

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

FRIDAY, THE 27TH DAY OF AUGUST 2021 / 5TH BHADRA, 1943

WP(C) NO. 17036 OF 2021

PETITIONER:

INDULEKHA SREEJITH
AGED 34 YEARS
W/O. SREEJITH MENON.S., KAVALAMPILLY HOUSE,
CHANGAMPUZHA NAGAR P.O., PIN-682 033, ERNAKULAM
DISTRICT

BY ADVS.
SRI.P.T.MOHANKUMAR
SRI.GEORGE CHERIAN
SRI.RAJESH CHERIAN KARIAPPARAMBIL

RESPONDENTS:

- 1 UNION OF INDIA
REP BY ITS SECRETARY, MINISTRY OF WOMEN AND CHILD
DEVELOPMENT, SHASTRI BHAVAN, NEW DELHI-110 001
- 2 STATE OF KERALA,
REPRESENTED BY THE SECRETARY, DEPARTMENT OF WOMEN
AND CHILD DEVELOPMENT , GOVERNMENT SECRETARIAT,
THIRUVANANTHAPURAM-695 001
- 3 THE DISTRICT MEDICAL OFFICER,
OFFICE OF THE DISTRICT MEDICAL OFFICER, ERNAKULAM,
ERNAKULAM, PIN-682 011
- 4 THE PRINCIPAL,
GOVT. MEDICAL COLLEGE ALAPPUZHA, VANDANAM,
ALAPPUZHA, PIN-688 005
- 5 DIRECTOR,
DEPARTMENT OF GYNAECOLOGY AND OBSTETRICS, SUNRISE
HOSPITAL, KAKKANADU P.O., KOCHI-682 030

6 **SUPERINTENDENT
MEDICAL COLLEGE, ALAPPUZHA
IS SUO MOTU IMPLEADED AS ADDITIONAL R6 AS PER
ORDER DATED 17.08.2021 IN WPC 17036/2021**

BY ADVS.

SMT. VINITHA B, GOVERNMENT PLEADER

**THIS WRIT PETITION (CIVIL) HAVING COME UP FOR
ADMISSION ON 27.08.2021, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

C.R.

P.B.SURESH KUMAR, J.

W.P.(C) No.17036 of 2021

Dated this the 27th day of August, 2021

JUDGMENT

A pregnant woman, the gestation of whose pregnancy corresponds to 31 weeks, has approached this Court seeking directions to the respondents to terminate her pregnancy. The case of the petitioner is that though substantial foetal abnormalities have been diagnosed, the respondents are refusing to terminate the pregnancy, as the outer time limit prescribed for termination in terms of the provisions of the Medical Termination of Pregnancy Act, 1971 (the Act) is over.

2. Heard the learned counsel for the petitioner as also the learned Government Pleader.

3. On 17.8.2021, this court passed the following interim order :

“Heard the learned counsel for the petitioner and the learned Government Pleader.

Superintendent, Medical College, Alappuzha is suo motu impleaded as additional respondent No.6. There will be a direction to the Superintendent, Medical College, Alappuzha to convene the permanent medical board specified under Exhibit P6, Government Order, G.O.(Rt) No.2444/2020/H&FWD dated 31-12-2020 and to arrange for the medical examination of the petitioner with further direction to submit a medical report before this Court on or before 31.08.2021.

Post on 31.08.2021.”

4. In compliance with the interim order aforesaid, the Medical Board at the Medical College Hospital, Alappuzha examined the petitioner on 24.8.2021, and the report of the Medical Board has been made available to the Court. The operative portion of the report reads thus:

“Mrs.Indulekha Sreejith, aged 34 yrs, attended Medical Board along with her father K.K.Gopinath 66 yrs and mother Sobana Kumary 60 yrs at 11 am on 24/08/2021. Indulekha Sreejith is a 3rd gravida with 2 normal deliveries in past. Her LMP 17/01/2021 and gestational age is 29 weeks as per L.M.P. Ultra sound done on 24/08/2021 from TDMC,

Alappuzha showed gestational age of 30 weeks +4 days. The Left Kidney of the fetus is multi cystic dysplastic with PUJ obstruction. Both Humerus bone length is less than 1 percentile. Other bones appear normal. No lethal anomalies detected in the present scan.

