

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE BECHU KURIAN THOMAS

THURSDAY, THE 30TH DAY OF APRIL, 2020/10TH VAISAKHA, 1942

W.P(C) TMP NO.206 OF 2020

PETITIONERS:

1. NEETHU NARENDRAN, W/O REJEESH R.,
AGED 35 YEARS,
KULATHINAL HOUSE, KODUMON EAST MURI, KODUMON P.O,
ADOORTALUK, PATHANAMTHITTA DISTRICT - 691 555
2. REJEESH R., S/O RAVINDRAN., AGED 38 YEARS,
HAVING PERMANENT
ADDRESS AT REJEESHBHAVAN, VELLALLOOR P.O,
KILIMANOOR AND
NOW RESIDING AT KULATHINAL HOUSE,
KODUMON EAST MURI,
KODUMON P.O, ADOORTALUK,
PATHANAMTHITTA DISTRICT - 691 555

BY ADV. SRI. MANU RAMACHANDRAN

RESPONDENTS:

1. STATE OF KERALA, REPRESENTED BY SECRETARY TO GOVERNMENT
DEPARTMENT OF HEALTH AND FAMILY WELFARE, GOVERNMENT
SECRETARIAT, THIRUVANANTHAPURAM-695 001
2. THE DIRECTOR OF MEDICAL EDUCATION, STATE OF KERALA,
DIRECTORATE OF MEDICAL EDUCATION,
MEDICAL COLLEGE P.O, THIRUVANANTHAPURAM- 695 011
3. THE SUPERINTENDENT, MEDICAL COLLEGE HOSPITAL,
MEDICAL COLLEGE P.O, THIRUVANANTHAPURAM- 695 011
4. THE HEAD OF DEPARTMENT,
SREEAVITTAMTHIRUNAL HOSPITAL,
MEDICAL COLLEGE HOSPITAL, MEDICAL COLLEGE P.O,
THIRUVANANTHAPURAM- 695 011

R1-4 BY SRI. K.P. HARISH, GOVERNMENT
PLEADER

THIS WRIT PETITION (CIVIL) TMP HAVING COME UP FOR
ADMISSION ON 30.04.2020, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

C.R

BECHU KURIAN THOMAS

W.P (C) TMP No.206 of 2020

Dated this the 30th day of April, 2020

JUDGMENT

An anguished couple is knocking at the doors of this Court seeking permission to terminate the pregnancy of the 1st petitioner, which has gone beyond the gestational limit of 20 weeks prescribed under the Medical Termination of Pregnancy Act 1971.

2. According to the petitioners, though they were overjoyed on realising that the 1st petitioner has conceived for the second time, with the last menstrual date as 18-11-2019, they had the shock of their lives when the scan conducted on 20-4-2020, suggested several anomalies for the growing foetus. The report indicated that due to lack of amniotic fluid - a condition medically known as Oligohydramnios, foetal organs could not be visualised. The scan report suspected a condition called bilateral Renal Angenesis, which in common

parlance means absence of both kidneys and she was referred to the SAT Hospital Thiruvananthapuram. With the referral report issued by the Holy Cross Hospital, Adoor and the records, petitioners rushed to Sree Avittam Thirunal Hospital and Medical College at Thiruvananthapuram. After detailed assessment, the doctors at SAT hospital confirmed the findings recorded by the referring hospital. It was however informed that since the gestational age of the foetus, as per the last menstrual day, had reached 23 weeks, termination of pregnancy could not be carried out, legally. 1st petitioner was advised to continue her pregnancy. It was also informed that since there was possibility of miscarriage or still birth, appropriate precautions must be taken to avoid mishaps to the mother. Unable to comprehend the agonising news, 1st petitioner subjected herself to yet another scan on 22-04-2020 at another hospital. The report of the said scan was also no different from the earlier one.

3. Instead of lamenting or brooding over the predicament that had befallen the petitioners, they acted

adroitly and moved this Court in its vacation sitting through video conferencing on 28-4-2020. On being apprised of the factual situation, this Court directed the constitution of a Medical Board on the next day itself, so as to assess the condition of the petitioner and to report to this Court by today. The learned Government Pleader Adv. Sri. K. P Harish was directed to inform the Superintendent of the Medical College Hospital, Thiruvananthapuram, since the action, if any, required to be taken was wholly time bound.

4. In deference to the directions of this Court, a Medical Board was constituted by the 3rd respondent consisting of 7 reputed doctors, including himself. After an assessment of the 1st petitioner's foetus, a report dated 29-4-2020, was placed for consideration of this Court. While the Paediatric Neurologist reported the presence of an open spinal defect on the foetus, the paediatric nephrologist confirmed the finding of bilateral Renal Agenesis (absence of both kidneys) and stated that the said condition is not compatible with post natal life. The Psychiatrist in the Medical Board discussed and

explained to the 1st petitioner the procedure required and the precautions that may be necessary even in respect of future pregnancies. The Medical Report however states that, since the pregnancy has advanced to 23 weeks, the risks associated with the termination of pregnancy will be very high with high chance of obstetric haemorrhage and subsequent problems.

