

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8440 OF 2019

KGP

Petitioner

Versus

PKP

Respondent

Mr. A.M. Gaikwad, Advocate for the petitioner.

Mr. V.D. Salunke & Mr. S.G. Nandedkar, Advocates for the respondent.

CORAM : Ravindra V.Ghuge, J.

DATE : 21st November, 2019.

JUDGMENT :

1. Rule.

2. Rule made returnable forthwith, considering the peculiar facts and circumstances emerging from the record and the learned advocates for the petitioner-husband and the respondent-wife having requested that this matter be considered finally in view of certain other proceedings pertaining to the marital discord between the parties, being pending before the different Courts. It is on this backdrop that this Court has heard the learned advocates on 19.11.2019, 20.11.2019 and today.

3. The issue that crops up in this petition is as to whether

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the demand of an estranged wife, before the Family Court in a pending petition for restitution of conjugal rights that, the husband shall restore sexual relations and bear a second child from his wife or he be subjected to In Vitro Fertilisation so as to let the wife give birth to a child, is legal and sustainable ?

4. While deciding the above issue, I am conscious of the pending proceedings between the parties and, I would therefore refrain from dealing with the allegations in the two proceedings initiated by them viz. a proceeding for divorce filed by the husband, pending at Panvel and, the proceeding preferred by the wife seeking restitution of conjugal rights, pending before the Family Court at Nanded.

5. In the pending proceedings initiated by the wife, she has moved an application Exhibit 35 on 26.11.2018 praying for a relief that the husband be directed to develop physical relations with the wife or he should be subjected to the IVF procedure. In support of the above prayer, the wife has canvassed in paragraph no. 2 of the application Exhibit 35 that, though the couple has one male child aged about 6 years residing with the wife, she desires a second child

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from the estranged husband. It is her contention that in future the son is likely to go abroad for education or a job and she would be alone. The second child would keep her company. Another reason cited is that the birth of the second child would be psychologically advantageous for the mental and physical growth of the first child and both the children would grow up together with the feeling of caring and sharing. It is also stated, as one of the reasons to compel the husband to have a second child that, the wife is about 35 years of age and it is the right age to have second child, lest with advancing age, she may not be physically and mentally in a position to have a second child.

6. The husband has completed his education in MBBS and has acquired a degree in Medicine (MD) with specialisation in chest diseases from the Seth GS Medical College and KEM Hospital, Mumbai. He has done DNB in the year 2003 and was also for a while in USA. The wife has also secured MBBS degree. Both came together by way of an arranged marriage on 18.11.2010 and the child was born on 04.06.2013.

7. The petitioner-husband opposed the application Exhibit

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35 by tendering his written say on 22.05.2019. Though it is contended that the application is untenable in law, he has specifically averred that no spouse can be compelled to have sex, directly or indirectly, without free consent. He has further averred that he has preferred a divorce petition. It is submitted that the application be rejected and there should be no order to the petitioner-husband to develop physical relations with the wife or a direction to undergo any mode of procreation.

8. In the proceedings preferred by the husband seeking divorce, the alleged unruly behaviour of the wife is averred as under :-

The Petitioner states that when the Petitioner with his mother returned back home, the Respondent started quarrelling with him asking him that how can the Petitioner go to Kerala without the Respondent ? The Petitioner states that the Respondent started abusing him with bad words stating “maderchod mai kya tere liye kam hu ki tu apni ma ke sath ghumne jata hai”. The Petitioner states that he had never encountered such type of slang language in his life and was shocked to hear this from his own wife i.e. the Respondent.

The Petitioner states that the Respondent in all her

quarrels, used to abuse with slang languages like “Melya, Maderchod, Gandu, Halkat, Kutrya Bhosdike, Ganda Khoon” which the Petitioner have never thought he will have to come across in his lifetime from his wife. The Petitioner states that the Respondent used to abuse him that the Petitioner is a gigolo and sexually hungry, hence entertains himself with various ladies and also with his mother.

When the Respondent expressed her wish to create her portfolio for joining modeling career, the Petitioner told her that what is the need for her to join modeling as she has already acquired a noble professional medical degree ? On this the Respondent started quarreling, fighting, hurling slang languages and sexual abuses to the Petitioner and left the main discussion aside.

