

(2016) 09 MAD CK 0050

In the Madras High Court

Case No : Writ Petition (MD) No. 12212 of 2016

Marimuthu

APPELLANT

Vs

Inspector of Police

RESPONDENT

Date of Decision : 19-09-2016

Acts Referred:

Constitution of India, 1950 — Article 21
Medical Termination of Pregnancy Act, 1971 — Section 5
Penal Code, 1860 (IPC) — Section 375
Prohibition of Child Marriage Act, 2006 — Section 3

Citation : (2017) 1 CriCC 778 : (2017) 2 Crimes 116 : (2016) 2 CWC 767 :
(2016) 8 MLJ 418 : (2017) 1 RCRCriminal 636

Hon'ble Judges : S. Vimala, J.

Bench : Single Bench

Advocate : K.P.S. Palanivel Rajan, Advocate, for the Amicus Curiae; C. Bethana Samy, Advocate, for the Respondent No. 5; D. Muruganandam, Addl. Govt. Pleader, for the Respondent Nos. 1 to 3; N. Adithyavijayalayan for D. Venkatesh, Advocate, for the Petitioner

Final Decision : Disposed Off

Judgement

S. Vimala, J. - Whether the father/guardian of the minor pregnant daughter can get the foetus of the minor daughter aborted, when the pregnant minor daughter herself is not agreeable for such termination is the question raised in this case;

2. In other words, whether the minor daughter's right to life under Article 21 includes the right to beget a life or create a life is the more pertinent issue raised.

Brief Facts:

3. The writ petition seeking to terminate the pregnancy of his daughter, was filed by the father and presented before this Court in person by both the father Marimuthu and mother Selvarani.

3.1. Originally, the petitioner/father preferred a complaint before the 1st

respondent complaining that his minor daughter was missing (from 13.02.2016). The 1st respondent after investigation, arrived at the conclusion that one Sithanathan, S/o.Perumal kidnapped the petitioner's daughter by offering false promise of marriage and on 14.04.2016, they were secured. Thereafter, a case of girl missing registered in Crime No.57 of 2016 was altered into Sections 417, 366A and 376 of IPC and Section 4 & 5 of POCSO Act.

3.2. The accused was arrested and produced before the Juvenile Justice Board, as he was aged 17. The petitioner's daughter was sent for medical examination. On 15.04.2016, the Doctor gave the report that the minor girl was pregnant and the age of the womb was found to be 14 weeks.

3.3. The critical period of twenty weeks, before which alone there can be a safe abortion, was over by 05.07.2016. The father alleged that his minor daughter was made pregnant on account of the rape committed by the accused and therefore, the 1st respondent should refer the petitioner's daughter to the Medical Officers (R2 and R3) in order to get the pregnancy terminated. So seeking this writ of mandamus has been filed.

4. The father and the mother appeared in person before this Court on 20.07.2016. On hearing both of them, the alleged minor daughter Mariammal and the alledgedly responsible persons Sithanathan were suo motu impleaded as R4 and R5 by this Court and the impleaded parties were directed to be produced before this Court on 21.07.2016.

4.1. On 21.07.2016, this Court has passed the following order:

"2.....

3. Today, both the respondents 4 and 5 appeared before this Court and Sithanathan/R5 has admitted that he is the person responsible for the pregnancy of Mariammal. However, the said Mariammal is not in a position to say whether she is prepared to beget the child or is willing to terminate her pregnancy.

4. In order to avoid further loss of time, this Court feels it appropriate to refer the daughter of the petitioner Mariammal to the Rajaji Government Medical College Hospital, Madurai. The Dean of Rajaji Government Medical College Hospital, Madurai is directed to depute a team of Doctors, consisting of not less than three registered medical practitioners to examine Mariammal and find out,

a) the duration of pregnancy;

b) to ascertain as to whether it is advisable to terminate her pregnancy at this stage; and

c) whether 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, as contemplated under Section 3(2)(i) of the Medical Termination of Pregnancy Act, 1971 and submit a report to this Court forthwith."

4.2. Again the case was listed on 22.07.2016.

4.3. After examination of the pregnant girl/R4, the Dean, Madurai Medical College, Madurai has submitted a report dated 21.07.2016 to this Court, wherein it has been stated as under:

"Single live intra uterine gestation of 21-22 wks"

4.4. Before medical examination, when the Doctors sought for consent of the minor girl for examination, the girl has stated that she is not willing to abort the foetus itself. Necessary endorsement also finds place in the report. Perhaps, that could have been the reason as to why with regard to the safety of abortion, no specific opinion has been expressed.

