

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.04.2019

CORAM

THE HONOURABLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.No.8112 of 2019
and
W.M.P.Nos.8702 & 8703 of 2019

S.Yogesh

... Petitioner

Vs

1. The Secretary to Government,
Health and Family Welfare Department,
Secretariat,
Chennai.
2. The Dean,
Rajiv Gandhi Government General Hospital,
Madras Medical College,
Chennai.
3. The Chief Medical Officer,
Chennai District,
Chennai.
4. The Inspector of Police,
Kundratur Police Station,
Chennai.
5. V.Banumathi @ Devayani
6. Varadarajan Yadhav
7. V.Bhuvaneswari

... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, directing the 2nd respondent to examine the 5th respondent under the provisions of Medical Termination of Pregnancy Act, 1971 and Rules framed thereunder and consequently direct the 2nd respondent to perform the termination of pregnancy of the 5th respondent.

For Petitioner : Mr.A.Veerasami
for Mr.S.Senthilvadivelan

For Respondents : Mr.A.Kumar,
Additional Advocate General
assisted by Mr.E.Balamurugan,
Special Government Pleader for R1 to R4
Mr.J.Milton Arul Rajendran, R5 to R7

O R D E R

The petitioner seeks for a Mandamus directing the 2nd respondent to examine the 5th respondent under the provisions of Medical Termination of Pregnancy Act, 1971 and Rules framed thereunder and consequently, direct the 2nd respondent to perform the termination of pregnancy of the 5th respondent.

2. The petitioner is the husband of the 5th respondent. The 6th and 7th respondents are the parents of the 5th respondent.

3. The case of the petitioner in short is as follows:

He married the 5th respondent on 27.04.2018 and subsequent to the marriage, he started his family life with her in his residence. He was shocked to know the indifference attitude of his wife and her poor intelligence. On 20.01.2019, the parents of the 5th respondent informed that his wife is pregnant. The doctor, who examined the 5th respondent, confirmed that she is not having proper brain development and suggested to refer her to Clinical Psychiatrist for I.Q. assessment. Therefore, the petitioner decided to terminate the pregnancy after thorough investigation under the provisions of Medical Termination of Pregnancy Act, 1971. However, the respondents 6 and 7 are objecting without understanding the real issues involved in the above matter. At present, the 5th respondent is residing with the respondents 6 and 7 in their residence. Therefore, the writ petition is filed with the relief as stated supra.

4. When the matter was taken up for admission on 20.03.2019, the learned Special Government Pleader took notice for the respondents 1 to 4 who is being represented by the learned Additional Advocate General Mr.A.Kumar. Notice was ordered to the respondents 5 to 7. Thereafter, the matter was taken up on 27.03.2019, on which day, it was found that the notice sent to respondents 5 to 7 was not served. Hence, the Registry was directed to take steps to serve the notice on the respondents 5 to 7 and to post the matter on 01.04.2019. On 01.04.2019, the respondents 5 to 7 appeared through their counsel. They also personally present on that day when the matter was taken up for hearing at my Chamber. After hearing the learned counsels appearing on either side, I enquired the petitioner and the respondents 5 to 7 individually. The respondents 5 to 7 contended that the 5th respondent is perfectly alright and they are not willing for abortion. In fact, when I specifically asked

the 5th respondent as to what is her response to the plea made by her husband, she said that she is not willing to abort the child. However, when I enquired the petitioner, he stuck to his stand that the 5th respondent is mentally ill and consequently, the child in her womb may not have normal, physical and mental health. There was a dispute between the parties with regard to the age of pregnancy as well. When the petitioner claimed that it was only 16 weeks pregnancy, the respondents 5 to 7 claimed that it was 22 weeks. Under the above stated facts and circumstances, this Court passed an interim order as follows:

7. Under the above stated facts and circumstances, this Court is of the view that before deciding the merits of the claim made by the respective parties, it is better to refer the 5th respondent to be examined by the Board constituted by the 2nd respondent Government Hospital under the Medical Termination of Pregnancy Act, 1971, and file a report before this Court so as to arrive at a just and proper decision in this matter in the interest of both parties. Accordingly, the Board will examine the mother/5th respondent and the status of her pregnancy in accordance with the procedure contemplated under the above said Act and file a complete report. The respondents 6 and 7 are directed to produce the 5th respondent before the 2nd respondent Government General Hospital on 03.04.2019, on which day, the Board constituted by the 2nd respondent Hospital as stated supra, will examine the 5th respondent and the status of her pregnancy and file a complete report. Post the matter on 05.04.2019 for filing such report and further hearing.

