

VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

Thursday, the 14th day of July 2022 / 23rd Ashadha, 1944

WP(C) NO. 22652 OF 2022(F)

PETITIONER:

YYY

RESPONDENTS:

1. UNION OF INDIA REPRESENTED BY SECRETARY, MINISTRY OF WOMEN AND CHILD DEVELOPMENT, SASTHRI BHAVAN, NEW DELHI-110001.
2. STATE OF KERALA REP BY SECRETARY TO GOVERNMENT, DEPARTMENT OF WOMEN AND CHILD DEVELOPMENT, SECRETARIAT, THIRUVANANTHAPURAM-695001.
3. DIRECTOR OF MEDICAL EDUCATION, DIRECTORATE OF MEDICAL EDUCATION, MEDICAL COLLEGE P.O, MEDICAL COLLEGE, KUMARAPURAM ROAD, CHALAKKUZHI, THIRUVANANTHAPURAM-695011.
4. STATION HOUSE OFFICER OF INSPECTOR OF POLICE, KAZHAKKOOTAM POLICE STATION, THIRUVANANTHAPURAM DISTRICT, PIN-695582.
5. SAT HOSPITAL, REPRESENTED BY ITS SUPERINTENDENT GOVERNMENT MEDICAL COLLEGE, KUMARAPURAM P.O, THIRUVANANTHAPURAM DISTRICT. PIN-695011.
6. CHILD WELFARE COMMITTEE, THIRUVANANTHAPURAM, REPRESENTED BY ITS CHAIRPERSON, POOJAPPURA, THIRUVANANTHAPURAM-695012

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 5th respondent to constitute a Medical Board of competent Medical Practitioners to examine the stage of pregnancy of the Petitioner's Minor daughter and file a Report before this Hon'ble court forthwith during the pendency of this Writ Petition.

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 12.07.2022 and upon hearing the arguments of M/S.M.KABANI DINESH & C.ANCHALA Advocates for the petitioner, ASSISTANT SOLICITOR GENERAL OF INDIA for the respondent 1 and of GOVERNMENT PLEADER for the respondents 2 to 6, the Court passed the following:

V.G.ARUN, J.

W.P(C).No. 22652 of 2022

Dated this the 14th day of July, 2022

O R D E R

This case projects the plight of a fifteen year old girl, a POCSO victim, who is pregnant by 24 weeks and wants to terminate her pregnancy. The Medical Termination of Pregnancy Act, 1971 provides an outer limit of 24 weeks, beyond which termination is not permissible.

2. As per Section 312 of the Indian Penal Code, causing miscarriage is a punishable offence, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman. An exception to this penal provision is carved out by Section 3(2) of the Medical Termination of Pregnancy Act, 1971, which reads as under;

"Section 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 twenty weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twenty weeks but does not exceed twenty-four weeks in case of such category of woman as may be prescribed by rules made under this Act, if not less than two registered medical practitioners are,

of the 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 any serious physical or mental abnormality.

Explanation 1.—For the purposes of clause (a), where any pregnancy occurs as a result of failure of any device or method used by any woman or her partner for the purpose of limiting the number of children or preventing pregnancy,

the anguish caused by such pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.—For the purposes of clauses (a) and (b), where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

3. Section 5 provides an exception from the rigour of Section 3, when the registered medical practitioner is of opinion that the termination is immediately necessary to save the life of the pregnant woman.

4. This Court is now faced with the question whether to permit the prayer for termination of pregnancy by exercising the discretion under Article 226 and thereby, relieve the girl of the physical and mental stress or to deny permission, adopting a rigid interpretation of the statutory provisions. Having given careful thought to the vexing question, I deem it appropriate to lean in favour of the minor girl, rather than sticking to the strict letter of law.

5. The report of the Medical Board is to the following effect;

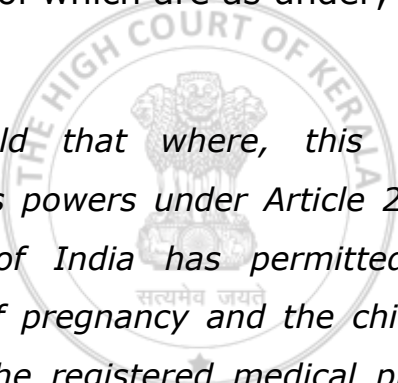
"The pregnancy has passed the legal limit of medical termination of pregnancy of 24 weeks (as per the amendment 2021) both by menstrual date and ultra sound. (Ultra sound report enclosed) Neonatologist opined that at this gestational age the chance of neonatal survival in our hospital is about 30%. The baby if survives, will require admission to neonatal ICU. Morbidity is high and baby may require 2-3 months of NICU care. There is also risk of neurodevelopmental disability for the baby. It is not ethical to withhold resuscitation of the new born if born alive. We are ethically and medico legally bound to give care to the new born.

On detailed psychological evaluation child is found to have average intelligence. Symptoms of acute stress noted. No other significant Psychopathology seen".

6. This gives rise to the question as to what is to be done if the baby survives?

7. Learned Counsel for the petitioner pointed out that the

issue was considered *in extenso* by the High Court of Bombay in XYZ v. Union of India and Others (MANU/MH/0565/2019). and a series of directions issued. A reading of the judgment shows that, one of the issues considered was the legal status of a child born alive, despite medical termination of the pregnancy-the procedure to be followed in such cases-and the responsibility of the State in such matters? The issue was considered threadbare and the judgment rendered with a slew of directions, the contextually relevant of which are as under;



"we hold that where, this Court, in exercise of its powers under Article 226 of the Constitution of India has permitted medical termination of pregnancy and the child is born alive, then, the registered medical practitioner and hospital/clinic concerned will have to assume full responsibility to ensure that such child is offered best medical treatment available in the circumstances, in order that it develops into healthy child;

We further hold that where, this Court, in exercise of its powers under Article 226 of the Constitution of India has permitted medical termination of pregnancy and the child is born

alive, if the parents of such child are not willing to or are not in a position to assume the responsibility for such child, then, the State and its agencies will have to assume full responsibility for such child and offer such child medical support and facilities, as may be reasonably feasible, adhering always to the principle of best interests of such child as well as the Statutory provisions in the Juvenile Justice Act."

8. Considering that each days delay will add to the victim's agony, and being of opinion that the above directions would ensure that the child is not abandoned at birth, the following directions are issued;

(I) The petitioner is permitted to get the victim girl's pregnancy terminated at a 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.

- (ii) The petitioner shall file an appropriate undertaking, authorising 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 assume full responsibility and offer medical support and facilities to the child, as may be reasonably feasible, keeping in mind the best interests of the child and the statutory provisions in the Juvenile Justice (Care and Protection of Children) Act, 2015.

Post after ten days.

Sd/-
V.G.ARUN, JUDGE

vgs