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## Securing Reproductive Justice in India: A Casebook

Aparna Chandra

Mrinal Satish

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SECURING  
**REPRODUCTIVE  
JUSTICE**  
IN INDIA

A CASEBOOK

**Aparna Chandra, Mrinal Satish,  
and the Center for Reproductive Rights**

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Policy and Governance

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### **CENTRE FOR CONSTITUTIONAL LAW, POLICY, AND GOVERNANCE, NATIONAL LAW UNIVERSITY, DELHI**

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**Aparna Chandra, Mrinal Satish,  
and the Center for Reproductive Rights**

Assisted by **Meher Dev and Shreya Shree**

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# CHAPTER ONE

# Introduction: Constitutional and Human Rights Framework for Reproductive Justice in India

Women's<sup>1</sup> life circumstances, their ability to access and exercise their rights, their mental physical and emotional health, and their ability to shape and control their own lives and destiny, rely to a crucial extent on their reproductive freedom and wellbeing. This is why, in the 1994 International Conference on Population and Development Programme of Action, the global community resolved to make reproductive health and rights the cornerstone of policies on population and development,<sup>2</sup> and recognized reproductive rights as the human right to "decide freely and responsibly the number, spacing and timing of [one's] children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes [the] right to make decisions concerning reproduction free of discrimination, coercion and violence..."<sup>3</sup> Reproductive rights are essential to the realization of a wide range of human rights – rights to life, liberty and security, health, non-discrimination and equality, privacy, and freedom from torture and ill treatment, to name a few.<sup>4</sup>

Together, these rights encompass both freedoms and entitlements that must be ensured by states to guarantee women's and girls' autonomy, bodily integrity, and dignity. A recognition of women's reproductive rights in law is insufficient without adequate state and social structures for providing women the material ability to access these rights and exercise this freedom. For example, women who not have the economic ability or decision-making power within the family or society to access contraceptive services may be constrained in their ability to prevent frequent or early pregnancy, which could jeopardize their life and health. For this reason, a focus on women's legal rights in the realm of reproduction has to be supplemented with re-structuring the material circumstances in which reproductive choices can be effectively made. Economic and social justice for women is therefore crucial for securing their reproductive rights just as reproductive rights are crucial for women's economic and social wellbeing. Recognizing the inherent connection between reproductive rights and economic and social justice, women's movements around the world today speak of *reproductive justice*<sup>5</sup> to call for a human rights-based approach to ensuring women's and girls' sexual and reproductive health and autonomy. The human rights framework affirms the link between reproductive rights and women's and girls' enjoyment of the spectrum of civil, political, economic, social, and cultural rights, and recognizes that obligations to respect, protect, and fulfil reproductive rights include both limits on state action (negative measures) as well as positive measures. Such proactive measures include steps to create an enabling environment by ameliorating social conditions such as poverty and unemployment.<sup>6</sup> Further, the human rights framework affirms the role of the judiciary, among other actors, in ensuring access to justice and accountability for reproductive rights.<sup>7</sup>

In India, courts have been at the forefront of recognizing and securing reproductive justice for women. In cases spanning issues such as maternal health, access to contraception, forced and involuntary sterilization, abortion, sexual and reproductive health rights of adolescents, employment discrimination on grounds of pregnancy or childcare, among others, Indian courts have developed robust jurisprudence that not only reflects but also advances global human rights standards. They have also innovated remedies to attempt structural change and ensure that these rights are realized in practice. While court decisions are not uniform, several trailblazing rulings have laid the foundation for Indian courts to continue to play a strong role in preventing and addressing ongoing violations of these rights.

Though issues implicating reproductive justice concerns come up frequently before Indian courts, there has been little sustained effort to study this entire area of adjudication in a holistic manner.<sup>8</sup> In an effort in this direction, this book aims to bring together judgments and orders by the Indian Supreme Court and High Courts across various reproductive justice domains. This holistic overview aims to provide a ready reference for those working on policy, advocacy, adjudication and academic interventions around issues of reproductive justice. To enable such engagement, the book includes judgments

and orders that facilitate securing reproductive justice as well as those that present an obstacle to its realization. The aim is to enable the reader to understand the trajectories of development in the jurisprudence around reproductive justice, and to provide the base material for interrogating this jurisprudence.

Courts in India are continuously engaged in adjudicating cases pertaining to reproductive justice – we ourselves did not realize the extent of this engagement till we began work on this casebook. Our research was carried out in 2017 and is current up to the end of that year. The writing, editing, extracting, reviewing and other work associated with the production of the casebook was carried out in 2018 and the early part of 2019. In this period, courts across the country delivered many more judgements that could have formed part of the book. Some judgments, such as the Supreme Court's decisions in *Navtej Johar v. Union of India*<sup>9</sup> and *Joseph Shine v. Union of India*<sup>10</sup> were of such crucial importance to a range of reproductive justice issues that we felt the need to include these cases despite them being outside the time period of our research. However, the casebook does not claim to comprehensively cover cases decided after 2017. The casebook covers cases that engage substantively with the principles of law around questions of reproductive justice. It therefore excludes cases in which Court orders only direct the State to provide a compliance report (even though seeking such a compliance report is a powerful mechanism for securing implementation of schemes, policies and court orders).

The book is divided into 12 chapters, that detail, sequentially, the Courts' jurisprudence on the following issues:

- Constitutional and Human Rights Framework for Reproductive Justice in India
- Contraceptive Information and Services and Government Population Policies
- Sex Determination
- Surrogacy and Assisted Reproductive Technologies
- Medical Termination of Pregnancy
- Adolescent Reproductive Rights and Criminal Laws
- Disability and Reproductive Rights
- Reproductive Rights of Incarcerated Persons
- Sexuality and Reproductive Decision-Making in Matrimonial Laws
- Maternal Health
- Medical Negligence, Consumer Protection, and Reproductive Health
- Pregnancy, Maternity and Child Care Leave, and Employment

Except for the introduction, which reviews the full body of case law from a constitutional and human rights perspective, each chapter begins with a cover note which lists the issues that have been adjudicated on the topic under discussion. The cover note provides a broad overview of cases that have been adjudicated on the topic, the issues in each case, and the court's broad holding. Since courts often rely on international human rights material to adjudicate reproductive justice cases, each cover note also directs the reader to relevant human rights norms and standards applicable to the issues under discussion in that chapter. This section of each chapter provides reference to human rights sources commonly cited by courts in India on reproductive rights, including United Nations treaties signed and ratified by India, treaty-monitoring bodies' general comments/recommendations and jurisprudence, thematic reports by U.N. human rights experts and expert bodies, and regional human rights jurisprudence.<sup>11</sup>

Following the cover note, each chapter contains extracts from the cases mentioned in the cover note. These extracts are arranged chronologically. They have not been edited for grammatical, spelling or typographical errors. Each extract is preceded by a small headnote to indicate the factual and procedural history of the case and the relevant issue(s) that the case addresses, in order to place the case in its context.

To set the context for the discussions in each of these chapters, the remainder of this introduction describes judicial interventions that address constitutional norms implicated in securing reproductive justice in India.

# 1. Constitutional and Human Rights Foundations of Reproductive Justice in India

The Constitution of India guarantees the right to life with dignity,<sup>12</sup> the rights to health,<sup>13</sup> to personal liberty (including sexual, reproductive and decisional autonomy),<sup>14</sup> the right to privacy,<sup>15</sup> the right against torture or cruel, inhuman and degrading treatment,<sup>16</sup> the right to equality - specifically the right to non-discrimination on grounds of sex,<sup>17</sup> and the right to equality of opportunity in public employment,<sup>18</sup> amongst other rights. The Constitution also empowers the Supreme Court and High Courts to provide remedies for violation of fundamental rights.<sup>19</sup> All these rights are implicated in securing reproductive justice for women and Courts in India have referenced these rights in adjudicating reproductive justice cases. Courts have also relied heavily on international human rights norms in determining the contours and contents of rights under the Indian Constitution, and correspondingly, the State's obligation to secure reproductive justice.<sup>20</sup>

Each chapter of this book highlights the constitutional issues raised in cases on the topic under discussion. In this chapter, we discuss the broader constitutional themes that have emerged from such cases and present the related human rights framework.<sup>21</sup>

The Chapter lists cases that discuss:

1. The Right to Privacy and to Sexual and Reproductive Autonomy
2. The Right to Life and Health, including Reproductive Health
3. The Right to Equality and Non-Discrimination

## 1.1 The Right to Privacy and to Sexual and Reproductive Autonomy

### 1.1.1 CONSTITUTIONAL NORMS

In *K.S. Puttaswamy v. Union of India*,<sup>22</sup> a nine-judge bench of the Supreme Court affirmed that the Indian Constitution guarantees the right to privacy as a fundamental right. The Court held that the right to privacy protects the ability of individuals to exercise control over vital aspects of their lives, including in matters relating to contraception and procreation. Various concurring opinions in this judgment addressed the impact of the right to privacy on aspects of a woman's reproductive capacity. In their respective opinions, Nariman and Chelameswar JJ. recognized that a woman's decision to procreate or to abort a pregnancy falls within the realm of her right to privacy. Chelameswar J. also affirmed that the right to make an informed choice regarding sterilization is also included within the right to privacy.<sup>23</sup> The Court further affirmed its ruling in *Suchita Srivastava v. Chandigarh Administration*,<sup>24</sup> that a woman's right to reproductive autonomy emanates from her right to privacy, dignity and bodily integrity under Article 21. In *Suchita Srivastava*, the Court had recognized women's right to make reproductive choices as part of the right to "personal liberty" under Article 21 of the Indian Constitution. This includes the right to refuse participation in a sexual activity; insist on use of contraceptive methods; adopt birth control measures; carry a pregnancy to its full term and raise children or seek abortion.

