

XXXX vs Union of India

XXXX vs Union of India

SooperKanoon Citation : sooperkanoon.com/1383179

Court : Kerala

Decided On : Jan-31-2023

Judge : Honourable Mr. Justice Shaji P.Chaly

Appeal No. : WP(C)/28001/2022

Appellant : XXXX

Respondent : Union of India

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE SHAJI P.CHALY
TUESDAY, THE 31ST DAY OF JANUARY 2023 / 11TH MAGHA, 1944
CRIME NO.0849/2022 OF NEMOM POLICE STATION,
THIRUVANANTHAPURAM PETITIONER: XXXX BY ADVS.
K.P.PRADEEP HAREESH M.R. SANAND RAMAKRISHNAN T.THASMI
M.J.ANOOPA SANU S MALAKEEL RESPONDENTS:

1 UNION OF INDIA REPRESENTED BY SECRETARY, MINISTRY OF
WOMEN AND CHILD DEVELOPMENT, SHASTRI BHAVAN, NEW
DELHI, PIN - 110001 2 STATE OF KERALA REPRESENTED BY THE
SECRETARY, DEPARTMENT OF WOMEN AND CHILD

DVELOPMENT, GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM, PIN - 695001 3 DIRECTOR OF MEDICAL
EDUCATION, MEDICAL COLLEGE KUMARAPURAM RD,
CHALAKKUZHI, THIRUVANANTHAPURAM, , PIN - 695011 4 STATION
HOUSE OFFICER/INSPECTOR OF POLICE NEMOM POLICE
STATION, THIRUVANANTHAPURAM-695020 5 SUPERINTENDENT
SREE AVITTOM THIRUNAL HOSPITAL- (SAT HOSPITAL)
GOVERNMENT MEDICAL COLLEGE CAMPUS, CHALAKKUZHI,
THIRUVANANTHAPURAM-, PIN - 695011 6 CHILD WLEFARE
COMMITTEE THIRUVANANTHAPURAM, REPRESENTED BY ITS
CHAIRPERSON GOVERNMENT CHILDREN'S HOME
POOJAPPURA, THIRUVANANTHAPURAM, PIN - 695012 SMT. DEEPA
N., SR.GP

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 31.01.2023, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

JUDGEMENT

This writ petition is filed by the petitioner-xxx (name masked for securing privacy)
seeking the following reliefs;

- i. To call for the records leading to issue Ext P2 FIR and to issue a writ of mandamus or any other appropriate writ or writs or order or direction permitting the medical termination of pregnancy of the victim refereed in Ext P2 First Information report under the provisions of the Medical Termination of Pregnancy Act, 1971 and to issue consequential directions to the 5th respondent, to conduct such termination procedure, in accordance with law, forthwith, to secure the ends of justice
- ii. Grant such other relief, in the interest of justice, which this Hon'ble Court deems fit in the

facts and circumstances of the case.

2. When the matter came up for consideration on 02.09.2022, the following order was passed;

The petitioner's daughter, a minor girl aged 16 years, is a victim of rape. Her pregnancy has crossed gestational age of 29 weeks. The physical strain of carrying a pregnancy at such a young age and the psychological impact and consequent mental stress are projected as reasons for seeking this Court's intervention and direction to terminate the pregnancy medically. 2. When the writ petition came up for admission, it was directed to constitute a Medical Board for examining the victim girl. Responding with promptitude, the 5th respondent constituted the Medical Board and has made

available the Medical Boards report. The relevant portion of the Medical Board's opinion is as follows; Medical Board Opinion Psychiatry Opinion The child reports that she has been anxious and apprehensive since she came to know that she is pregnant. She fears that continuing pregnancy would affect her studies and her future. She express desire to terminate pregnancy at earliest. Clinically the child's intelligence is within normal limits. She does not have any evidence of mental illness." Gynaecology Opinion Having examined the 16 yr old victim found her in good general condition, oriented with stable vitals, no pallor. obstetric examination revealed 30 weeks of gestation which corresponds to the ultrasound findings, cephalic presentation good fetal heart rate. As the period of gestation has crossed the limit of legal medical termination the decision for the same may be taken by the honourable high court and we will comply with the decision thereof. Neonatology Opinion "At a gestation of 29 weeks 5 days approximately 1.3 Kg if terminated now the chance of survival of new born is approximately 70%. There is increased risk of neonatal morbidities like respiratory distress syndrome, NEC, intra ventricular bleed, prolonged NICU stay. Also there is an increased risk of

long term neuro development disability. We are ethically and medico legally bound to give care to the preterm newborn baby after birth. A course of antenatal steroids is recommended prior to termination."

3. Learned Counsel for the petitioner, submitted

that this Court should consider the physical strain and mental stress being suffered by the young girl and the possible social ostracisation that the girl and her family will have to face. Reliance is placed on the Division Bench decision of this Court in ABC v. Union of India [2020

(4) KLT 279] and that of a learned Single Judge in W.P.