Consequently, the matter was listed on 05.04.2019, on which day, the learned Additional Advocate General produced a communication sent by the Dean, Rajiv Gandhi Government General Hospital, Chennai, to the learned Special Government Pleader dated 05.04.2019, wherein it is stated as follows:

"With reference to the above letters cited, Thiru S.Yogesh, S/o.K.Selvam filed a Writ Petition W.P.No.8112/2019 in the Hon'ble High Court, Madras, Chennai-104 requested for MTP of his wife Tmt.V.Banumathi @ Devayani and the Hon'ble High Court given instructions to the Rajiv Gandhi Govt. General Hospital to constitute a Board and send the report for the above MTP case.

In this connection, the Dean, Rajiv Gandhi Govt. General Hospital, Chennai has constituted Permanent Board for MTP Cases with nine members of

the Medical Team to examine the above individual on 03.04.2019.

The Board Members have examined the individual and furnished the detailed report of the status of Tmt.V.Banumathi and the Gynaecologists requested to get the detailed psychiatric evaluation of the individual to finalise the above MTP case.

In this regard, the Director, Institute of Mental Health has constituted a Board for the evaluation of the above case. It is in progress. The final report of the above case will be submitted on 08.04.2019 only.

In view of the above, I will send the report on receipt of the detailed evaluation report from the Institute of Mental Health, Chennai - 10 for the above MTP case."

5. Therefore, this Court, after recording the said communication, posted the matter for further hearing today. The learned Additional Advocate General today produced the Medical Report of the nine members medical team and a report of the Institute of Mental Health, Chennai-10, in respect of the 5th respondent. In the report filed by the nine members Medical Team of the 2nd respondent, it is stated as follows:

Special Medical Board on 03.04.2019 at Institute of Obstetrics & Gynaecology, Egmore, Chennai / RGGGH, Chennai

Ref: No.29387/ RMB/ RGGGH/ 19 dated 01.04.2019

The Board constituted by the Dean, Rajiv Gandhi Government General Hospital, Chennai-03. comprising of the following members met at the Institute of Obstetrics & Gynaecology, Egmore, on 03.04.2019. The Board members obtained that the detailed analysis/ report of the status of Tmt. Banumathi is needed and hence the convenor requested the Director, Institute of Mental Health, to depute/ nominate a Psychiatrist to assess the patient based as the petitioner's complaint.

Prof. C.Jaya Krishnaveni, Psychiatrist, Institute of Mental Health, Chennai-10, attended the board meeting and opined that the individual has intellectual disability and needs further evaluation.

Prof. R.Ravi, Director, Barnard Institute of Radiology, Rajiv Gandhi Government General Hospital, Chennai, Performed a Ultra Sonogram and submitted report stating that the baby is 17 weeks old on the date of examination and structurally normal for this age of pregnancy.

Prof. Shanthi Sivakumar, Professor, Obstetrics

& Gynacology, department of FP & W, Institute of Gynacology, Chennai, convenor of the board performed clinical examination of the individual, she is a primi gravida with 16-17 weeks of gestation and as per the Ultra sonogram foetus is found to be structurally normal. Patient on clinical examination, patient is found to be physically fit condition.

Detailed evaluation was advised and patient requested to present in IMH to assess the Psychological evaluation Immediately.

6. In the observation report filed by the Institute of Mental Health, Kilpauk, Chennai -10 dated 06.04.2019, it is stated as follows:

Mrs.Banumathi @ Devayani was examined by a panel of psychiatrists and psychologist from 03/04/2019 till today 06/04/2019.

A detailed physical, mental and psychological evaluation was done. The history reveals delayed motor milestones compared to her sibling. She had no formal education. She is assisting her mother in day to day activities like cutting vegetables, washing clothes, cleaning house and other daily chores. She is married since eleven months and became pregnant.