Following *Suchita Srivastava*, the Supreme Court has repeatedly stressed that the bodily integrity, personal autonomy and sovereignty of a woman over her body must be respected in relation to abortion.<sup>25</sup> In *Z v. State of Bihar*,<sup>26</sup> the Supreme Court relied on *Suchita Srivastava's* articulation of reproductive autonomy and linked it to the prohibition against torture. Finding that denial of termination of an unwanted pregnancy when a woman was otherwise entitled to such termination under the law causes "grave mental torture" and that such torture affects her dignity and corrodes her self-respect, the Court held that the denial of her statutory rights, would in these circumstances, entitle the woman to damages for the violation of her fundamental rights under Article 21. In *Z*, the Court also emphasized that for adult women who are not suffering from mental illness, the Medical Termination of Pregnancy Act, 1971 (MTP Act), which governs induced abortion, only requires the woman's consent for abortion. It is interesting to note that prior to *Suchita Srivastava*, the Supreme Court had held, in the context of divorce petitions, that not seeking spousal consent for abortion amounted to "cruelty" against the husband.<sup>27</sup> However, in more recent cases such as *Anil Kumar Sharma v. Dr. Mangla Dogra*,<sup>28</sup> the Supreme Court refused to interfere in a decision of the Punjab and Haryana High Court<sup>29</sup> which had held that a husband is not entitled to damages from his wife or her doctor on account of the wife's decision to terminate a pregnancy without his consent. In reaching its decision, the Court held that a husband cannot compel his wife to conceive or give birth to a child against her will. This more recent line of cases, rooted in the recognition of a woman's reproductive autonomy, therefore calls into question the basis of the previous dictum that termination of pregnancy without spousal consent amounts to cruelty within a marriage.

Along these lines, the Bombay High Court, in **High Court on its Own Motion v. State of Maharashtra**,<sup>30</sup> has recognized that forcing a woman to continue with an unwanted pregnancy violates her right to bodily integrity and is deleterious to her mental health. The Court held that a woman's decision to procreate or abstain from procreating flows 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 of the Indian Constitution. The Court recognized that a foetus is not a rights-bearing entity, and its interests cannot be put on a higher pedestal than the right of a living woman. Thus, according to the Court, the fundamental right under Article 21 of the Indian Constitution protects life and personal liberty which covers a woman's decision to terminate an unwanted pregnancy.

In its recent decisions,<sup>31</sup> the Supreme Court has emphasized women's sexual autonomy as a facet of their fundamental rights under the Indian Constitution. In his concurring opinion rendered in **Joseph Shine v. Union of India**,<sup>32</sup> Chandrachud J. recognized that sexual autonomy of a woman forms part of her "inviolable core" and is a manifestation of her fundamental right to privacy, dignity and liberty under Article 21 and right to equality under Article 14. In this case, Section 497 of the Indian Penal Code, 1860 that criminalised adultery was declared unconstitutional, *inter alia*, on the grounds that it curtailed the sexual agency of women.

Without reproductive autonomy, a woman can never have complete sexual autonomy. The Supreme Court recognized the interrelatedness of sexual and reproductive autonomy in **Independent Thought v. Union of India**.<sup>33</sup> In striking down an exemption from criminal liability for rape within marriage where the victim was between 15-18 years of age, the Court held that depriving a girl the right to deny sexual intercourse to her husband violates the bodily integrity of the girl child and her right to reproductive choice.

This recent line of cases on sexual and reproductive autonomy call into question the reasoning and dictum of the courts in cases such as **Javed v. State of Haryana**,<sup>34</sup> where the Supreme Court refused to recognize the right to decide the number of children one has, as a facet of reproductive autonomy protected by Article 21 of the Indian Constitution. Instead, the Court emphasized the goals of population control and socio-economic welfare, which according to the Court justified a law that disqualified persons with more than two children from being elected to certain local government posts.

Courts have engaged with privacy and the right to life with dignity in cases on menstruation and women's rights. In **Neera Mathur v. Life Insurance Corporation of India**,<sup>35</sup> the Court directed the Life Insurance Corporation to delete the "embarrassing if not humiliating" questions in their employee declaration form regarding menstruation, pregnancy, abortion and childbirth. The Court termed seeking such information a denial of an employee's modesty and self-respect and an unwarranted intrusion into personal issues of the employee.

More recently, in **Indian Young Lawyers Association v. State of Kerala**,<sup>36</sup> Chandrachud J. expressly acknowledged that the menstrual status of a woman is an attribute of her privacy, and that enforcing any segregation or exclusion on this basis violates her right to life with dignity. In his concurring opinion, he stated that the practice of prohibiting entry to women of menstruating age (between 10 to 50 years) violates the prohibition of untouchability contained in Article 17 of the Indian Constitution. Justice Chandrachud held that such social exclusion of women legitimized the notions of "purity and pollution" associated with menstruation and was a manifestation of the practice of untouchability that is forbidden under Article 17.

### 1.1.2 HUMAN RIGHTS NORMS

Autonomy is a core component of the rights to life, privacy and liberty, among others, and includes individuals' rights to make informed decisions about their bodies, including their reproductive and sexual lives. In human rights law, the right to reproductive autonomy is rooted in the right to privacy and the right to determine the number and spacing of one's children. The right to privacy is enshrined in Article 17 of the International Covenant of Civil and Political Rights (ICCPR).<sup>37</sup> The Human Rights Committee has repeatedly recognized the state obligation to ensure reproductive autonomy arises from the right to privacy.<sup>38</sup>

The right to determine the number and spacing of children is articulated in Article 16 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).<sup>39</sup> The CEDAW Committee has stated that "the right to autonomy [for women] requires measures to guarantee the right to decide freely and responsibly on the number and spacing of their children."<sup>40</sup> It has also expressed concern where countries fail to ensure the reproductive rights of women, which include "the right of women to autonomous decision-making about their health."<sup>41</sup>

Full exercise of autonomy requires that choices are meaningful, not limited by discrimination or lack of opportunities. Women are unable to exercise their reproductive autonomy where laws, policies, and practices restrict this autonomy, imposing arbitrary or unlawful restrictions on their right to access sexual and reproductive health services. Impermissible barriers to reproductive autonomy include third party authorization requirements—such as those required from spouses, parents, guardians, judges or health authorities—for reproductive health services.<sup>42</sup> The Human Rights Committee has found that the failure to act in conformity with a woman's decision to undergo a legal abortion is a violation of the right to privacy, including when the judiciary interferes with such a decision.<sup>43</sup>

Further, women also experience violations of the right to reproductive autonomy when they are subjected to violence or coercion. This may include forced reproductive health procedures such as forced or coerced sterilization, gender-based violence, and harmful traditional practices such as forced marriage that limit women's opportunities for decision-making, particularly around reproduction and sexuality.<sup>44</sup> Treaty monitoring bodies have also recognized that states must guarantee women the right to be free from violence when seeking maternal health services.<sup>45</sup>

In certain cases, human rights law recognizes that denial of reproductive autonomy as a result of violence or coercion may constitute a violation of the right to freedom from torture and cruel, inhuman and degrading treatment (ill treatment).<sup>46</sup> The right to freedom from torture and ill treatment is the subject of the Convention against Torture and other forms of Cruel, Inhuman and Degrading Treatment (CAT) and also enshrined in Article 7 of the ICCPR. While India has only signed but not ratified CAT, it is still obligated as a signatory to refrain from acts that are contrary to CAT.<sup>47</sup> The Committee against Torture, which monitors CAT, has confirmed that women are vulnerable to torture and ill treatment in the context of “deprivation of liberty [and] medical treatment, particularly involving reproductive decisions....”<sup>48</sup> The Human Rights Committee has also found that, in certain circumstances, denial of access to abortion services can lead to physical or mental suffering that amounts to ill-treatment.<sup>49</sup> Treaty monitoring bodies have also found that coerced and forced sterilization and, in some cases, the disrespect and abuse women face in health facilities can amount to ill treatment within the meaning of this Convention.<sup>50</sup>

## 1.2 Rights to Life and Health, Including Reproductive Health

### 1.2.1 CONSTITUTIONAL NORMS

Denial of reproductive rights, including specifically access to reproductive health care, has been found by courts to violate the protection of the right to life under Article 21 of the Constitution of India. Courts have established that the right to life includes the duty to preserve life<sup>51</sup> and to protect dignity.<sup>52</sup> In *Sandesh Bansal v. Union of India*, the High Court of Madhya Pradesh found that “shortage not only of the infrastructure but of the manpower” to implement maternal health schemes<sup>53</sup> led to the “inability of women to survive pregnancy and child birth [which] violates her fundamental right to live as guaranteed under Article 21 of the Constitution of India.”<sup>54</sup>

The Supreme Court of India has recognized the right to health as an aspect of the right to life with dignity.<sup>55</sup> Extending this to the realm of reproduction, the Court has recognized women's right to reproductive health as also being a facet of their Article 21 rights. In *Devika Biswas v. Union of India*,<sup>56</sup> the Supreme Court adopted international human rights norms with respect to reproductive health and stated that the right to reproductive health is “the capability to reproduce and the freedom to make informed, free and responsible decisions. It also includes access to a range of reproductive health information, goods, facilities and services to enable individuals to make informed, free and responsible decisions about their reproductive behaviour.”<sup>57</sup> The Court also affirmed the international human rights norm that “[t]he right to sexual and reproductive health is an integral part of the right of everyone to the highest attainable physical and mental health.”<sup>58</sup> Reiterating its ruling in *Suchita Srivastava* that reproductive autonomy is a facet of a woman's personal liberty guaranteed under Article 21, the Court held that reproductive rights include the right to make a choice regarding sterilization on the basis of informed consent and free from any form of coercion.