5. I have heard the learned counsel Adv.Sri. Manu Ramachandran and the learned Government Pleader Adv. Sri KP. Harish, through video conferencing.

6. It is evident from the ultrasound scan and the reports of all doctors that the foetus suffers from severe abnormalities. However, it is pointed out that law permits termination of pregnancy only up to the gestational period of 20 weeks. Since the foetus of the 1st petitioner has reached a gestational age of 23 weeks, it is medically advised that termination would involve high risk though the nature of foetus is not compatible with post natal life.

7. This Court is confronted with a situation where carrying out termination of the pregnancy on the 1st petitioner,

at this stage, has a possibility of causing danger to her during the surgery, while refusing permission to terminate the pregnancy may create a situation of severe trauma, not only for the child, but also for the entire family. Continuing the pregnancy can also result in foetal death and danger to the mother. In spite of the dangers involved in conducting medical termination of her pregnancy, the 1st petitioner insists that she undergoes termination of her pregnancy and beseech this Court to grant permission.

8. The statutory prescription as relating to medical termination of pregnancy came into being in 1971 by the enactment of Medical Termination of Pregnancy Act, 1971, hereinafter for brevity referred to as 'The Act'. Prior to coming into force of The Act, the provisions of the Indian Penal Code, enacted almost a century ago, governed the field, and made abortion a crime for which the mother, as well as the abortionist could have been punished. The Act brought in a liberalised approach to termination of pregnancy and contemplated 3 general grounds on which medical termination

of pregnancy could be resorted to. One of the grounds was eugenic in nature - where there is substantial risk that the child may suffer from deformities and diseases. Even in such cases, The Act prescribes that the length of pregnancy shall not exceed 20 weeks for a medical practitioner to perform a termination of pregnancy on a woman. However, section 5 of The Act, carves out an exception to the provisions of section 3 and 4, and provides that the length of pregnancy prescribed shall not apply to medical termination of pregnancy by a registered medical practitioner, If, in his opinion, such termination is necessary to save the life of the pregnant woman.

9. Of late, there has been a trend to permit termination of pregnancies even where the gestational limits have crossed. Taking note of changing pattern in Judicial thinking, an amendment to The Act has been introduced in the Parliament called the Medical Termination of Pregnancy (Amendment) Bill, 2020 on 14.02.2020. It has not yet been approved. However, a reference to Statement of Objects and

Reasons to the bill will clearly indicate a shift in the approach towards the gestational period in cases where foetal abnormalities are detected. It is mentioned in the statement of objects and reasons to the amendment bill that “considering the need and demand for increased gestational limit under certain specified conditions and to ensure safety and well being of women, it is proposed to amend the said Act. Besides this, several writ petitions have been filed before the Supreme Court and various High Courts seeking permission for aborting pregnancies at gestational age beyond the present permissible limit on the grounds of foetal abnormalities or pregnancies due to sexual violence faced by women”. It is proposed as an amendment to Section 3 that the provisions relating to the length of 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.

10. Though the above said Bill has not yet become a law, still, it indicates the will of the law makers to consider

accepting the judicial approach to medical termination of pregnancy in cases where foetal abnormalities are detected, irrespective of the gestational period, as the codified law of the land. It is indicative of giving the right of informed choice through the statute itself to the mother.

11. The proposed amendment is also a reflection of the idea that decision regarding whether to continue a pregnancy or terminate it should fundamentally be the decision of a woman as it may shape her future and even impact her various other human rights. Compelling by law or otherwise to continue an unwanted pregnancy may in certain circumstances intrude into the right to life and personal liberty, right to health and bodily integrity.

12. Life, as has been constitutionally interpreted, includes right to live with human dignity with all its splendour. A life that affects the mental health of the mother, causing agony and pain to the entire family is not a life at all. When continuation of the pregnancy could only result in crippling the whole family emotionally, physically and monetarily, it is

within the realm of the power of a Court of law to permit medical termination of pregnancy. The rights of an unborn child, when balanced against the rights of a woman bearing the child, the scales will tilt, certainly in favour of the woman. The future well being of the mother, augurs better for the society as a whole, rather than a life devoid of all its splendour. This right of informed choice has already been accepted as a part of the right to liberty of a woman. The life and liberty of the mother cannot be extricated from that of the unborn child as there is no life for a foetus separated from that of its mother. When the life of the mother is in danger, it is certainly a matter that requires greater attention by the courts of law.

13. A glance at few of the decisions will reflect the above change in Judicial thinking as regards Medical termination of pregnancy is concerned. In **Justice K.S. Puttuswamy vs. Union of India**, 2017 (10) SCC 1, the Supreme Court has approved the constitutional right of a woman to make reproductive choices as part of her personal

liberty under Article 21 of the Constitution of India. Their Lordships went further and expanded the doctrine of right to privacy to even include the right of a woman to enjoy or not to enjoy motherhood. The concept of a woman having autonomy of the body and mind which includes the ability to make decisions on vital matters of concern to her life have been elevated to the status of her right to privacy.