Psychological assessment done. Based on the above findings it is opined that she has features suggestive of borderline level of intelligence and social and adaptive functioning. She is not having any mental illness.

During the interview she is aware that she is pregnant and says that she wants to have the baby. Her parents are also supportive of her decision to have her baby.

Heard both sides.

7. The petitioner as the husband of the 5th respondent seeks for termination of the pregnancy of the 5th respondent by contending that she is mentally ill and therefore, she is not fit to give birth to a child. On the other hand, when this Court enquired the 5th respondent in person, she refused to terminate the pregnancy and on the other hand, she wants to give birth to a child. Her parents namely, respondents 6 and 7 also refused to accept the claim of the petitioner and consequently, informed this Court in person that they are not willing for terminating the pregnancy of their daughter. However, this Court, based on the firm stand taken by the petitioner about the mental health of the 5th respondent, directed for medical examination of the 5th respondent as stated supra. The medical reports now filed before this Court, pursuant to such examination, would reveal that the

foetus which is 16 to 17 weeks of gestation is found to be structurally normal and that the 5th respondent, on clinical examination, is also found to be physically fit. The above report was given by the nine members team of the Rajiv Gandhi Government General Hospital. The report submitted by the Institute of Mental Health, Kilpauk, further indicates that the 5th respondent is not having any mental illness as claimed by the petitioner. The said report further states that during the interview, the 5th respondent was known to be aware that she is pregnant and that she wants to have the baby. It is further stated therein that her parents are also supportive of her decision to have her baby.

8. At this juncture, the relevant provision of the Medical Termination of Pregnancy Act, 1971, viz., Section 3 is relevant to be noted which contemplates as to when the pregnancies may be terminated by registered medical practitioners. It reads as follows:

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 twelve weeks, of such medical practitioner is, or

(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that -

(i) the continuance of the pregnancy would involve 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 such physical or mental abnormalities as to be seriously handicapped.

9. Under the above said provision, thus a pregnancy may be terminated by a registered medical practitioner only under the circumstances which are as follows:

Where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, the opinion, formed in good faith, that the continuance of the pregnancy will involve a risk to the life of the pregnant women or of grave injury to her physical or mental health; or there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

10. Explanation-I to the above said provision deals with pregnancy alleged to have caused by rape. Explanation-II deals with unwanted pregnancy of a married women as a result of failure of any device or method used by any married women or her husband for the purpose of limiting the number of children.

11. Sub section 3 of the above said provision contemplates that in determining whether the continuance of a 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 reasonable foreseeable environment.

12. Sub-section 4 of Section 3 deals with a pregnant woman, not attained the age of eighteen years or a mentally ill person even if she has attained the age of eighteen years. Sub-section 4 sub-clause (b) specifically contemplates that no pregnancy can be terminated except the consent of the pregnant woman.

13. A careful perusal of the above provision would show that under sub-clause 4(a) the pregnancy may be terminated in the case of a minor having not attained the age of eighteen years and in the case of a mentally ill person, though attained the age of eighteen years, only with the consent of her guardian in writing. In all other cases, no pregnancy shall be terminated except with the consent of the pregnant woman. No doubt, sub-section 2 contemplates termination of pregnancy, if the medical practitioners are of the opinion that the continuance of pregnancy would involve a risk to the life of the pregnant women or of grave injury to her physical or mental health or there is substantial risk that if the child were born, it would suffer from physical or mental abnormalities as to be seriously handicapped. Even though such termination of pregnancy is facilitated under sub-section 2, in my considered view, despite such opinion formed by the medical practitioners, the same cannot be terminated, if the pregnant women has not given her consent for abortion. Therefore, it is evident that facilitation provided under sub-section 2 is subject to the provisions of sub-section 4 and consequently, the consent of the pregnant woman is mandatory, if she is not mentally ill or is under the

age of eighteen years. Only in those cases with the consent, in writing, of the guardian of the pregnant women terminating the pregnancy is possible.