Similarly, in *Laxmi Mandal v. Deen Dayal Harinagar Hospital*,<sup>59</sup> the Delhi High Court stated that a woman's right to health, including her right to reproductive health, is a facet of her “inalienable survival rights” under Article 21 of the Constitution.<sup>60</sup> Relying on a range of international human rights instruments, the Court emphasized the interrelatedness of civil and political and socio-economic rights to state that the proper implementation of schemes designed to give effect to these rights was essential for meeting the state's obligations arising from these rights. Similarly, in *Kali Bai v. Union of India*,<sup>61</sup> the Chhattisgarh High Court held that the right to health includes the right to access public health facilities and



the right to a minimum standard of treatment and care through such facilities. Noting that such right to health and the reproductive rights of women are inalienable components of Article 21, the Court emphasized that the identification of high-risk pregnancies, and the prompt referral of cases needing specialist care to institutions equipped to provide the same, were “indefensible components of access to protection and enforcement of reproductive rights.”<sup>62</sup>

The denial of reproductive rights also risks a woman’s broader physical, mental, and social well-being. The MTP Act itself recognizes and presumes that carrying certain unwanted pregnancies constitutes “a grave injury to the mental health” of the pregnant woman.<sup>63</sup> The Bombay High Court, in *High Court on its Own Motion v. State of Maharashtra*,<sup>64</sup> recognized that forcing a woman to continue with any unwanted pregnancy is deleterious to her mental health. The Bombay High Court also clarified that the right to life accrues only post-birth, stating: “a person is vested with human rights only at birth; an unborn foetus is not an entity with human rights.”<sup>65</sup> In cases such as *Meera Santosh Pal v. Union of India*,<sup>66</sup> *Sarmishtha Chakraborty v. Union of India*,<sup>67</sup> and *Mrs. X v. Union of India*,<sup>68</sup> the Supreme Court has emphasized that a pregnant woman has the right to preserve her life and protect herself against grave risk to her physical or mental health, and as such, cannot be mandated to continue with a pregnancy that may endanger her life, or her physical or mental health.

## 1.2.2 HUMAN RIGHTS NORMS

Under human rights law, the right to life is enshrined in the ICCPR,<sup>69</sup> and the right to health is protected under the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>70</sup> CEDAW<sup>71</sup> offers legal protection against discrimination in the enjoyment of women’s right to health, including non-discrimination in access to healthcare.<sup>72</sup>

The right to life obligates governments to ensure women are not at risk of preventable deaths due to legal restrictions or other barriers to reproductive health care. The Human Rights Committee, the body which monitors the implementation of ICCPR, has stated in General Comment 6 that the right to life obligates states to take measures to safeguard individuals from arbitrary and preventable losses of life<sup>73</sup> and should not be narrowly interpreted.<sup>74</sup> This includes taking steps to protect women against the unnecessary loss of life related to pregnancy and childbirth<sup>75</sup> by ensuring that reproductive health services such as abortion, maternal health care, and contraceptive information and services are accessible.<sup>76</sup> In General Comment 36 on the right to life, the Human Rights Committee has recognized that states must ensure that any restrictions on abortion do not violate the right to life of the pregnant woman or girl, including by imposing criminal sanctions against women and girls for undergoing abortion or medical providers for assisting them.<sup>77</sup> International human rights law recognizes the right to life as accruing only at birth. Under human rights law, any state prenatal protections must be consistent with and cannot violate women’s human rights, including their right to life.<sup>78</sup>

The right to life is closely linked to the right to the highest attainable standard of health, which includes sexual and reproductive health. The Committee on Economic, Social and Cultural Rights (ESCR Committee), the body which monitors implementation of the ICESCR, has stated that the right to sexual and reproductive health includes freedoms and entitlements. The freedoms include “the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one’s body and sexual and reproductive health.”<sup>79</sup> The entitlements include “unhindered access to a whole range of health facilities, goods, services and information.”<sup>80</sup> States must ensure both the underlying determinants of health, such as nutrition and education, as well as the social determinants of health, which include social inequalities as manifested in laws, institutional arrangements and social practices that prevent individuals from effectively enjoying in practice their sexual and reproductive health.

The human rights framework requires that all health facilities, goods, and services—including sexual and reproductive health-related facilities, goods, and services—must be available, accessible, acceptable, and of good quality.<sup>81</sup> This framework requires states to fulfil the following principles within the right to health, including the right to sexual and reproductive health:

- **Availability:** States must ensure adequate training of health care providers, a sufficient number of health facilities throughout the country, adequate sanitation and infrastructure for sexual and reproductive health services, including in rural areas, and essential drugs, as defined by the World Health Organization (WHO) Model List of Essential Medicines.<sup>82</sup>
- **Accessibility:** States must ensure that sexual and reproductive health information and services are accessible by guaranteeing physical, economic, and information accessibility.<sup>83</sup>
- **Acceptability:** States must provide sexual and reproductive health care in a way that respects the rights to confidentiality and informed consent and is sensitive to gender and life-cycle needs. Such care must be respectful of the culture of individuals, including minorities; this requirement cannot be used to justify the refusal of tailored care to specific groups. Acceptability requires that provision of sexual and reproductive health care respects women’s dignity and is sensitive to their needs and perspectives.<sup>84</sup>

- **Quality:** Health services must be scientifically and medically appropriate, which requires skilled medical personnel, scientifically approved and unexpired drugs, sufficient hospital equipment, safe and potable water, and adequate sanitation.<sup>85</sup>

The ESCR Committee has recognized states' obligations "to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to ensure the full realization of the right to sexual and reproductive health."<sup>86</sup> Although the right to health is considered a right of progressive realization, there are minimum core obligations related to the provision of reproductive health services, which states must fulfil regardless of resource constraints. These core obligations include eliminating discrimination in access to health services, avoiding retrogressive measures, and providing essential medicines in accordance with the WHO Model List of Essential Medicines.<sup>87</sup>

## 1.3 Equality and Non-Discrimination

### 1.3.1 CONSTITUTIONAL NORMS

Discrimination against women on the basis of their reproductive capacity, pregnancy, childbirth or child care responsibilities, in the context of employment and educational opportunities has been held to violate women's right to equality and non-discrimination on the basis of sex protected under Articles 14, 15 and 16 of the Constitution. In so holding, courts have also invoked the State's obligations to promote the directive principles of state policy to provide just and humane conditions of work and maternity relief (Article 42) and make effective provisions to secure right to work and education (Article 41), as well as international human rights norms governing the field.

In *Air India v. Nergesh Meerza*,<sup>88</sup> the Supreme Court held that employment regulations requiring airhostesses to retire on their first pregnancy violated their right to equality under Article 14 of the Constitution. However, the Court justified the prohibition on marriage of airhostesses up to four years of service and termination of employment on third pregnancy on grounds of the overall health of airhostesses, goals under the family planning programmes, as well as in the interest of good upbringing of children.

Recently, in *Navtej Singh Johar v. Union of India*,<sup>89</sup> Chandrachud J. questioned the reasoning of the Court in *Nergesh Meerza*. *Inter alia*, he criticized the Court's approach in placing the entire burden of family planning and upbringing of children on women as a violation of their constitutional guarantee against non-discrimination on grounds of sex under Article 15 since it reinforces stereotypical gender norms. Reflecting this gender equality dimension of policies relating to reproduction, in *Devika Biswas*, the Supreme Court cautioned that sterilization policies that unduly emphasize and incentivize female sterilization would violate gender equality norms. The Court also highlighted the state's obligation to promote substantive equality and to ensure that socio-economic vulnerabilities are not exacerbated by its policies, or that reproductive freedom is not effectively denied because of socio-economic contexts which leave vulnerable groups with little meaningful choice. This recognition that policies operate differently based on social realities and hierarchies was noticeably missing in *Javed*, where the Court dismissed the argument that a provision disqualifying persons with more than two children from being elected to certain government officers would have a disproportionate impact on Indian women who often lack the autonomy to make reproductive choices in households controlled by men.<sup>90</sup>

Along similar lines, the Kerala High Court in *Neetu Bala v. Union of India*,<sup>91</sup> held that denial of employment to women solely on grounds of pregnancy was arbitrary and illegal and thus violative of Articles 14, 16 and 42 of the Indian Constitution. It further stated that such discrimination would amount to negation of India's obligations under the CEDAW, International Labour Organization's Maternity Protection Convention, and the Universal Declaration of Human Rights (UDHR)<sup>92</sup>.

Courts have also located maternity benefits including maternity leave as a facet of the guarantee of equality and non-discrimination. The Delhi High Court in *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*,<sup>93</sup> stated that although the directive principles of state policy are unenforceable, Article 42 can be used to determine the legal validity of the petitioners' claim to maternity benefits. The Court found that the Maternity Benefit Act, 1961 aims at achieving a just social order by providing all the facilities to women employees that they are entitled to in order to deal with the state of motherhood in a dignified and peaceful manner, without fearing penalties for forced absence during the pre-natal or post-natal period. The Court added the principles under Article 11 of CEDAW on the right to non-discrimination on grounds of marital status, pregnancy, child birth, or family care obligations, should be read into the employees' contract of service.

Similarly, the Delhi High Court in *Seema Gupta v. Guru Nanak Institute Management*,<sup>94</sup> held that provisions providing for maternity benefits under the employment and service regulations should be construed in the light of Articles 15, 41 and 42 of the Constitution and the obligations under UDHR and CEDAW. It stated that the case of an employee seeking extension of her maternity leave in line with employment regulations is not to be construed as a traditional case of enforcement of contract of service but an exercise of her fundamental rights.

The Delhi High Court in *Inspector (Mahila) Ravina v. Union of India*,<sup>95</sup> and Kerala High Court in *Mini K.T. v. Life Insurance Corporation of India*,<sup>96</sup> have held that forcing a female employee to choose between motherhood and employment violates her fundamental rights under Articles 14, 15 (1), 16(2) and 21 of the Constitution. The Delhi High Court held the right to reproduction and child rearing form an essential facet of the right to life under Article 21 and the directive principle under Article 42 reflects the constitutional commitment to provide all circumstances conducive for exercise of this right. Along similar lines, the Kerala High Court stated that motherhood forms an integral part of the dignity, status and self-respect of women. It further held that pleas of financial implications or organisational interest cannot be raised by employers to deny equality of opportunity or to penalise women employees who are unable to attend work due to “compelling family responsibilities” of child care.