(C) No.7503 of 2022, to contend that under identical circumstances, this court had granted the permission sought for.

4. Learned Government Pleader submitted that,

under the Medical Termination of Pregnancy Act, 1971 ('the Act' for short), the maximum permissible gestational period is 24 weeks. In the instant case, the pregnancy has crossed 29 weeks. Being so, the findings of the Medical Board assume relevance. Reference is made to Section 3 (1)(2-B) of the Act to point out that there can be an exemption from the maximum time limit prescribed under the Act only in cases where termination is necessitated by the diagnosis of any substantial, foetal abnormality by the Medical Board.

5. The law on medical termination of pregnancy is governed by the Medical Termination of Pregnancy Act,

1971. Sections 3, 4 and 5 being contextually relevant are extracted hereunder; 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. (2-A) The norms for the registered medical practitioner whose opinion is required for termination of pregnancy at different gestational age shall be such as may be prescribed by rules made under this Act. (2-B) The provisions of sub-section (2) relating to the length of

the pregnancy shall not apply to the termination of pregnancy by the medical practitioner where such termination is necessitated by the diagnosis of any of the substantial foetal abnormalities diagnosed by a Medical Board. (2-C) Every State Government or Union territory, as the case may be, shall, by notification in the Official Gazette, constitute a Board to be called a Medical Board

for the purposes of this Act to exercise such powers and functions as may be prescribed by rules made under this Act. (2-D) The Medical Board shall consist of the following, namely-

(a) a Gynaecologist;

(b) a Paediatrician;

(c) a Radiologist or Sonologist; and

(d) such other number of members as may be notified in the Official Gazette by the State Government or Union territory, as the case may be.]

(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 reasonably 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 mentally ill person, 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.

6. Careful scrutiny of Section 3, with particular

reference to sub-section 2 and Explanation I thereunder shows that medical termination of pregnancy can be permitted up to 24 weeks, if continuance of the pregnancy would involve risk to the life of the pregnant woman or grave injury to her physical or mental health. Going by Explanation II, cases in which pregnancy is alleged 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. In

this context, it may also be appropriate to read Rule 3B of the Medical Termination of Pregnancy Rules, 2003. Under Rule 3B, specific categories of women are to be considered eligible for termination of pregnancy under Clause (b) of sub-section (2) of Section 3 of the Act. This category of women includes survivors of sexual assault or rape, or incest, as also minors. In the case at hand, the victim is a rape survivor and a minor.

7. Taking a cue from the above provisions, I lean

in favour of the victim while being conscious of the rights of the unborn baby. It is pertinent to note that a woman's right to make reproductive choices is recognised as part of her personal liberty under Article 21, subject of course to reasonable restrictions. The Division Bench has considered these aspects in *ABC v. Union of India* [2020 (4)) KLT 279] while granting permission for medical termination to a minor girl whose pregnancy had progressed to the 24th week. A similar view was taken by a learned Single Judge in W.P.(C) No.7503 of 2022, wherein the pregnancy had crossed 26 weeks.

8. The Apex Court in *X v. Union of India* and

others [(2020) 19 SCC 806], wherein also, the pregnancy was permitted to be terminated considering the age of the victim girl. The Apex Court

considered the trauma the girl had suffered because of the sexual abuse and the agony she was going through and the medical board's report. This Court also had occasion to consider the case of a 15 year old victim girl. The pregnancy in that case, which had crossed 24 weeks, was permitted to be terminated after considering all relevant aspects. Here also, on consideration of the physical difficulties, mental agony and opinion of the Medical Board, I am inclined to allow the prayer for medical termination of the pregnancy. Considering that each days delay will add to the victim's agony, and being of opinion that the above directions would ensure that the baby, if born alive, is not abandoned at birth, the following directions are issued;

- (i) The petitioner is permitted to get the victim girls 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.
- (iii) 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.

3. Today when the matter is taken up, learned counsel

for the petitioner submitted that MTP was done, and baby is safe; and I am also informed that the baby is taken care of in an orphanage. Any how, since the MTP

is already done, I do not find any reason to retain the writ petition before this Court.

4. I have heard Sri. K.P.Pradeep, the learned counsel

appearing for the petitioner as well as Smt. Deepa N, the learned Senior Government Pleader and perused the pleadings and documents on record. The writ petition is disposed of, recording the above aspects and making the interim order extracted above absolute. Sd/- SHAJI P.CHALY JUDGE LU APPENDIX OF WP(C) 28001/2022 PETITIONER EXHIBITS : EXHIBIT P1 THE TRUE COPY OF THE LETTER NO. CWC/TVPM/1001/2022 DATED 24.08.2022 ISSUED BY THE CHILD WELFARE COMMITTEE, THIRUVANATHAPURAM EXHIBIT P2 THE TRUE COPY OF RELEVANT PAGES OF THE FIR IN CRIME NO. 849/2022 OF NEMOM POLICE STATION. // True Copy // PA To Judge

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com