14. Keeping the above legal position in mind and going by the medical report submitted by the team of doctors which includes a report from the Institute of Mental Health, when we see the present case, it is apparent that the 5th respondent being the major and not mentally ill cannot be compelled by her husband to terminate the pregnancy. The medical report says that she is physically fit and the foetus is also structurally normal. Further, the report does not say anywhere that the continuance of the pregnancy would involve a risk to the life of 5th respondent or cause grave injury to her physical or mental health or there is a substantial risk that if the child were born it would suffer from physical or mental disability. Thus, it is evident that requirements under section 3(2)(i) & (ii) of the said Act are not present in this case warranting termination of pregnancy. Even then, it is already stated supra that the 5th respondent is not willing to terminate the pregnancy nor her parents as well. Under such circumstances, the petitioner is not entitled to seek for termination of pregnancy, though he is the husband of the 5th respondent. Whether to carry the pregnancy and give birth to a child or terminate the same, is an absolute discretion vested on the wife/ 5th respondent and therefore, no one, including her husband, can compel her to terminate the pregnancy.

15. Under the above stated facts and circumstances, I find no merit in this Writ Petition. Accordingly, the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

सत्यमेव जयते

Sub Assistant Registrar

vsi

To

1. The Secretary to Government,
Health and Family Welfare Department,
Secretariat,
Chennai.
2. The Dean, Rajiv Gandhi Government General Hospital,
Madras Medical College,

WEB COPY

3. The Chief Medical Officer,
Chennai District,
Chennai.

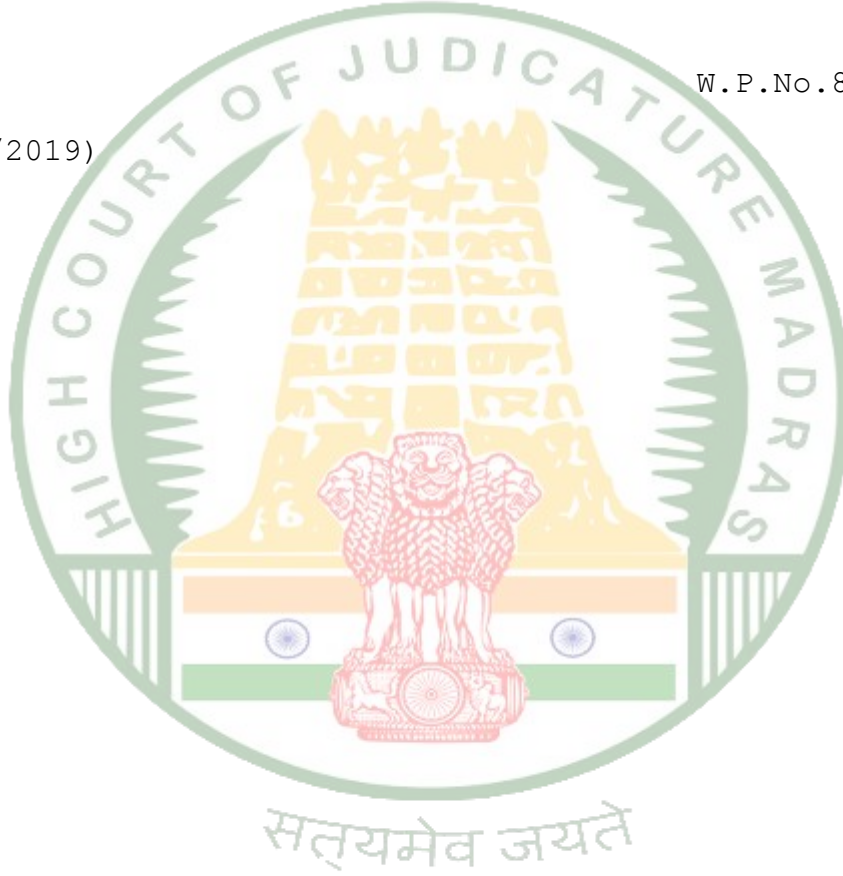
4. The Inspector of Police,
Kundratur Police Station,
Chennai.

+1 cc to Mr.S.Senthilvadivelan, Advocate, S.R.No.35374

+1 cc to Mr.J.Milton Arul Rajendran, Advocate, S.R.No.35026

(CO)
SSM(23/05/2019)

W.P.No.8112 of 2019



WEB COPY