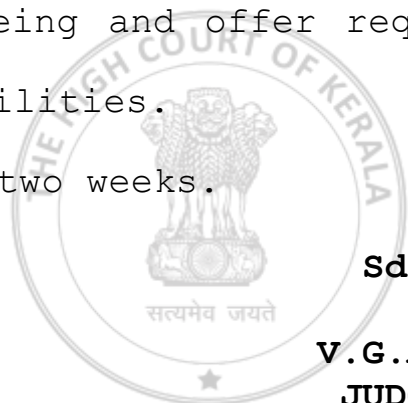
(ii) On production of this order, the Superintendent of the Hospital shall take immediate measures for constituting a medical team for conducting the procedure.

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

(iv) If the baby is alive at birth, the hospital shall ensure that the baby is 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 take up the responsibility for the time being and offer requisite medical support and facilities.

Post after two weeks.



Sd/

**V.G.ARUN
JUDGE**

Sc1/26.09.22