The Petitioner states that even while travelling to Nanded in the car, the Respondent would continue to quarrel and once she was so obsessed in her quarrels that she suddenly jumped out of the slowly moving car in Panvel. The Petitioner states that luckily there was no accident since the Petitioner had applied urgent brakes. The Petitioner states that the Respondent stood outside the car for hours and did not sit inside the car despite repeated persuasion by Petitioner and when after a long time her anger settled, the Respondent sat inside the car and then they moved ahead.

9. The only reason for re-producing the allegations made by the petitioner-husband on oath in his proceeding is to enable me to assess whether the couple could be encouraged to save their marriage and come together and have children, or whether the relations were seriously strained.

10. The husband has narrated before this Court a list of cases filed by both the parties against each other in various police stations. Several allegations have been hurled against each other and the same are subject matter of various complaints filed against each other in various police stations.

11. During the extensive hearing of this matter in the Court, I called upon the learned Advocate for the husband to take instructions as to whether his bitter experience could be forgotten and the couple could come together. The learned Advocate submits on instructions that, considering the behaviour of the wife including the incident when she attempted to strangle him with a wire in his own clinic in the presence of patients and with what he has suffered, it is impossible for him to even think of cohabiting with her.

12. The learned Advocate appearing for the wife has strenuously submitted that the wife desires a second child from the petitioner-husband. She has filed a proceeding for restitution of conjugal rights as she desires to live with the petitioner-husband. It is submitted that the mother of the husband is of a dominating nature and the entire family does not want the respondent to work as a doctor with any hospital or institution. They want her to be a home maker and work only in the house. This is the reason why the discord between the couple has got blown up and both are now facing several cases and criminal complaints filed against each other.

13. The learned Advocate for the petitioner-husband has drawn my attention to the various conclusions arrived at by the Family Court vide the impugned order by which, the Family Court has issued the following directions :-

1. The petitioner and respondent shall meet the Marriage Counselor Shri Dugaonkar for counselling on 24/06/2019.

2. The Marriage Counselor shall assist the petitioner and respondent to seek appointment of Dr. Gayatri Wadekar, Obstetricians & Gynecologists, IVF Expert, within one month from the date of this order for clinical consultation about the ART procedure in their case.

3. The petitioner shall bear the expenses of clinical consultation and medical procedure, if any suggested.

4. Copy of this order be provided to Dr. Gayatri Wadekar with a request to submit confidential report to this court after clinical consultation of the parties.

14. The learned Advocate for the husband insists that when he does not even desire the company of the wife, he is not agreeable for having a child by whatever procedure and does not desire to be a party to the wife conceiving a second child per force.

15. Per contra, the learned Advocate for the wife has raised certain issues as to whether it is the right of the wife to be a mother for the second time. He submits that there is no precise definition of conjugal rights in the Act and he has therefore relied upon, for the meaning of conjugal rights, on Webster Dictionary and the Concise Law Dictionary which indicates that conjugal rights are the sexual rights and privileges implied by and involved in marriage relations which include sexual intercourse. Such rights and privileges are as regards love, affection, sexual relations, companionship, comfort and service to each other. By placing reliance on the Law Lexicon, he submits that co-habitation does not mean mere living together, but is living together of men and women as husband and wife. Co-

habitation would imply sexual intercourse between the husband and the wife.

16. He then submits that Exhibit 35 was a justified application since no Court has granted divorce to the couple and both are husband and wife today. The wife has moved the application in her proceedings seeking restitution of conjugal rights. The wife has a desire to have a second child and that is her fundamental right and a natural right recognised in the Indian society. He submits that the application was for a good cause and there is no perversity in the order passed by the Family Court.

17. He further submits that as the wife has a fundamental right to have a child, the husband cannot oppose such a request. It is to be left to the husband whether he desires to establish physical relations or whether a child could be born through the IVF procedure. The wish of the wife has greater importance and she is willing to bear the physical and mental stress and agony to have a child.

18. He has relied upon the following judgments of the

Honourable Supreme Court in support of his case :-

1. Saroj Rani Vs. Sudarshan Kumar Chadha,
[1984 AIR (SC) 1562]
2. Javed & others Vs. State of Haryana & others
[Writ Petition (Civil) No. 302 of 2001 dated 30.07.2003]
3. Samar Ghosh Vs. Jaya Ghosh
[Appeal (Civil) No. 151 of 2004 dated 26.03.2007]
4. Suchita Srivastava & another Vs. Chandigarh
Administration
[Civil Appeal no. 5845 of 2009 dated 28.08.2009]
5. J.C.M. Vs. A.N.A.
[2012 BCSC 584]

19. The learned Advocate for the husband submits that he has suffered untold miseries on account of the behaviour of the wife, especially the manner in which she used to abuse him in filthy language and the incident of assault. He also points out from some of his pleadings that the wife abused him and his mother by stating as to whether the husband desires to sleep with the mother and ignore the wife. On a tour by him to Kerala along with his mother, he had to suffer tongue lashing after he returned and the wife alleged that he was physically enjoying his mother.