14. In **Suchita Srivastava and Another Vs. Chandigarh Administration** (2009) 9 SCC 1, the Supreme Court upheld “a woman’s right to make reproductive choices as a dimension of personal liberty” under Article 21 of the Constitution of India.

15. In a recent decision, the Delhi High Court had in **Priyanka Shukla vs. Union of India and Others** (AIR 2019 (NOC) 790) held as follows:-

“15. Section 3(2) (b) permits termination of pregnancy, inter alia, where there is substantial risk of serious physical or mental abnormalities were the child to be allowed to be born. Seen in isolation, it thus places a gap of 20 weeks gestation for this to be permissible. At the

same time, Section 5 relaxes the rigour of Section 3(2) in a case where the termination of the pregnancy is immediately necessary to save the life of the pregnant woman. We are of the opinion that these provisions have to be construed as part of one cumulative dispensation and not isolated from each other. Seen thus, we are convinced that, even in a case where the condition of foetus is, as in the present case, incompatible with life, the rigour of Section 3(2) deserves to be relaxed, and the right to terminate the pregnancy cannot be denied merely because gestation has continued beyond 20 weeks.

16. Law, needless to say, cannot be construed in a manner incompatible with life."

16. A similar case was dealt with by the Hon'ble Supreme Court in **Mrs. X and others v. Union of India and Others** [(2017) 3 SCC 458]. The Supreme Court after observing the report of the Medical Board, that there is no curative treatment available for bilateral *Renal Agenesis*, granted permission for termination of pregnancy in a case where the foetus had developed upto 24 weeks.

17. In yet another case in **Sarmishtha Chakraborty and Another vs. Union of India Secretary and Others**

[(2018) 13 SCC 339], the Supreme Court permitted termination of pregnancy in the 25th week, after relying upon the medical records that even if the child is born alive, it would have to undergo complex cardiac corrective surgeries stage by stage after birth. In another case **Sonali Kiran Gaikwad vs Union of India** (MANU/SCOR/43704/2017), the Supreme Court, permitted termination of pregnancy in an instance where the pregnancy had advanced to 28 weeks since the foetus showed multiple serious neurological and skeletal anomalies.

18. It is not necessary to multiply the authorities or the instances. Suffice to say that the Court, as well as the Legislature, are slowly moving in the direction of removing the gestational limit prescribed under Section 3 of the Act in cases where foetal abnormalities are detected.

19. In the instant case, it is explicit, from the records produced, and from the report of the Medical Board that, the foetus contains irreversible abnormalities. It has also been reported that the condition of absence of both kidneys on the

fetus is not compatible with post-natal life. The child if born, cannot under any circumstance lead a quality life.

20. In order to avoid a compromised existence of not only the child but also that of the mother, the father and even the sibling, it is necessary that, in the instant case, medical termination of pregnancy is permitted to be carried out.

21. After hearing the learned counsel for the petitioners and the learned Government Pleader and after referring to the various medical reports produced in the writ petition and the opinion of the Medical Board, I feel that this is a fit case where medical termination of pregnancy of the 1st petitioner's foetus can be permitted to be carried out, even though the pregnancy has gone beyond the gestational limit prescribed.

22. Accordingly, I direct the 1st petitioner along with the 2nd petitioner to approach the SAT Hospital, Thiruvananthapuram which is the hospital of choice of the petitioners for carrying out medical termination of pregnancy of the 1st petitioner's foetus as early as possible along with a copy of this order. Since this is a period of lock down, I request

the learned Government Pleader to inform the Superintendent of Medical College Hospital, Thiruvananthapuram so as to enable the medical termination of pregnancy to be carried out on the 1st petitioner at the SAT Hospital. Needless to state all required precautions shall be taken while conducting the surgery.

The writ petition is allowed as above.

**BECHU KURIAN THOMAS
JUDGE**

APPENDIX

PETITIONERS EXTS:

- EXHIBIT P1: THE TRUE COPY OF THE ULTRASOUND SCAN REPORT DATED 13.01.2020 AT HOLY CROSS HOSPITAL, ADOOR
- EXHIBIT P2: THE TRUE COPY OF THE ULTRASOUND SCAN REPORT DATED 13.02.2020 AT HOLY CROSS HOSPITAL, ADOOR
- EXHIBIT P3: THE TRUE COPY OF THE ANOMALY SCREENING BY CHECKING MATERNAL SERUM DATED 20.02.2020
- EXHIBIT P4: THE TRUE COPY OF THE ULTRASOUND SCAN REPORT DATED 20.04.2020 OF HOLY CROSS HOSPITAL, ADOOR
- EXHIBIT P5: THE TRUE COPY OF THE REFERRAL DATED 20.04.2020 ISSUED BY HOLY CROSS HOSPITAL, ADOOR
- EXHIBIT P6: THE TRUE COPY OF THE CASUALTY OUT PATIENT RECORD OF THE 1ST PETITIONER AT SREEAVITTAMTHIRUNAL HOSPITAL, MEDICAL COLLEGE, THIRUVANANTHAPURAM
- EXHIBIT P7: THE TRUE COPY OF THE ANOMALY SCAN REPORT OF THE 1ST PETITIONER DATED 22.04.2020