Likewise, in the context of educational opportunities, the Karnataka High Court in *Jennifer A. v. ESIC College of Nursing and Ors.*,<sup>97</sup> and Delhi High Court in *Vandana Kandari v. University of Delhi*,<sup>98</sup> held that students who were unable to meet the minimum attendance requirement because of their pregnancy were entitled to concessions in attendance requirements in view of the directive principles under Articles 41 and 42. Both Courts held that denial of such relaxation to pregnant students would amount to making “motherhood a crime” and negate the constitutional guarantee of gender equality.<sup>99</sup> On the contrary, the Kerala High Court in *Jasmine V.G. v. Kannur University*,<sup>100</sup> opined that pregnancy is not a medical condition that arises unexpectedly and therefore, preferential treatment cannot be given to students who opt to become pregnant in the face of their educational commitments.

### 1.3.2 HUMAN RIGHTS NORMS

The right to equality and non-discrimination is found in every major international human rights treaty, including the ICCPR, ICESCR, and CEDAW.<sup>101</sup> The human rights framework recognizes that ensuring equality means addressing both formal and substantive inequality.<sup>102</sup> Human rights bodies have recognized the insufficiency of formal approaches to equality which only require ensuring that laws and policies treat all persons alike.<sup>103</sup> CEDAW and other human rights bodies have clarified that states are obligated to ensure substantive equality—that is, to address discriminatory power structures to address inequalities, recognize difference in how men and women experience rights violations due to discriminatory social and cultural norms, and ensure the equality of results and outcomes.<sup>104</sup> To ensure substantive equality, the CEDAW Committee, as well as other treaty monitoring bodies, urge states to “make more use of temporary special measures such as positive action, preferential treatment or quota systems.”<sup>105</sup> Further, states must eliminate prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”<sup>106</sup>

The right to non-discrimination obligates governments to ensure that women are able to equally enjoy their human rights.<sup>107</sup> Recognizing that women’s role in procreation exposes them to discrimination, CEDAW calls on states specifically to introduce special measures to protect women during pregnancy.<sup>108</sup> This requires taking measures to prevent discrimination against women in the field of work, including those arising on the grounds of marriage or maternity.<sup>109</sup> Such measures include prohibiting dismissal on the grounds of pregnancy or of maternity leave; prohibiting discrimination in dismissals on the basis of marital status; introducing maternity leave with pay or comparable social benefits without loss of former employment, seniority or social allowances; and encouraging provision of necessary social services to enable parents to combine family obligations with work responsibilities and participation in public life.<sup>110</sup>

International law recognizes that the deprivation of reproductive rights discriminatorily violates women’s ability to enjoy their other human rights, including their rights to life, health, and privacy. Human rights bodies have recognized that women’s right to non-discrimination in enjoyment of the right to life is violated, for example, where governments fail to protect women from arbitrary and preventable losses of life related to pregnancy and childbirth, which are risks only women face.<sup>111</sup> Similarly, states discriminatorily violate women’s right to health where “a health-care system lacks services to prevent, detect and treat illnesses specific to women.”<sup>112</sup> Women also experience discrimination in enjoyment of the right to privacy where governments “fail to respect women’s privacy with regards to the reproductive functions.” Human rights law recognizes that states must take action to prevent violations of women’s right to privacy by private actors, such as employers who conduct mandatory pregnancy tests prior to hiring women.<sup>113</sup>

States have an obligation to eliminate gender-based violence under the right to non-discrimination, including arising from denials of reproductive rights.<sup>114</sup> This obligation requires ensuring that women are not forced to seek unsafe abortion because of lack of access to appropriate reproductive health services, do not experience coerced sterilization, or face disrespect and abuse in maternal health care.<sup>115</sup> Further, states must ensure that women and girls who suffer sexual violence have access to necessary reproductive health care, including legal abortion, emergency contraception,<sup>116</sup> and post-exposure prophylaxis to protect against HIV infection.<sup>117</sup>

The right to non-discrimination also requires that states take measures to eliminate multiple discrimination.<sup>118</sup> Treaty monitoring bodies have established that states should make extra efforts to ensure that women from marginalized groups have access to sexual and reproductive health information and contraceptives, including adolescents; rural women; women from certain castes or tribes; refugees, internally displaced people, and migrants; and women with disabilities.<sup>119</sup>

## Endnotes

- 1 While the terms “woman” or “women” are used in this casebook, it does not exclude other persons who may also become pregnant and want or need access to abortion.
- 2 See *Programme of Action of the International Conference on Population and Development*, Cairo, Egypt, Sept. 5-13, 1994, U.N. Doc. A/CONF.171/13/Rev.1 (1995) [hereinafter *ICPD Programme of Action*].
- 3 *ICPD Programme of Action*, *supra* note 2, para. 7.3.
- 4 See discussion below.
- 5 The best known definition of reproductive justice comes from the Asian Communities for Reproductive Justice which defines reproductive justice as “the complete physical, mental, spiritual, political, economic, and social well-being of women and girls, and will be achieved when women and girls have the economic, social and political power and resources to make healthy decisions about our bodies, sexuality and reproduction for ourselves, our families and our communities in all areas of our lives.” Asian Communities for Reproductive Justice, *A New Vision for Advancing our Movement for Reproductive Health, Reproductive Rights and Reproductive Justice*, available at <https://forwardtogether.org/tools/a-new-vision/>. See also Robin West, *From Choice to Reproductive Justice: DeConstitutionalizing Abortion Rights*, 118 Yale L.J. 1394, 1425 (2009) (“Reproductive justice requires a state that provides a network of support for the processes of reproduction: protection against rape and access to affordable and effective birth control, healthcare, including but not limited to abortion services, prenatal care, support in childbirth and postpartum, support for breastfeeding mothers, early childcare for infants and toddlers, income support for parents who stay home to care for young babies, and high quality public education for school age children”).
- 6 UNFPA, A GUIDE IN SUPPORT OF NATIONAL HUMAN RIGHTS INSTITUTIONS: COUNTRY ASSESSMENTS AND NATIONAL INQUIRIES ON HUMAN RIGHTS IN THE CONTEXT OF SEXUAL AND REPRODUCTIVE HEALTH AND WELL-BEING (2019).
- 7 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39<sup>th</sup> Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984), 1465 U.N.T.S. 85 (*entered into force* June 26, 1987) [hereinafter CAT], arts. 2(1), 12, 14; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21<sup>st</sup> Sess., Supp. No.16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR], art. 2(2); Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, (44<sup>th</sup> Sess., 1992), at 200, para. 8, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008) [hereinafter Human Rights Committee, *Gen. Comment No. 20*]; Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, (80<sup>th</sup> Sess., 2004), at 244-245, paras. 7-8, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008) [hereinafter Human Rights Committee, *Gen. Comment No. 31*]; Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties’ obligations (Art. 2, para. 1)*, (5<sup>th</sup> Sess., 1990), at 7-8, paras. 3-5, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008) [hereinafter ESCR Committee, *Gen. Comment No. 3*]; Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Art. 12)*, (22<sup>nd</sup> Sess., 2000), at 90-92, paras. 51, 53, 56, 59, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008) [hereinafter ESCR Committee, *Gen. Comment No. 14*]; Convention on the Elimination of All Forms of Discrimination against Women, *adopted* Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34<sup>th</sup> Sess., Supp. No. 46, at 193, U.N. Doc. A/24/46, U.N.T.S. 13 (*entered into force* Sept. 3, 1981) [hereinafter CEDAW], arts. 2(a)-(c), (e)-(f).
- 8 An excellent exception is HUMAN RIGHTS LAW NETWORK, CLAIMING DIGNITY (1<sup>st</sup> edition 2009; 2<sup>nd</sup> edition 2013).
- 9 (2018) 10 SCC 1.
- 10 2018 SCC OnLine SC 1676.
- 11 While not included in this casebook for brevity, reference to country-specific concluding observations and special procedures’ reports would also be useful in considering reproductive rights cases. The Office of the High Commissioner on Human Rights’ Universal Human Rights Index is a helpful web-based tool in reviewing concluding observations, available at <https://uhri.ohchr.org/en>. The Center for Reproductive Rights’ Breaking Ground 2018: Treaty Monitoring Bodies on Reproductive Rights also includes summaries of concluding observations on reproductive rights, available at <https://reproductiverights.org/sites/default/files/documents/Breaking-Ground-2018.pdf>.
- 12 Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, AIR 1981 SC 746 (interpreting Article 21, Constitution of India).
- 13 Pt. Parmanand Katara v. Union of India, (1989) 4 SCC 286; Paschim Banga Khet Majoor Samiti v. State of West Bengal, (1996) 4 SCC 37 (interpreting Article 21, Constitution of India).
- 14 See e.g., Justice K.S. Puttaswamy – I v. Union of India, (2017) 10 SCC 1, Navtej Johar v. Union of India, (2018) 10 SCC 1.
- 15 Justice K.S. Puttaswamy – I v. Union of India, (2017) 10 SCC 1.
- 16 Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, AIR 1981 SC 746 (interpreting Article 21, Constitution of India).
- 17 Articles 14 and 15, Constitution of India.
- 18 Article 16, Constitution of India.
- 19 Articles 32 and 226, Constitution of India, respectively.
- 20 In Vishaka v. State of Rajasthan, AIR 1997 SC 3011 in a Public Interest Litigation filed in the Supreme Court regarding the state’s failure to provide effective redressal for sexual harassment in the workplace, the Court held that, “[i]n the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.” This ruling was based on an interpretation of Article 51 (c) of the Constitution which mandates the state to endeavour to “foster respect for international law.”
- 21 The human rights sub-sections draw on a survey of human rights norms developed by the Center for Reproductive Rights. See Center for Reproductive Rights, Breaking Ground (2018): Treaty Monitoring Bodies on Reproductive Rights (2018), available at <https://reproductiverights.org/sites/default/files/documents/Breaking-Ground-2018.pdf>.
- 22 (2017) 10 SCC 1.
- 23 (2016) 10 SCC 726 / 733.
- 24 (2009) 9 SCC 1.
- 25 See e.g., Meera Santosh Pal v. Union of India, (2017) 3 SCC 462; Sarmishtha Chakraborty v. Union of India, (2018) 13 SCC 339; Mrs. X v. Union of India, (2017) 3 SCC 458.
- 26 (2018) 11 SCC 572.
- 27 See e.g., Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511.
- 28 Civil Appeal No. 4704/2013. Decided on: October 27, 2017 by a bench comprising of Chief Justice Dipak Misra, Justice A.M. Khanwilkar and Dr. Justice D.Y. Chandrachud.
- 29 Dr. Mangla Dogra v. Anil Kumar Sharma, ILR (2012) 2 P&H 446.
- 30 2017 Cri.L.J. 218 (Bom).
- 31 See Justice K.S. Puttaswamy – I v. Union of India, (2017) 10 SCC 1, Navtej Johar v. Union of India, (2018) 10 SCC 1.
- 32 2018 SCC OnLine SC 1676.
- 33 (2017) 10 SCC 800.
- 34 (2003) 8 SCC 369.
- 35 (1992) 1 SCC 286.
- 36 2018 SCC OnLine SC 1690.
- 37 ICCPR, *supra* note 7, art. 17, paras. 1-2.
- 38 K.L. v. Peru, Human Rights Committee, Commc’n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); L.M.R. v. Argentina, Human Rights Committee, Commc’n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).
- 39 CEDAW, *supra* note 7, art. 16, para. 1(e).