Medical Board evaluated the patient's condition and reached the following conclusion.

Anomaly detected in antenatal scan is non lethal and present gestational age is 30 weeks + 4 days. No Chromosomal study reports are available at present. So termination of pregnancy may result in a live baby who may need prolonged hospitalisation because of prematurity. So it will be better to continue the pregnancy till term." (underline supplied)

The case of the petitioner that there is foetal abnormalities cannot be disputed in the light of the said report. But, as seen from the report, since it is found that the abnormalities are not lethal and the termination of pregnancy is likely to result in a live baby, the Medical Board is not in favour of termination of the pregnancy. The question falls for consideration, therefore, is whether this court would be justified in permitting medical termination of pregnancy in a case where a duly constituted Medical Board opines that the foetal abnormalities are not lethal and the stage of pregnancy is such that it may result in a live

baby, merely for the reason that the pregnant woman chooses to terminate the pregnancy.

5. Before proceeding to decide the question, it is necessary to refer to the object of the Act. It is seen that the Act has been introduced to legalise termination of pregnancy by registered medical practitioners in certain contingencies which would have otherwise constituted the offence of causing miscarriage in terms of the provisions of the Indian Penal Code, mainly with a view to protect the life and health, both physical and mental, of the pregnant woman. Going by the provisions contained in sub-section (2) of Section 3 of the Act, a pregnancy can be medically terminated only if the continuance of the pregnancy would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health or there is a substantial risk that if the child were born, it would suffer from serious physical or mental abnormalities as to be seriously handicapped. Explanation (1) to sub-section (2) clarifies that the anguish caused by her pregnancy if it is caused on account of

rape, shall be presumed to constitute a grave injury to the mental health of the pregnant woman. Explanation (2) to the said sub-section clarifies that where the pregnancy occurs as a result of failure of any device or method used by her or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may also be presumed to constitute a grave injury to the mental health of the pregnant woman. Sub-section (3) of Section 3 clarifies that in determining whether the continuance of pregnancy would involve grave injury to the physical and mental health of the pregnant woman, the actual or reasonably foreseeable environment of the pregnant woman can be taken into account. The Act has prescribed an outer time limit of 20 weeks, in terms of sub-section (2), for terminating a pregnancy medically. In other words, the scheme of the Act is that a pregnancy cannot be terminated medically after 20 weeks, even if the circumstances mentioned in sub-section (2) of Section 3 exist. Section 5 of the Act, however, clarifies that the requirements in sub-section (2) of Section 3 do not apply to the

termination of a pregnancy by a registered medical practitioner in a case where he is of the opinion that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

6. Despite the provisions in the Act as regards the outer time limit within which a pregnancy could be terminated medically, having regard to the fundamental rights of the citizens, the constitutional courts in the country have been permitting termination of pregnancies medically if the continuance of the pregnancy would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health or there is a substantial risk that the child, if born, would suffer from serious physical or mental abnormalities as to be seriously handicapped. The trend of the decisions rendered by the courts in this regard would indicate the inadequacy of the provisions in the Act to protect the fundamental right to life of the pregnant woman to its fullest extent, especially having regard to the advancement of medical technology for safe abortion. It appears, having taken

note of the decisions rendered by the constitutional courts in this regard, with a view to ensure dignity, autonomy, confidentiality and justice for women who need to terminate pregnancy, the Act has been amended in terms of the Medical Termination of Pregnancy (Amendment) Act, 2021. The Amended Act, however, has so far not been notified. The essence of the amendments introduced to the Act is that the outer time limit prescribed for terminating the pregnancy medically is raised from 20 weeks to 24 weeks and that the restriction as regards the outer time limit will not apply to the termination of pregnancy where such termination is necessitated by the diagnosis of any substantial foetal abnormalities by a Medical Board constituted in terms of the provisions of the Act. In other words, once the Amendment Act is notified, the termination of pregnancy would be lawful if it is carried out within 24 weeks, if the grounds mentioned in sub-section (2) of Section 3 exist. Similarly, once the Amendment Act is notified, the termination of pregnancy would be lawful even if it is carried out beyond 24 weeks if a Medical Board constituted in

terms of the provisions of the Act diagnoses substantial foetal abnormalities.