20. I find it necessary to record that I may not deal with the

allegations being made by the couple against each other in this matter. The reason for making a passing reference to the allegations against each other is only to test whether the Family Court, Nanded, was conscious of the bitterly strained relations between the couple while passing the order, the operative part of which is reproduced above.

21. The Honourable Apex Court has laid down the law insofar as supervisory jurisdiction of the Single Judge of this Court is concerned under the Writ of Certiorari and Article 227 of the Constitution of India in the matters of **Syed Yakoob Vs. K.S. Radhakrishnan and others** [1964 AIR SC 477] and **Surya Dev Rai Vs. Ramchander Rai and others** [2003 AIR SC 3044]. It is held that unless this Court finds that the impugned order is perverse, erroneous and likely to cause injustice to the party, no interference is called for. This is also the submission of the learned Advocate for the wife that this Court should not interfere with the impugned order on the ground that it may appear to be erroneous. This Court may interfere only if it concludes that the impugned order is perverse, erroneous and likely to cause injustice.

22. This Court cannot turn a blind eye and appear to be insensitive to the future of the 'probable child' which, neither the couple before the Court has considered, nor has been considered by the Family Court.

23. Today, a serious grievance of the wife is that due to the marital discord and separation of the couple from May 2016, none belonging to the immediate family of the husband has even cared to inquire as to how the son (the child of the couple) is growing up. The child feels neglected and is presently in the company of his mother at Nanded. He is a school going boy. The grievance of the wife is that the child is practically growing up as a fatherless child. Now, this is the present condition of the first child.

24. In this backdrop, two issues fundamental to the litigation crop up :-

A) Whether, either the husband or the wife can be compelled to have a second child despite the strong resistance and refusal of the partner ?

B) What would be the fate of such child who, on growing up, accidentally stumbles across the litigation between the parents and realises the circumstances in which he was forcibly born ?

25. In my view, the growth of such a child who would eventually get knowledge of the circumstances in which he was brought to this earth, would have a devastating effect on his mental growth. Nature cannot stunt any living being from physically growing up. The natural growth of a living being is a design of Nature and, to those who believe in God, it is a blessing of the God Almighty. People seldom fathom the effect of a stunted mental growth or the mental growth of a child suffering on account of such circumstances. A child may grow to his or her full physical strength and appearance. But if the mental growth of the child suffers due to trauma on account of the circumstances that led to his birth, it would be something which is beyond perception and imagination.

26. It is in the above backdrop that I would be considering as to whether the order passed by the Family court appears to be perverse, erroneous and likely to cause gross injustice not only to a partner, but probably even to the child who is yet to take birth on this land.

27. It would be apposite to reproduce certain observations of the Family Court appearing in the impugned order, not to enlarge the

size of this judgment, but to make the judgment complete. Following are certain such observations made by the Family Court :-

No one can deny that, the widely acceptable social objective of a marriage is to procreate children. The meaning of 'procreation' is 'reproduction' or 'breeding'. After invention of new technologies in the field of medicine the conventional and traditional method of conjugal union of a man and a woman for procreation of children is becoming obsolete. Children are born with contemporary technologies like in-vitro fertilization, artificial insemination, surrogacy, hiring uterus, and by donating eggs and sperms.

This is a case where a wife is asking her husband to donate his sperms so that she can conceive by any of the Alternative Reproductive techniques. It is not a complex situation like surrogacy where three or four people are involved.

At this stage I would like to mention the observations made in the Law Commission Report No. 228. It said, "the legal issues related with surrogacy are very complex and need to be addressed by a comprehensive legislation. Surrogacy involves conflict of various interests and has inscrutable impact on the primary unit of society viz. Family. Non-intervention of law in this knotty issue will not be proper at a time when law is to act as ardent defender of human liberty and an instrument of distribution of positive entitlements. At the same time, prohibition on vague moral grounds without a proper assessment of social ends and purposes which surrogacy can serve would be irrational. Active legislative intervention is required to facilitate correct uses of the new technology i.e. ART and relinquish the cocooned approach to legalization of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalizing altruistic surrogacy arrangements and prohibit commercial

ones.”