- 40 Committee on the Elimination of Discrimination against Women (CEDAW Committee), *Decision 57/II Statement by the Committee on the Elimination of Discrimination against Women on sexual and reproductive health: beyond the 2014 review of the International Conference on Population and Development*, U.N. Doc. A/69/38 (2014).
- 41 K.L. v. Peru, Human Rights Committee, Commc'n No. 1153/2003, para. 6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); L.M.R. v. Argentina, Human Rights Committee, Commc'n No. 1608/2007, para. 9.3, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).
- 42 K.L. v. Peru, Human Rights Committee, Commc'n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); CEDAW Committee, *General Recommendation No. 24: Article 12 of the Convention (women and health)*, (20<sup>th</sup> Sess., 1999), paras. 11, 21, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, paras. 11-12, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008) [hereinafter CEDAW Committee, *Gen. Recommendation No. 24*].
- 43 K.L. v. Peru, Human Rights Committee, Commc'n No. 1153/2003, para. 6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); L.M.R. v. Argentina, Human Rights Committee, Commc'n No. 1608/2007, para. 9.3, U.N. Doc. CCPR/C/101/D/1608/2007 (2011).
- 44 CEDAW Committee, *Gen. Recommendation No. 24*, *supra* note 42, para. 22; Committee on the Rights of Persons with Disabilities (CRPD Committee), *General Comment No. 1: Article 12: Equal recognition before the law*, (11<sup>th</sup> Sess., 2014), para. 35, U.N. Doc. CRPD/C/GC/1 (2014) [hereinafter CRPD Committee, *Gen. Comment No. 1*]; CEDAW Committee, *General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19* (2017), para. 31, U.N. Doc. CEDAW/C/GC/20 (2017) [hereinafter CEDAW Committee, *Gen. Recommendation No. 35*]; CEDAW Committee & Committee on the Rights of the Child (CRC Committee), *Joint General Recommendation No. 31 & General Comment No. 18: On harmful practices* (2014), paras. 20-22, U.N. Doc. CEDAW/C/GC/31-CRC/C/GC/18 (2014) [hereinafter CEDAW Committee & CRC Committee, *Joint Gen. Recommendation No. 31 & Gen. Comment No. 18*].
- 45 See e.g., CEDAW Committee, *Concluding Observations: Portugal*, paras. 36-37, UN Doc. CEDAW/C/PRT/CO/8-9 (2015).
- 46 Committee against Torture (CAT Committee), *Concluding Observations: Kenya*, para. 27, U.N. Doc. CAT/C/KEN/CO/2 (2013); *Concluding Observations: United States of America*, para. 21, U.N. Doc. CAT/C/USA/CO/3-5 (2014).
- 47 Vienna Convention on the Law of Treaties, *adopted* May 23, 1969, arts. 10, 18, 1155 U.N.T.S. 331 (*entered into force* Jan. 27, 1980).
- 48 Committee against Torture, *General Comment No.2: Implementation of article 2 by States parties*, (39<sup>th</sup> Sess., 2007), at 377, para. 22, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008).
- 49 K.L. v. Peru, Human Rights Committee, Commc'n No. 1153/2003, paras. 6.3-6.6, 7, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); L.M.R. v. Argentina, Human Rights Committee, Commc'n No. 1608/2007, para. 9.2, U.N. Doc. CCPR/C/101/D/1608/2007 (2011); Mellet v. Ireland, Human Rights Committee, Commc'n No. 2324/2013, paras. 7.6-7.8, U.N. Doc. CCPR/C/116/2324/2013 (2016); Whelan v. Ireland, Human Rights Committee, Commc'n No. 2425/2014, paras. 7.7-7.9, 7.12, U.N. Doc. CCPR/C/119/D/2425/2014 (2017).
- 50 See e.g., CAT Committee, *Concluding Observations: Kenya*, para. 27, U.N. Doc. CAT/C/KEN/CO/2 (2013).
- 51 Paschim Banga Khet Mazdoor Samity v. State of West Bengal, (1996) 4 SCC 37, para. 16.
- 52 Chameli Singh v. State of Uttar Pradesh, (1995) 6 SCR 827, paras. 5 & 8.
- 53 Sandesh Bansal v. Union of India, W.P. No. 9061 of 2008 (Order dated 6 February 2012) (High Court of Madhya Pradesh).
- 54 Sandesh Bansal v. Union of India, W.P. No. 9061 of 2008 (Order dated 6 February 2012) (High Court of Madhya Pradesh).
- 55 Pt. Parmanand Katara v. Union of India, (1989) 4 SCC 286; Paschim Banga Khet Mazdoor Samity v. State of West Bengal, (1996) 4 SCC 37.
- 56 (2016) 10 SCC 726.
- 57 *Id.*
- 58 *Id.*
- 59 (2010) 172 DLT 9 / 2010 SCC OnLine Del 2234.
- 60 See also Sandesh Bansal v. Union of India, W.P. No. 9061 of 2008 (Order dated 6 February 2012) (High Court of Madhya Pradesh).
- 61 2017 SCC OnLine Chh 1081.
- 62 *Id.*
- 63 See Explanation I and II to Section 3, Medical Termination of Pregnancy Act, 1971.
- 64 2017 Cri.L.J. 218 (Bom).
- 65 *Id.*
- 66 (2017) 3 SCC 462.
- 67 (2018) 13 SCC 339.
- 68 (2017) 3 SCC 458.
- 69 ICCPR, *supra* note 7, art. 6.
- 70 International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, art. 12, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) (*entered into force* Jan. 3, 1976) [hereinafter ICESCR].
- 71 CEDAW, *supra* note 7, art. 12.
- 72 *Id.* art. 2(c) & 12(1).
- 73 Human Rights Committee, *General Comment No. 6: Right to life (Art. 6)*, (16<sup>th</sup> Sess., 1982), at 177, paras. 3 and 5, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008) [hereinafter Human Rights Committee, *Gen. Comment No. 6*].
- 74 Human Rights Committee, *General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, (124<sup>th</sup> Sess. 2018), para. 8, U.N. Doc. CCPR/C/GC/36 (2018) [hereinafter Human Rights Committee, *Gen. Comment No. 36*].
- 75 Human Rights Committee, *General Comment No. 28: Article 3 (The equality of rights between men and women)*, (68<sup>th</sup> Sess., 2000), at 229, para. 10, U.N. Doc. HRI/ GEN/1/Rev.9 (Vol. I) (2008) [hereinafter Human Rights Committee, *Gen. Comment No. 28*].
- 76 Human Rights Committee, *Concluding Observations: Mali*, para. 14, U.N. Doc. CCPR/CO/77/MLI (2003).
- 77 Human Rights Committee, *Gen. Comment No. 36*, *supra* note 74, para. 8..
- 78 See K.L. v. Peru, Human Rights Committee, Commc'n No. 1153/2003, U.N. Doc. CCPR/C/85/D/1153/2003 (2005); L.M.R. v. Argentina, Human Rights Committee, Commc'n No. 1608/2007, U.N. Doc. CCPR/C/101/D/1608/2007 (2011); see also CENTER FOR REPRODUCTIVE RIGHTS, *International and Regional Standards on the Right to Life, in WHOSE RIGHT TO LIFE? WOMEN'S RIGHT TO PRENATAL PROTECTION UNDER HUMAN RIGHTS AND COMPARATIVE LAW* (2012), available at [http://reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL\\_3\\_14\\_12.pdf](http://reproductiverights.org/sites/crr.civicactions.net/files/documents/RTL_3_14_12.pdf) [hereinafter CENTER FOR REPRODUCTIVE RIGHTS, *International and Regional Standards on the Right to Life*].
- 79 ESCR Committee, *Gen. Comment 14*, *supra* note 7, paras. 90-92.
- 80 *Id.*
- 81 ECSR Committee, *Gen. Comment No. 14*, *supra* note 7, para. 12; ESCR Committee, *General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social, and Cultural Rights)*, para. 39, U.N. Doc. E/C.12/GC/22 (2016) [hereinafter ESCR Committee, *Gen. Comment No. 22*].
- 82 ESCR Committee, *Gen. Comment No. 14*, *supra* note 7, paras. 12 and 36; ESCR Committee, *Gen. Comment No. 22*, *supra* note 81, para. 49 (g).
- 83 ESCR Committee, *Gen. Comment No. 14*, *supra* note 7, para. 12(b); ESCR Committee, *Gen. Comment No. 22*, *supra* note 81, paras. 14-19.
- 84 ESCR Committee, *Gen. Comment No. 22*, *supra* note 81, para. 20.
- 85 ESCR Committee, *Gen. Comment No. 22*, *supra* note 81, para. 20; ESCR Committee, *Gen. Comment No. 14*, *supra* note 7, para. 12.
- 86 ESCR Committee, *Gen. Comment No. 22*, *supra* note 81, para. 45.
- 87 ESCR Committee, *Gen. Comment No. 22*, *supra* note 81, para. 49 (g); ESCR Committee, *Gen. Comment No. 14*, *supra* note 7, paras. 12(a), 43 (d); CRC Committee, *General Comment No. 15: On the right of the child to the enjoyment of the highest attainable standard of health*, (2013), para. 37, U.N. Doc. CRC/C/GC/15 (2013) [hereinafter CRC Committee, *Gen. Comment No. 15*].