5. The contention of the father is that the continuance of the pregnancy would cause a risk of injury to the health of the girl, as the pregnancy is on account of rape committed on her. Such unwanted pregnancy would constitute a grave injury to the mental health of the daughter and therefore, it should be ordered to be aborted.

6. But the contention of the minor daughter is that the pregnancy was not out of coercion, but out of voluntary sexual intercourse between her and the 5th respondent and she has the total and complete pleasure in carrying the foetus and therefore, there should be no order for abortion.

7. In order to appreciate the contentions raised, it is necessary to look into Section 3 (2) of the Medical Termination of Pregnancy Act. Before deciding this issue, it is equally important to find out whether the petitioner's daughter was a minor on the date of alleged rape and whether the consent of the petitioner's daughter is mandatory before ordering termination of pregnancy at the request of the father.

"Section 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 twelve weeks if 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 a risk to the life of the pregnant woman or of grave injury to 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.

Explanation 1.-Where any, pregnancy is alleged by the pregnant woman to have

been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation 2.-Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(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 reasonable 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 lunatic, shall be terminated except with the consent in writing of her guardian.(b) Save as otherwise provided in C1.(a), no pregnancy shall be terminated except with the consent of the pregnant woman."

8. The issue regarding necessity/importance of consent of the minor girl has to be considered in the light of rights made available to children under the International Conventions and the Indian Law.

9. The United Nations Convention on the Rights of the Child (UNCRC) providing for the rights of children cover all civil, political, social, economic and cultural rights of every child.

a) Right to Survival: A child's right to survival begins before a child is born. According to Government of India, a child life begins after twenty weeks of conception. Hence the right to survival is inclusive of the child rights to be born, right to minimum standards of food, shelter and clothing, and the right to live with dignity.

b) Right to Protection: A child has the right to be protected from neglect, exploitation and abuse at home, and elsewhere.

c) Right to Participation: A child has a right to participate in any decision making that involves him/her directly or indirectly. There are varying degrees of participation as per the age and maturity of the child.

d) Right to Development: Children have the right to all forms of development: Emotional, Mental and Physical. Emotional development is fulfilled by proper care and love of a support system, mental development through education and learning and physical development through recreation, play and nutrition.

10. Before deciding the issue regarding the consent of the pregnant girl, whether she was a minor or major on the date of the alleged occurrence and as on date of production before this Court are material issues to be considered.

Minority/Majority:

11. During the course of enquiry, this Court directed the parents to produce the Birth Certificate of the so called victim girl and it was produced. From the Birth Certificate, it is evident that the date of birth of victim girl is found as 14.05.1998. The date of her missing was 13.02.2016. The date on which the victim girl was secured was 13.04.2016. On 15.04.2016, a report by the Doctor has been given stating that the victim girl was pregnant by 14 weeks. Therefore, the occurrence of sexual intercourse ought to have happened around January, 2016. Therefore, at the time of occurrence, she might have been approximately aged 17 years 8 months, but on the date of production before this Court, her age was above 18 years.

11.1. The date of birth of alleged juvenile in conflict with law is 08.08.1998 as found in the Transfer Certificate. On the date of complaint of missing, he was aged about 17 years 6 months.

11.2. Therefore, on the date of occurrence, both of them were minors and on the date of production before this Court, both of them were above 18 years of age.

12. Now the next question is, when the victim girl was minor at the time of incident, and when the victim girl was a major on the date of production before this Court, when she was pregnant, whether consent of the victim girl is essential in deciding the issue regarding termination of her pregnancy.

13. Obviously, the victim girl was not in a position to express herself completely and freely, as she was depending upon her parents at this crucial stage of pregnancy as well as in need of moral support. Therefore, she was not in a position to engage a counsel for herself, though she had a different opinion with regard to retention of her pregnancy. Therefore, this Court thought of getting assistance to the Court by appointing an Amicus Curiae. Accordingly, Mr. K.P.S. Palanivel Rajan was appointed as Amicus Curiae.