7. An unborn child has a life of its own and rights of its own and the rights of unborn are recognised by law. No doubt, only if the unborn can be treated as a person, the right to life of the unborn can be equated with the fundamental right of the mother guaranteed under article 21 of the Constitution. True, an unborn is not a natural person, but it is well known that after six weeks, life is infused into the embryo, thus converting embryo into foetus and once an embryo evolves into a foetus, the heartbeat starts. In other words, the unborn has life from the stage it transforms into foetus. If the unborn has life, though it is not a natural person, it can certainly be considered as a person within the meaning of article 21 of the Constitution, for there is absolutely no reason to treat an unborn child differently from a born child. In other words, the right to life of an unborn shall also be considered as one falling within the scope of Article 21 of the Constitution.

8. In all cases where a court is called upon to adjudicate the question whether permission shall be granted to a pregnant woman for terminating her pregnancy on a plea of infringement of her fundamental right to life guaranteed under Article 21 of the Constitution, the court is making a balance between the rights of the mother and the rights of the unborn. No doubt, while doing so, if there is any threat to the life of the mother, the scales shall certainly tilt in favour of the mother, for if the life of the mother cannot be saved, the life of the unborn cannot be protected.

9. Reverting to the question, when a duly constituted Medical Board opines that the stage of pregnancy is such that it may result in a live baby and that the foetal abnormalities diagnosed are not lethal, in the absence of any threat to the life or health of the mother, I am of the view that the reproductive choice of the mother which is a facet of the fundamental right guaranteed to her under Article 21 of the Constitution, will have to give way to the right of the unborn to be

born. True, if the Medical Board diagnoses substantial foetal abnormalities, the amended provisions of the Act permit termination of pregnancy notwithstanding the outer time-limit prescribed in the Act for termination of pregnancy. According to me, even if the amended provisions were notified, the relief sought by the petitioner in the instant case cannot be granted at this stage of her pregnancy, for the Medical Board has not opined that foetal abnormalities found are substantial in nature. The question formulated for decision is thus answered in the negative.

In the result, the writ petition is dismissed.

**Sd/-
P.B.SURESH KUMAR, JUDGE.**

PV

APPENDIX OF WP(C) 17036/2021

PETITIONER'S EXHIBITS

Exhibit P1 THE TRUE COPY OF THE SCAN REPORT DATED 13.08.2021 ISSUED BY DR. ANURAG V.M., DEPARTMENT OF RADIOLOGY, SUNRISE HOSPITAL, KAKKANAD, KOCHI-682 030

Exhibit P2 TRUE COPY OF THE CERTIFICATE DATED 14.08.2021 ISSUED BY THE PAEDIATRICIAN DR. M.H. MOHAMMED SAHEER

Exhibit P3 TRUE COPY OF THE MEDICAL CERTIFICATE DATED 14.08.2021 ISSUED BY THE SENIOR CONSULTANT GYNECOLOGIST AND LAPAROSCOPIC SURGEON, DR. HAFEEZ RAHMAN PADIYATH

Exhibit P4 TRUE COPY OF THE JUDGMENT DATED 06.04.2021 IN WPC 4117/2021 OF HON'BLE HIGH COURT OF DELHI

Exhibit P5 TRUE COPY OF EMAIL COMMUNICATION (LETTER OF CONSENT) DATED 16.08.2021 OF HUSBAND OF THE PETITIONER

Exhibit P6 TRUE COPY OF THE GOVERNMENT ORDER GO (RT) NO. 2444/2020/H & FWD DATED 31.12.2020