- 88 (1981) 4 SCC 335.
- 89 (2018) 10 SCC 1.
- 90 Javed v. State of Haryana, (2003) 8 SCC 369, 395.
- 91 2016 SCC OnLine P&H 602.
- 92 Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) [hereinafter UDHR].
- 93 (2000) 3 SCC 224.
- 94 2006 SCC OnLine Del 1421.
- 95 MANU/DE/3946/2015.
- 96 2017 SCC OnLine Ker 41588.
- 97 2016 SCC OnLine Kar 8362.
- 98 2010 SCC OnLine Del 2341.
- 99 On facts, in *Jennifer* the Court determined that the petitioner had not intimidated the College in time about her absence and had therefore precluded the possibility of extra classes or other remedial measures being taken by the College to make up for her absence. In this factual scenario, the Court denied relief to the petitioner, but also directed that the College should amend its Rules to provide specifically for the contingency of pregnancy.
- 100 2016 SCC OnLine Ker 3221.
- 101 UDHR, *supra* note 92; ICCPR, *supra* note 7; ICESCR, *supra* note 70; Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969) [hereinafter CERD]; CEDAW, *supra* note 7; CAT, *supra* note 7; Convention on the Rights of the Child, *adopted* Nov. 20, 1989, G.A. Res. 44/25, annex, U.N. GAOR, 44<sup>th</sup> Sess., Supp. No. 49, U.N. Doc. A/44/49 (1989) (*entered into force* Sept. 2, 1990) [hereinafter CRC].
- 102 See CEDAW Committee, *General Recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures)*, (13<sup>th</sup> Sess., 2004), at 366-367, paras. 7-10, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008) [hereinafter CEDAW Committee, *Gen. Recommendation No. 25*]; ESCR Committee, *General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights* (art. 3), (34<sup>th</sup> Sess., 2005), at 114-115, para. 7, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008) [hereinafter ESCR Committee, *Gen. Comment No. 16*].
- 103 CEDAW Committee, *Gen. Recommendation No. 25, supra* note 102, paras. 7-8.
- 104 CEDAW Committee, *Gen. Recommendation No. 25, supra* note 102, paras. 7-8; CEDAW Committee, *General Recommendation No. 28: The core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, (47<sup>th</sup> Sess., 2010), para. 9, U.N. Doc. CEDAW/C/GC/28 (2010) [hereinafter CEDAW Committee, *Gen. Recommendation No. 28*]; ESCR Committee, *General Comment No. 20: Non-discrimination in economic, social and cultural rights* (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), paras. 8, 9 & 39, U.N. Doc. E/C.12/GC/20 (2009) [hereinafter ESCR Committee, *Gen. Comment No. 20*]; CRC Committee, *Gen. Comment No. 15, supra* note 87, para. 9; Human Rights Committee, *Gen. Comment No. 28, supra* note 75, para. 30.
- 105 CEDAW Committee, *General Recommendation No. 5: Temporary Special Measures*, (7<sup>th</sup> Sess., 1998), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 320, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008); *see also*, Human Rights Committee, *General Comment No. 18: Non-discrimination*, (37<sup>th</sup> Sess., 1989), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 196, para. 10, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008); CEDAW Committee, *Gen. Recommendation No. 25, supra* note 102, para. 14; ESCR Committee, *Gen. Comment No. 16, supra* note 102, para. 15.
- 106 CEDAW, *supra* note 7, art. 5(a). India has a declaration to article 5(a) stating that "it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent."
- 107 ICESCR, *supra* note 70, art. 2(2); ESCR Committee, *Gen. Comment No. 16, supra* note 102 para. 19; ICCPR, *supra* note 7, art. 3.
- 108 CEDAW, *supra* note 7, Preamble, art. 11(2).
- 109 *Id.* art. 11(2).
- 110 *Id.*
- 111 Human Rights Committee, *Gen. Comment No. 28, supra* note 75, para. 19.
- 112 CEDAW Committee, *Gen. Recommendation No. 24, supra* note 42, para. 11.
- 113 *Id.*; *see also* Human Rights Committee, *Gen. Comment No. 28, supra* note 75, para. 20.
- 114 CEDAW Committee, *General Recommendation No. 19: Violence against women*, (11<sup>th</sup> Sess., 1992), at 331, para. 24(m), U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008) [herein after CEDAW Committee, *Gen. Recommendation No. 19*].
- 115 CEDAW Committee, *General Recommendation No. 19; see also* MANDATES OF THE WORKING GROUP ON THE ISSUE OF DISCRIMINATION AGAINST WOMEN IN LAW AND IN PRACTICE; THE SPECIAL RAPPORTEUR ON THE RIGHT OF EVERYONE TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH; THE SPECIAL RAPPORTEUR ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT; AND THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES 5-7 (2015); CAT Committee, *Concluding Observations: Kenya*, para. 27, U.N. Doc. CAT/C/KEN/CO/2 (2013); CAT Committee, *Concluding Observations: United States of America*, para. 21, U.N. Doc. CAT/C/USA/CO/3-5 (2014); CEDAW Committee, *Concluding Observations: Portugal*, paras. 36, 37, UN Doc. CEDAW/C/PRT/CO/8-9.
- 116 *See e.g.*, CEDAW Committee, *Concluding Observations: Egypt*, para. 40, U.N. Doc. CEDAW/C/EGY/CO/7 (2010); Committee on the Rights of the Child (CRC Committee), *Concluding Observations: Costa Rica*, para. 64, U.N. Doc. CRC/C/CRI/CO/4 (2011); ESCR Committee, *Concluding Observations: Chile*, para. 53, U.N. Doc. E/C.12/1/Add.105 (2004); ESCR Committee, *Concluding Observations: Kuwait*, para. 43, U.N. Doc. E/C.12/1/Add.98 (2005); ESCR Committee, *Concluding Observations: Malta*, para. 41, U.N. Doc. E/C.12/1/Add.101 (2004); ESCR Committee, *Concluding Observations: Nepal*, para. 55, U.N. Doc. E/C.12/1/Add.66 (2001).
- 117 Special Rapporteur on violence against women, its causes and consequences, *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women, Intersections of Violence against Women and HIV/AIDS, Report of the Special Rapporteur on violence against women, its causes and consequences*, Yakin Ertürk, at 23, U.N. Doc. E/CN.4/2005/72 (Jan. 15, 2005).
- 118 CEDAW Committee, *Gen. Recommendation No. 25, supra* note 102, para. 12.; ESCR Committee, *Gen. Comment No. 22, supra* note 81, paras. 30 & 31.
- 119 CRC Committee, *General Comment No. 20: Implementation of the rights of the child during adolescence* (33<sup>rd</sup> Sess., 2003), paras. 39 & 60, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (2008); CEDAW Committee, *General Recommendation No. 34: on the rights of rural women* (63<sup>rd</sup> Sess., 2016), para. 37, U.N. Doc. CEDAW/C/GC/34 (2016); CEDAW Committee, *Concluding Observations: Switzerland*, paras. 38-39, U.N. Doc. CEDAW/C/CHE/CO/4-5 (2016); CRPD Committee, *General Comment No. 3: Women with Disabilities* (Art. 6), (9<sup>th</sup> Sess., 2016), U.N. Doc. CRPD/C/GC/3 (2016).





# CHAPTER TWO

# Contraceptive Information and Services and Government Population Policies

The Constitution of India guarantees the right to reproductive autonomy, including the right to decide whether to procreate or not, and hence, to access contraceptives.<sup>1</sup> Cases have arisen before courts questioning policies that restrict reproductive autonomy in the context of access to contraception, including coercive and substandard sterilization.<sup>2</sup> In this chapter, cases on the following issues are discussed:

- Fundamental Right to Access and Use of Contraception Information and Services
- Regulation of Contraception and Medical Termination of Pregnancy Act, 1971
- Sterilization Without Informed Consent and Lack of Implementation of National Sterilization Guidelines
- Indirect Population Control Measures
  - Disqualification under State Panchayati Raj Acts
  - Disqualifications under Employment or Education Related Policies

## Fundamental Right to Access and Use of Contraception Information and Services

The Supreme Court in ***Suchita Srivastava v. Chandigarh Administration***,<sup>3</sup> held that Article 21 of the Indian Constitution guarantees and protects the right to reproductive choice of women. This includes women's right to refuse participation in sexual activity, to insist on use of contraceptive methods, or to choose appropriate birth-control methods.<sup>4</sup>

## Regulation of Contraception and the Medical Termination of Pregnancy Act, 1971

In 2008, a public interest litigation was filed by an anti-choice organization seeking a ban on the advertisement, sale and distribution of the i-pill (an emergency contraceptive pill) and a declaration that sale of emergency contraceptive pills without prescription is illegal. The Kerala High Court in ***Krupa Prolifers v. State of Kerala***<sup>5</sup> rejected the argument of the organization holding that the contraceptive pill only prevents fertilization and does not cause abortion or termination of pregnancy, and thus fell outside the purview of Medical Termination of Pregnancy Act, 1971.

## Sterilization Without Informed Consent and Lack of Implementation of National Sterilization Guidelines

The Supreme Court in ***Ramakant Rai v. Union of India***<sup>6</sup> noted that uniform procedures and norms were not being followed by States for implementing national guidelines on sterilization. It issued directions to all States to, amongst other measures, have an approved panel of doctors appointed under a uniform eligibility criteria for conducting sterilization procedures; require doctors to fill a prescribed checklist recording details such as the age of the patient, number of children and the health condition of the patient; require doctors to take consent of the patient for sterilization in a prescribed format; set up a quality assurance committee for monitoring implementation of prescribed guidelines; and to hold inquiries and take punitive actions in case of breach of national guidelines. It also directed the Union of India to lay down prescribed formats for States to follow on the issues listed above and to lay down norms of compensation.