14. Learned counsel for the petitioner invited the attention of this Court to Section 4(a)(b) of the Medical Termination of Pregnancy Act, 1971 under which it is stated that save as otherwise provided in Clause (a) [reference is to Clause 4(a)], no pregnancy shall be terminated except with the consent of the pregnant woman. Section 4(a)(b) is already extracted supra.

15. Under the Indian Penal Code, termination of pregnancy is an offence. To save the registered medical practitioners from the penal offences, Section 3 of Medical Termination of Pregnancy Act, 1971 provides for exceptions under which termination is not an offence. In other words, Section 3 of the Medical Termination of Pregnancy Act, 1971 is an enabling provision/saving provision to save the registered medical practitioner from the purview of the Indian Penal Code. Termination of pregnancy under the provisions of the Act is not the rule, but it is only an exception. Under Section 3(2), there can be no termination of pregnancy, if the length of pregnancy had exceeded 20 weeks. Only exception is found in Section 5 under which pregnancy can be terminated to save the life of the pregnant woman, if the opinion of the medical practitioner is formed in good

faith.

16. The entire scheme of the Act show that the provisions are intended to save the pregnant woman. So far as the medical practitioners are concerned, if they find that the pregnant woman happens to be a minor, they must take care to get the consent of the guardian in writing. Whether consent of the minor can be dispensed with, if she is found to be below 18 years of age is the issue under challenge. In other words, whether Sub-Section 4(a) can be understood as dispensing with the consent of the pregnant woman if she is below 18 years of age, is the crucial issue for consideration.

17. At the time of conception, no doubt, the petitioner's daughter was below 18 years of age, but she had attained 18 at the time of hearing by this Court. This is a case where, not even a forced pregnancy or unwanted pregnancy is alleged by the victim girl.

18. It is not the case of the victim that the pregnancy would give her the feeling of the bearing the violence or aggravating her mental trauma. The victim girl seems to be mature enough to understand the implication of the pregnancy. Under such circumstances, whether choice of motherhood can be deprived to her, especially when her answers to the Court (in front of the parents of both parties and the respective counsels) gave satisfaction to the Court that the decision taken by her to retain the pregnancy had been taken on account of informed decision knowing fully well about the implication of the pregnancy.

19. In English Law, the opinion of the parents or natural guardians in the matter of abortion is irrelevant and if the minor girl is capable of understanding the implication, her opinion is quite relevant and important.

19.1. The American Law takes into account the rights of the minor vis-a-vis the maturity level. In *Denforth's case* (49 L.Ed.2d 788), it was held (1) that mature minors have a right to make their own decisions about abortion without parental involvement; (2) that mature and immature minors must, as a matter of constitutional law, have the opportunity, through an alternative judicial or administrative procedure, to obtain an abortion without parental consent or consultation; and (3) that with respect to immature minors, the sole test must be their own best interests.

20. The provision under Section 4(a)(b) should be interpreted having regard to the objective of the Medical Termination of Pregnancy Act and having regard to the scheme of that, it can never be interpreted as dispensing with the consent of the minor in case the minor wants to retain the pregnancy.

21. This Court was conscious of the urgency involved in passing orders when the issue was with regard to termination of pregnancy. But, startling facts were presented to the Court one after the other. Only during enquiry, this Court decided to spend some time for enquiry, especially in the medical report itself, it had been mentioned that the victim girl was not willing to have the pregnancy

terminated and this Court decided to go by that report. At the end of the enquiry, the person responsible for pregnancy submitted that he had already married the victim girl and produced the photograph in support of the same. In fact, a memo has been filed on behalf of R5, submitting that he had married the victim girl on 14.02.2016 in Thiruavinankudi Murugan Temple at Palani. On hearing this statement made on 22.07.2016, both parties on both sides agreed that the foetus need not be aborted.

22. On account of twist and turns, this Court was driven to decide the next issue regarding the validity of marriage in terms of the provisions of The Prohibition of Child Marriage Act, 2006. Under the provisions of the said Act, the marriage is a void marriage, only if the circumstances prescribed under Sections 12 (a) to (c) exist. It is the case of the victim girl that such circumstances were not available in her case. Section 12 is extracted for convenient reference:

"12. Marriage of a minor child to be void in certain circumstances - Where a child, being a minor-

(a) is taken or enticed out of the keeping of the lawful guardian; or

(b) by force compelled, or by any deceitful means induced to go from any place; or

(c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void."

23. When the marriage itself is not shown to be a void marriage, then the request of the father to terminate the pregnancy of the daughter without the consent/concurrence of the daughter cannot be permitted.