In the United Nations International Conference on population and development, 1994, it was held that, “A Key aspect of personal autonomy are reproductive rights, which entail rights to make sexual and reproductive decisions.”

At this juncture I would like to make reference of the observation of the Supreme Court of United States of America, in Skinner V/s Stte of Okl. Ex. Rel. Williamson (1942 No. 782 Decided : June 1, 1942.) The United States Supreme Court, held that, ‘Marriage and procreation are fundamental to the very existence and survival of the race.’ It further said that reproductive right is one of the basic civil rights of human being.

The Judiciary in India too has recognized the reproductive right of humans as a basic right. In B.K. Parthasarathi v. Government of Andhra Pardesh (2000) ALD, AP, 1 p 199, the Andhra Pradhes High Court upheld “the right of reproductive autonomy” of an individual as a facet of his “right to privacy” and agreed with the decision of the US Supreme Court in Jack T. Skinner v. State of Oklahom which chractertized the right to reproduce as “one of the basic civil rights of man.”

In Justice K. S. Puttaswamy V/s Union of India, WRIT PETITION (CIVIL) NO. 494 OF 2012 the Constitutional right of woman to make reproductive choices, as a part of personal liberty under Article 21 of Indian Constitution is recognized.

The Bombay High Court in a suo motu PIL no. 1/2016, in its order dated 19 September 2016, concerning the deplorable condition of a female prison inmate, categorically stated that a “woman alone should have the right to control her body, fertility and motherhood choices.” It said, “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. If a woman does not want to continue with the pregnancy then forcing her to do so represent a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health."

In a situation exactly opposite to this, where a woman is seeking assistance of court to exercise her reproductive right to have another child, the observation of Bombay High court made in a suo motu PIL no. 1/2016, has to be interpreted in the same spirit but for opposite situation. In the given situation the petitioner is desirous and capable to give birth to a child. She possesses the right to control her body, fertility and motherhood choices. If a woman is legally, socially, physically and medically capable and willing to conceive is restricted from conceiving, then it is violation of the woman's bodily integrity and it can aggravate her mental trauma which would be deleterious to her mental health.

Women have a right not to be a mother, similarly they have a right to be a mother. Both these rights are to be equally respected. These rights emerge from her human right to live with dignity as a human being in the society and is protected as a fundamental right under Article 21 (protection of life and personal liberty) of the Constitution of India, with reasonable restrictions.

The aforesaid discussion clearly indicates that reproductive choices can be exercised to procreate as well as to refrain from procreating. Thus, unreasonable restrictions should not be placed on a woman's right to procreate specially when it is a bonafide and legitimate wish. It can also be seen that the right to reproduce is a very intricate feminine right emanating from basic woman's human right. Now allowing a fertile woman to procreate is like compelling her to sterilize. To curb or to curtail reproductive right may have subtle and devastating

demographic outcome.

Therefore, it is seen that in India reproductive rights are considered a collective decision of the family, not the decision of the individual women it affect.

In the matters of conceiving and procreating a child, men and women are not similarly situated. Therefore, women will always have an upper hand in the matter of reproduction.

Involvement of men in reproductive decisions and choices of women which are pragmatic and reasonable will create a gender synergy between men and women. Men can propagate responsible fatherhood and gender equality by supporting the womens choice of family planning. In issues of reproduction the common aim of both gender should be the well-being of all family members.

28. It therefore appears from the reproduced portion of the impugned judgment that the Family Court considered the institution of marriage from the angle of the western world and certain writings/ literature available in the documents of the International Organization. While doing so, it is accepted by the Family Court that the reproductive choice can be exercised by the couple to procreate as well as to refrain from procreating. It is also observed that a woman has a right either to be a mother or refuse to be a mother. This emerges from her right to live with dignity as a human being in the

society. If a woman is forcibly made to conceive, it would be violation of the woman's bodily integrity and it can aggravate her mental trauma which would be deleterious to her mental growth. She possesses a right to control her body and her motherhood choice.

29. With these observations, the Family Court has concluded that a woman's right to procreate, specially when it is a bonafide and legitimate wish, will have to be respected and the right to reproduce is a very intricate feminine right emanating from the woman's basic human right. Not allowing a fertile woman to procreate is like compelling her to sterilize. To curb or to curtail reproductive right may have subtle and devastating demographic outcome.