Thereafter, in ***Devika Biswas v. Union of India***,<sup>7</sup> a public interest litigation was filed in the Supreme Court highlighting the unsanitary and unsafe conduct of sterilization procedures in sterilization camps in Bihar and Chhattisgarh. The Supreme Court recognized reproductive rights as both part of the right to health as well as an aspect of personal liberty under Article 21 and defined such rights to include the right to “access a range of reproductive health information, goods, facilities and services to enable individuals to make informed, free, and responsible decisions about their reproductive behaviour.” The Supreme Court found that “the freedom to exercise these reproductive rights would include the right to make a choice regarding sterilization on the basis of informed consent and free from any form of coercion.” Taking note of the non-compliance of prescribed procedures and the resulting deaths in the sterilization camps in various States, it issued supplementary directions for compliance with its order in ***Ramakant Rai***. Further, the Court directed the government to discontinue its unnecessary focus on female sterilization and make efforts for ending the system of

sterilization camps within a fixed time frame, while simultaneously strengthening its primary health care facilities. It also directed the Union of India to promptly consider formulating a National Health Policy based on gender equity. The Court also noted that it may be necessary to reconsider policies that set targets and provide incentives for performing sterilization procedures, since these have a disproportionate impact on women from marginalized and vulnerable communities. The Court observed that women from these groups, due to their economic and social conditions, are left with no real choice and their consent to sterilization procedures may not be informed or true consent. It also noted that incentives and targets for service providers may force providers to coerce women into undergoing sterilization procedures. The Court relied on international human rights instruments as one of the bases for its ruling in this case, including to outline the obligation to ensure the full range of reproductive health services and informed consent.

**Dr. Sukha Raj Singh Rathore v. State of UP**<sup>8</sup> involved the death of a 28-year-old woman, who was induced to undergo sterilization by a basic health worker. Her post-mortem report and subsequent investigation by a Medical Board did not attribute her death to the sterilization procedure. The Allahabad High Court directed a police investigation to ascertain the cause of her death and verify if all the required medical tests were conducted prior to the sterilization operation. It noted that this case illustrated the dangers of coerced or induced sterilization on poor persons without their informed consent and without necessary preoperative tests and safety precautions.

## Indirect Population Control Measures

### DISQUALIFICATION UNDER STATE PANCHAYATI RAJ ACTS

In **Mukesh Kumar Ajmera v. State of Rajasthan**,<sup>9</sup> writ petitions were filed in the Rajasthan High Court, challenging the constitutional validity of provisions of the Rajasthan Panchayati Raj Act, 1994 that disqualified persons having more than two living children after a prescribed date from holding certain public offices in the Rajasthan Panchayat. The Court rejected the argument that the disqualification provisions infringed upon the privacy and the right of procreation of the person and held that the provisions were not violative of Article 21. It stated that the rights to life and personal liberty are not absolute and can be curtailed in light of compelling State interest which in this case was controlling the “menace” of population explosion. The Court held that population control was essential to achieve goals laid down under Directive Principles of the State Policy enshrined under Articles 39(e) and (f), 41, 43, 45 and 47 of the Indian Constitution and that while the number of children had no bearing on the performance of officers of the Panchayat, the officers of the Panchayat should serve as role models for the electorate.

In **B.K. Parthasarathi v. State of Andhra Pradesh**<sup>10</sup> and **Elkapalli Latchaiah v. State of Andhra Pradesh**,<sup>11</sup> the Andhra Pradesh High Court relied on **Mukesh Kumar Ajmera** while upholding the constitutional validity of a similar disqualification provision under the Andhra Pradesh Panchayat Raj Act, 1994.

Subsequently, this issue came up before the Supreme Court in **Javed v. State of Haryana**<sup>12</sup> in a challenge to the disqualification provision under the Haryana Panchayati Raj Act, 1994. The Court held that the disqualification of persons having more than two children after a prescribed date satisfied the test of reasonable classification and had a rational nexus with the objective of promoting public health, family welfare and population control. Reading fundamental rights in conjunction with directive principles of state policy and fundamental duties of citizens, the Court held that the provision did not violate the right to life and personal liberty under Article 21. It also rejected the argument that many Indian women, who lack the independence to make reproductive choices were disparately impacted by this provision.

In light of the decision of the Supreme Court in **Justice K. Puttaswamy v. Union of India**<sup>13</sup> declaring the right to privacy to be a fundamental right and stating expressly that decisions about procreation are included within the right to privacy, the decision in **Javed** may have to be reconsidered by the Supreme Court.

### DISQUALIFICATIONS UNDER EMPLOYMENT OR EDUCATION RELATED POLICIES

In **Ku Madhuvanti Thatte v. State of Maharashtra**,<sup>14</sup> a writ petition was filed before the Bombay High Court by a candidate challenging her denial of admission on various grounds including exclusion under a rule for grant of additional marks in case any of the parents had undergone sterilization. Interpreting the rule broadly and in view of its intended objective of limited families, the Court held that the rule would be applicable even if the parents had not undergone sterilization but had limited their family by other means. Subsequently, in **Miss Rajashri Yeshwant Jadhav v. State of Maharashtra**,<sup>15</sup> the High Court relied on **Ku Madhuvanthi Thatte** to uphold the constitutionality of the rule granting an additional mark for

family planning. It further held that rule satisfied the test of reasonable classification under Article 14 and had a nexus with national population control policy, which was closely connected with national health and medical education.

The Rajasthan High Court, in **Smt. Renuka Sahal v. State of Rajasthan**,<sup>16</sup> dismissed a constitutional challenge to rules declaring candidates having more than two children on or after a prescribed date as ineligible for appointment or promotion in service. Relying on the Supreme Court decision in **Javed**, the High Court noted that family planning was the need of the hour and the two-child norm was being promoted through the national population policy. Likewise, in **Kanaiyalal Narandas Patel v. State of Gujarat**,<sup>17</sup> the Gujarat High Court dismissed a constitutional challenge to a government regulation which denied the benefit of encashing leave travel concessions to teachers working in government aided schools who had joined service after the prescribed date and were having more than two living children.

In **People's Union for Civil Liberties v. Union of India**,<sup>18</sup> the Supreme Court extended the cash benefit under the National Maternity Benefit Scheme to all women irrespective of their age and number of children. However, the Court directed the Union of India to consider if grant of such benefit would go against the national population policy.

## Related Human Rights Standards and Jurisprudence

Below is a selection of international and regional human rights standards and jurisprudence that explains states' obligations concerning contraceptive information and services, including freedom from coerced or forced sterilization.

The Government of India has committed itself to comply with the obligations outlined in various international human rights treaties that protect sexual and reproductive health and rights: these include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR).<sup>19</sup> Under international law all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.<sup>20</sup> The Supreme Court has held that in light of the obligation to "foster respect for international law" in Article 51 (c) of the Indian Constitution "[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee."<sup>21</sup>

### INTERNATIONAL TREATY STANDARDS

#### TREATIES

- **ICESCR, Articles 12, 15** (outlining the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and the right to benefit from scientific process).
- **ICCPR, Articles 2, 3, 6, 17** (protecting the rights to equality, non-discrimination, privacy, life, and found a family).
- **CEDAW, Articles 10(h), 12(1), 14(2)-(b), 16(e)** (outlining women's right to family planning information, goods and services and to "decide 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").
- **Convention on the Rights of Persons with Disabilities (CRPD), Article 25** (safeguarding the rights of persons with disabilities to sexual and reproductive health on a basis of free and informed consent, including the rights to retain fertility, to decide the number and spacing of children, and to access reproductive and family planning facilities, information and services, including in rural areas).

#### SELECTED GENERAL COMMENTS

- **CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19**, U.N. Doc. CEDAW/C/GC/35 (2017), para. 18 (violations of women's sexual and reproductive rights, including forced sterilizations constitute gender-based violence and may amount to torture or cruel, inhuman or degrading treatment).
- **CEDAW Committee, General Recommendation No. 24 on Article 12 of the Convention (women and health)**, U.N.

Doc. A/54/38/Rev.1 (1999), paras. 17, 22 (discussing the obligation on states parties to not permit non-consensual sterilization and to require fully informed consent for all health services, and stating that a lack of access to contraceptives can indicate that the state has failed to uphold its duties).

- **CEDAW Committee, *General Recommendation 21: Equality in marriage and family relations***, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II) (1994), para. 22 (women require access to contraceptive and family planning information and services to make decisions on whether to have children, and their decisions must not be limited by spouse, parent, partner or Government).
- **Committee for Economic Social and Cultural Rights, *General Comment No. 22 (2016) on the right to sexual and reproductive health***, U.N. Doc. E/C.12/GC/22 (2016), paras. 13, 18, 28, 41, 44-45, 57-59, 62 (states must ensure the availability of essential medicines, including a wide range of contraceptive methods, as well as access to relevant information; states may not ban, deny in practice or limit access to sexual and reproductive health care, including contraception, nor institute laws and policies that directly or indirectly perpetuate involuntary, coercive or forced medical interventions, including forced sterilization, or incentive- or quota-based contraceptive policies).
- **Human Rights Committee, *General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life***, U.N. Doc. CCPR/C/GC/36 (2018), para. 8 (explaining that states should ensure that women, men, boys and girls have access to information and education about sexual and reproductive health and to a wide range of affordable contraceptive methods).
- **Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)***, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), paras. 11, 20 (recognizing forced sterilization or imposition of requirements such as spousal consent for sterilization as violations of the rights to non-discrimination, privacy, and freedom from torture or cruel, inhuman and degrading treatment).