24. Under such circumstances, the permission sought for by the father to terminate the pregnancy of his daughter is declined. Hence, the petition deserves to be dismissed.

25. Though it was not difficult to take a decision even at the initial stage, because of the fact that the daughter of the petitioner did not want to get her pregnancy terminated, still, it presented a lot of difficulties having regard to the issue raised regarding constitutional validity of certain sections of POCSO Act.

26. Originally, the age of consent with regard to forcible sexual intercourse was 16 under Section 375 of the Indian Penal Code, which was later raised to 18. Under the POCSO Act, the consent of victim is immaterial uptill her age of 18. Apprehension was expressed that many parents, who do not accept marriage of their daughter are likely to prefer false cases against the partner of the girl. The study by the National Law School, Bangalore was brought to the notice of the Court and it is appropriate to extract important observations in the report.

"The study by the National Law School, Bangalore, has shown that in 10 percent of the cases filed under the Protection of Children from Sexual Offences Act, the

accused was in a relationship with the victim. In another 19 percent, the two said they were already married.

In a significant number of cases, we found that the girl had left her house and gone away with her boyfriend, after which the (girl's) parents turned to the law. The tragedy of Pocso is that under the guise of protecting children, minors are being dragged into the criminal justice system and the resulting trauma," said Swagata Raha, one of the authors of the study."

27. The Protection of Children from Sexual Offences Act, 2012 (POCSO Act), defines a "child" to mean "any person below the age of eighteen years" and raised the age of consent from 16 years under the Indian Penal Code (IPC) to 18 years. The Act adopted a protectionist approach under the assumption that a uniform age of consent would be in accordance with the UN Convention on the Rights of the Child, 1989.

28. In the UK, the age of consent is 16 years. In the US, it varies from 16 to 18 across states. It is 14 years in Germany and Italy, and 15 in France.

29. The National Law School team examined judgments, court proceedings and also spoke to the lawyers and the victims. In absolute numbers, 555 cases ended in acquittals and only 112 led to convictions.

29.1. The National Commission for Protection of Child Rights had in 2010 proposed that any consensual sexual act should not be an offence when it involves two persons who are both above 14 and are either of the same age or the age difference is not more than three years.

30. In *Teddy Bear Clinic for Abused Children v. Minister of Justice and Constitutional Development* [2013] ZACC 35, the Constitutional Court of South Africa confirmed that provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, which criminalised consensual sexual conduct of adolescents above 12 years and below 16 years, were unconstitutional. The imposition of criminal liability on adolescents engaging in consensual sexual conduct was opposed to the right to dignity, right to privacy, and contrary to the best-interests principle. It observed that the provisions "...criminalise a wide range of consensual sexual conduct between children: the categories of prohibited activity are so broad that they include much of what constitutes activity undertaken in the course of adolescents' normal development.... the existence of a statutory provision that punishes forms of sexual expression that are developmentally normal degrades and inflicts a state of disgrace on adolescents."

Child marriage prohibition:

31. The Prohibition of Child Marriage Act, 2006 (PCM Act) seeks to prohibit the solemnization of marriages of girl below the age of 18 years and boys below the age of 21 years. The Act prescribes penalties for the solemnization, promotion, and allowing of child marriages. A male above 18 years of age can be punished

under the Act for contracting a marriage with a girl under 18 years. The Act is, however, silent on sexual relations in a child marriage. It extends legitimacy to children born of child marriages thus indirectly acknowledging sexual intercourse within a child marriage. Under the Indian Penal Code, 1860 (IPC), sexual intercourse by a man with his wife above 15 years of age, is an exception to rape. The Criminal Law Amendment Act, 2013 raised the age of consent to 18 years but did not disturb this exception. As a result, sexual intercourse with a wife above 15 years of age and below 18 years of age will not amount to rape under the IPC.

32. Even though legitimacy is attached to children born of child marriages, the Complications and dangers of teenage Pregnancy/Negative impact of child marriage/unintended/unplanned/unwanted/unwarranted pregnancies caused on account of sexual relationship, cannot be ignored:

33. The teenage pregnancy has a serious impact not only on the pregnant woman, but also on parents and the effect is very grave and long-lasting. The medical, psychological, economical and social impact of early child bearing are significant especially when the pregnant woman remains unmarried. Early child bearing harms the health of both the mother as well as the child. It goes to the extent of causing maternal mortality. It is reported that teenage deliveries are complicated by obstructed labour and other problem. The children born of such pregnancy suffer low weight, low educational facilities, abandonment, caught in a cycle of poverty and thereby losing development, upliftment and social recognition.