30. To say the least, I find such conclusions to be shocking to the judicial conscience of the Court.

31. The learned Family Court then has relied on the Convention on the Elimination of Discrimination against Women (CEDAW) to which India is a signatory. This Convention guarantees the women equal rights in deciding 'freely and responsibly on the number and spacing of their children and to have access to the

information, education and means to enable them to exercise these rights.’ The learned Judge places reliance upon the Beijing Platform for Action which states that the human rights of women include their right to have control over and decide freely and responsibly, on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. It is then concluded in paragraph no. 11 of the judgment that in India reproductive rights are considered a collective decision of the family, not the decision of the individual women it affect.

32. In paragraph No. 12, the learned Judge begins with the observation as to whether men have reproductive rights and which is a hotly debated topic across the globe. While reproductive rights have been legally recognized as a woman’s right, there are series of judgments of the Honourable Supreme Court which recognize the right to equality as being guaranteed to men and women if they are similarly situated. In the matters of conceiving and procreating a child, men and women are not similarly situated and therefore, women will always have a upper hand in the matter of reproduction. I do not feel that such conclusions could be sustained.

33. In paragraph no. 15 of the impugned judgment, the learned Judge observes that the issue of reproductive rights is an emotionally debatable and gender intricate issue. It can generate various legal and social complications and consequences. In the case in hand, the couple is not infertile. There is no need to have sperm donor or surrogate mother. The wife being legally wedded wife of the respondent cannot be faulted with for her eugenic choice of conceiving another child. The consent of the husband for ART is most essential and preliminary formality required to proceed for ART procedure.

34. The learned Judge then observes in paragraph no. 16 of the impugned judgment that the oldest legal maxim which is developed under the law of Torts would be applicable to the husband and wife viz. "*Ubi jus, ibi remedium*". It is further recorded that the wife, to facilitate and fortify her wish of another child, is so earnest that she declared that she would not claim any maintenance from the husband for the upbringing of the child.

35. I find that the trial Court has completely lost sight of the fact that the growth of a child is not money centric but is family

centric. The growth of a child, both mental and physical, to make a child an able, capable and competent human being with normal predisposition and bereft of mood swings, could only occur in a congenial family structure.

36. In order to be fair to the parties, I called upon the learned Advocate for the husband to state whether he would agree for a second child on the basis of the undertaking given by the wife that she does not want funds for upbringing of the second child. He submits that the respondent-wife is economically well placed. She is the owner of 30 tenements in Nanded and is also a partner in a hotel. Money is not the issue. The issue is that the respondent does not desire to have any relation with his wife considering his traumatic experience and he, therefore, is not willing to have a second child from respondent-wife in any circumstances, by adopting any procedure.

37. Both the sides have relied upon several judgments. In none of them, do I find any direction by any Court, at the request of the estranged partner that the other partner should forcibly forebear a child. The decisions are based on cases in which either the couple

is unable to come to terms to decide the number of children or the spacing between the children on the insistence of the family set up. I called upon the learned Advocates for the respective sides to point out a single judgment cited before the Court which would suggest or lay down the law that in a marriage or even in a case of marital discord wherein the partners are estranged, the Court has accepted the wish either of the wife or the husband to compel the partner to forcibly forebear a child.

38. In the light of the above, I find that the application Exhibit 35 was filed prematurely. The possibility that the couple may come together is a matter of speculation and neither the couple nor the Court can be prophetic. This aspect will have to be left for time to decide since, time heals all wounds. If in future, the couple reconcile and come together as husband and wife, even Nature will not stand in their way to have a second child. But, seeking directions to forcibly have a second child during the pendency of a petition seeking restitution of conjugal rights, would be detrimental to the mental growth of the child.

39. I find from the operative part of the impugned order that,

as a step towards ordering that a second child be borne by the couple, the learned Family Court has directed the couple to seek appointment of a lady Gynecologist, who is an expert in IVF procedure, for clinical consultation about the ART procedure. The learned Advocate for the husband submits that when he does not desire to take even a single step towards procreating a second child, he does not desire to visit the said Gynecologist for any sort of consultation or counselling.

40. In my view, as the law stands today, there cannot be such a direction notwithstanding the submission of Mr. Salunke that the male sperms are not the exclusive property of a husband.

41. In view of the above, this petition is allowed. The impugned order dated 17.06.2019 is quashed and set aside and the application Exhibit 35 stands rejected. Rule is made absolute.

(Ravindra V.Ghuge, J.)

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