34. Therefore, it is time that child marriage should be prohibited, but the question is what should happen to the marriage which is already performed due to lack of awareness?

35. Learned counsel appearing as Amicus Curiae to assist the Court pointed out that the attention of the Standing Committee was invited on the aspect of consent and the Committee expressly rejected the suggestion on the following reasoning:

"6.9. The Committee has also a word of caution. By having the element of consent, the focus would be on the victim which would invariably lead to revictimisation of the victim in the hands of the justice delivery process and would be especially problematic when dealing with children. The Committee would like to point out that a great deal of jurisprudence supports the theory that law should move away from this classical approach of trials in such cases and focus on the conduct of the accused and the circumstances surrounding the offence rather than the conduct of the victim thereby obviating the necessity of lengthy cross-examination of the victim on the issue of consent."

36. This Court, in the case of T. Sivakumar v. Inspector of Police, Thiruvallur Town Police Station, Thiruvallur District and Others, reported in (2011) 4 MLJ (Cri.) 315, gave a finding that until a female child of child marriage elects to

accept the marriage on attaining the age of 18 years, her custody cannot be entrusted to the male party to the marriage. There is also a finding that the minor girl, who entered into the marriage, which is prohibited under Section 3 of the Prohibition of Child Marriage Act is not an offender.

37. The problems associated with teenage is manifold, which is in the form of teenage love, teenage marriage, teenage suicide and teenage murder all on account of so called teenage romance. When the teenage boys and girls have the barrier to discuss it with their family members, it is appropriate that there should be a team of experts consisting of Doctors/Lawyers/Psychologists/Psychiatrists/Welfare Experts/Welfare Counsellors, who would be in a position to confidentially guide them and counsel them. This body is the need of the hour in every school and college. This Court endorse the view expressed by the District Judge of Delhi by name Dharmesh Sharma, who made a clarion call for creating public awareness about the impact of girl or boy marrying at a tender age or indulging in unsafe sexual activities.

38. Learned counsel appearing for the Government has also highlighted the efforts taken by the Government to create awareness regarding the evils arising on account of child marriages.

39. The right to autonomy to the woman and to decide what to do with their own bodies, including whether or not to get pregnant, and if pregnant whether to retain the pregnancy and to delivery the child, i.e. the right to motherhood is towards their empowerment and it is in accordance with the International Covenant on Human Rights. Considering the right to life, which includes the right to beget a life and the right to dignity, the right to autonomy and bodily integrity, the foetus cannot be ordered to be aborted against the wishes of the victim girl.

40. Whether the foetus carried is a pain or pleasure is the subjective opinion of the minor girl and the girl has formed an opinion that it is the total delight, when India has ratified the conventions on the rights of the Child and when the consent of the victim girl cannot be dispensed with while aborting pregnancy, this Court has no option except to decline permission to terminate pregnancy, leaving it open the question, who is to bear the cross?

41. In the result, this Writ Petition is dismissed. No costs.

42. These contradictions/controversies/conflict, which touch upon the constitutional validity of POCSO Act cannot be decided by this Court sitting single, as the matter involves constitutional validity or to be decided by the Division Bench as ordered by the Hon''ble Chief Justice of this Court. If deemed appropriate, the Hon''ble Chief Justice would consider posting this matter before the Division Bench for deciding the constitutional validity of POCSO Act.

43. This Court places on record its appreciation to Mr. D. Muruganandam, learned Additional Government Pleader appearing for the respondents 1 to 3, Mr. K.P.S. Palanivel Rajan, learned counsel appearing as Amicus Curiae, Mr. N.

Adithyavijayalayan learned counsel for Mr. D. Venkatesh, learned counsel for the petitioner and Mr. C. Bethana Samy, learned counsel appearing for R5 for having rendered their valuable assistance in arriving at the truth and also in disposing of this case.

44. Fee of Rs. 10,000/- (Rupees Ten Thousand only) payable to the learned Amicus Curiae shall be paid by the Legal Services Authority attached to this Court within a period of two weeks from the date of receipt of a copy of this order.