## INQUIRIES AND INDIVIDUAL COMPLAINTS

- **CEDAW Committee, *Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to CEDAW, Report of the Committee***, U.N. Doc. CEDAW/C/OP.8/GBR/1 (2018), paras. 60, 76, 86(a) (outlining that the failure to “to provide contraceptives, including guidance on scientifically sound contraceptive methods” constitutes discrimination against women; and recommending that the state ensure access to information on and the accessibility and affordability of all methods of contraception).
- **CEDAW Committee, *Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women***, UN Doc. CEDAW/C/OP.8/PHL/1 (2015), paras. 29, 32-34, 36-43, 49, 52 (recognizing that the failure to ensure “universal access to a full range of contraceptives and related information, in addition to counselling and services,” including where health has been decentralized, constitutes a violation of women’s rights to non-discrimination and health).
- **CEDAW Committee, *A.S. v. Hungary, Comm. No. 4/2004***, U.N. Doc. CEDAW/C/36/D/4/2004 (2006) (where a Roma woman was sterilized without her full informed consent, finding violations of the rights to information and advice on family planning, to access health care services, and to decide the number and spacing of children).

## UNITED NATIONS HUMAN RIGHTS EXPERT REPORTS

- **Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (SR Torture), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment—Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development***, paras. 38-39, 57, 68-69 (2008) (forced sterilization is inherently discriminatory and when carried out in accordance with coercive family planning laws or policies may amount to torture or even crimes against humanity, where widespread or systemic).
- **SR Torture, *Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. A/64/272 (2009), paras. 55, 57, 73 (outlining common situations leading to forced sterilization and contraception and affirming states must ensure the absence of any form of coercion in reproductive health services).

## SELECTED REGIONAL CASE LAW

### EUROPEAN COURT OF HUMAN RIGHTS

- ***I.G. and Others v. Slovakia*, Application No. 15966/04 (2009)**, §§ B–D (in case of sterilization without consent of a Roma woman finding violations of the rights to freedom from inhuman and degrading treatment, to private and family life, and to found a family under the European Convention on Human Rights).
- ***N.B. v. Slovakia*, Application No. 29518/10 (2012)**, paras. 68-73, 92-99 (in a case involving sterilization of a Roma minor under the influence of sedatives, finding violations of the rights to freedom from inhuman and degrading treatment and to private and family life).
- ***V.C. v. Slovakia*, Application No. 18968/07 (2011)**, paras. 100-120, 138-155 (outlining that sterilization was not a life-saving surgery justifying waiver of consent and finding violations of the rights to freedom from inhuman and degrading treatment and to private and family life).

### INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

- ***Maria Mamerita Mestanza Chavez v. Peru*, Report No. 71/03[1], Petition 12.191, Friendly Settlement (2003)** (outlining the terms of friendly settlement by a State providing reparations and preventing reoccurrence in a case involving the coerced sterilization and subsequent death of an indigenous woman under a government policy stressing sterilization as a means for rapidly altering the reproductive behavior of the population, especially poor, indigenous, and rural women).

### INTER-AMERICAN COURT OF HUMAN RIGHTS

- ***I.V. v. Bolivia*, Report No. 72/14, Case 12.655 (2016)**, §§ B–D (in a case where a woman was non-consensually sterilized in a public hospital, holding that forced sterilization is a form of gendered violence based on harmful gender stereotypes in violation of human rights, and finding violations, *inter alia*, of the rights to personal integrity, to freedom from torture and cruel, inhumane or degrading treatment, to personal liberty and security, to privacy, to dignity, and to marry and raise a family).

# RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

## IN THE HIGH COURT OF BOMBAY AT NAGPUR

**Ku. Madhuvanti Purushottam Thatte v. State of Maharashtra & Ors.**

**AIR 1983 Bom 443**

**Tulpule and Jamdar, JJ.**

***One of the rules framed for regulating admissions in State government-run medical colleges provided for addition of one mark to the qualifying score of a candidate if any of her parents had undergone a sterilization operation and the family did not have more than two living children. The Bombay High Court examined the correctness of this rule and its nexus with the object of admission to medical colleges in this writ petition filed by a candidate challenging her denial of admission on several grounds, including exclusion under this rule due to insistence on a formal sterilization operation as a precondition to a limited family.***

**Tulpule, J.:** “The petitioner passed her H.S.C. Examination in March 1982 and secured in the science subjects 250 marks out of 300, which is 83.33%. She applied for admission to the Medical College and for that purpose filled in the form which is prescribed giving therein the information as she thought was necessary and applied to her. The petitioner had secured a First Class at her H.S.C. level examination.

2. Admissions to the Medical Colleges run by the Government, are regulated and are governed by rules framed by the State Government in that behalf in the year 1971. These rules provide for addition of marks obtained by a student at the qualifying H.S.C. examination and also deduction. These are called the modified marks. Admissions are according to merit and a list of students who applied and their ranking in the order of merit after corrected or modified totals are made is published on the Notice Board...

3. The petitioner was not able to get admission even with these marks and was out of the admitted students or the category of students who were likely to be admitted. She then challenged her exclusion or denial of admission to her by this petition on various grounds.

4. The grounds on which the rules framed by the State Government in the year 1971 are challenged can be classified in two ways or two classes. Some of the challenges did not directly enure (sic) to the benefit of the petitioner. They are general and question the correctness, legality and nexus of the rules and the preference vis-a-vis admissions to the Medical Colleges. The other class of rules which are challenged are those which directly enure (sic) to the benefit of the petitioner and would, if her contention is accepted, add to her total of marks, increasing or brightening the prospects of admission to the medical college.

...

15. That leaves us with R. 16(ix), which is in these terms:—

“16(ix) One mark shall be added if any of the parents of the students has undergone sterilisation operation and the family has not more than two children living.”

16. It was contended on behalf of the petitioner that the thrust of R. 16(ix) is towards limited families and against a large family, which is a national objective of family planning. It was contended that family planning can be achieved in modern days by scientific and other appliances by so many ways other than the sterilisation. It is not merely enough that one of the parents of the student should have undergone a sterilisation operation. The most important condition which is laid down is that the family must not have more than two children living. It was also urged that a sterilisation operation is reversible and is easily possible in the case of males with high percentage of success, though the percentage of success in female sterilisation operation may not be as much as those in the case of males. In practice and in theory as also in principle reversion of sterilisation in the case of female is also possible. The rules have been framed in the year 1971 and though the objective remains the same, namely limited family, they have not marched in step with the scientific development. It

was therefore, urged that where the family is planned and does not consist, of more than two children, it would entitle a student under the rules, to get advantage of the rule and the student would also be entitled to get an addition of one mark.

17. In this context it was pointed out that looking to the keen competition and the large number of persons applying for admission, the grant of a single addition of mark does not go a long way in securing admission. The rule should, therefore, be interpreted in the light of its object and not in the light of its technical or formal requirement, which is capable of being defeated. The family which is planned, therefore, otherwise than by means of resort, to sterilisation, which is reversible, is deprived of the benefit and the discrimination there is without any rhyme or reason. If the nexus is the object of having limited family, then sterilisation alone is not capable of achieving that. If the family on the other hand is limited the children of such parents who could be said to be more enlightened, are discriminated against merely as the formal and technical operation has not been undergone. It was pointed out that it was possible to comply with this formal requirement by the parent undergoing an operation just at the time of the application for admission, though he had achieved the main objective of a planned family.

18. On behalf of the respondents it was not pointed out and contended that sterilisation is not reversible. It was also conceded that the principal object of the rule was that families should be limited and planned. In an effort to control the growth of population, the objective of devising disincentives, and grant of incentives, is certainly laudable and necessary. R. 16(ix) therefore, cannot be interpreted in any other way, excepting it being an incentive to have a limited family.

19. If, therefore, we interpret this rule in its spirit and in the broad sense in which it was intended to be worked, then we think, the technical and formal insistence upon a formal sterilisation operation need not be enforced. It need not become a precondition. If there is a limited family and the limited family is achieved by means other than the sterilisation. We think, the benefit of the rule should not be denied merely because the parents have not shown the further circumspection in undergoing sterilisation operation just before making an application for admission to medical college.

20. It was urged by Mr. Aney, the learned counsel before us that the petitioner's father or mother for the benefit of their daughter could have undergone this operation and secured for their daughter an addition of one mark. It was, therefore, urged that the technical and formal requirement should not be placed as a bar to achieve the object.

21. We think that the benefit of the rule is intended for children of those persons who regulate their family and plan it in accordance with the national objective and goal. If that is so, then we think that it is intended to be extended as an incentive and as a benefit which ought not to be denied in a particular case, merely because there was no formal compliance. The rule has to be interpreted in its broad sense and essentially in its spirit. If that is done, the petitioner would be entitled to one mark more to be added to her total.

...

## IN THE HIGH COURT OF BOMBAY

**Miss Rajashri Yeshwant Jadhav v. State of Maharashtra & Ors.**

**AIR 1985 Bom 31**

**Dharamadhikari and Kantharia, JJ.**

***Rule 6 of the Medical Colleges of the Government of Maharashtra Rules for Admission 1983-1984 provided for, inter alia, addition of one mark to the candidates' total score if the candidate's parents had undergone sterilization operation. The constitutional validity of the rule was challenged before the Bombay High Court on the ground that it was arbitrary and had no nexus with the object of selection of candidates for admission to a medical college, and thus, violative of Article 14 of the Indian Constitution.***

**Dharamadhikari, J.:** "In all these writ petitions the petitioners have challenged R. 6 of the Medical Colleges of the Government of Maharashtra Rules for Admission 1983-1984 (hereinafter called the Admission Rules) on the ground that the said Rule is violative of the petitioners' fundamental right guaranteed under Art. 14 of the Constitution it being arbitrary in nature and has no nexus with the objects sought to be achieved viz. selection of meritorious candidate for admission to the medical college.

...



### 3. ...Rule 6 of the Admission Rules reads as under:—

#### “Selection

A. Selection of students amongst those who have applied for admission to a medical college will be on the basis of merit as determined by the marks obtained in the science subjects, as specified in R. 3(ii) and further subject to additions and/or deduction as detailed under the Rules. These conditions will also govern the selection inter se of candidates for the reserved seats at the colleges.

#### B. Additions:—

...

(vii) 1 mark for sterilisation operation as stated in R. 4C(xv)(a) and (b)(viii). ...

...

4. It is true that Art. 14 does not forbid classification, but the classification has to be justified on the basis of the nexus between the classification and the object to be achieved. The object to be achieved in the case with which we are concerned in this case is to get best talent for admission to professional colleges. The rules for admission must have some nexus with the medical education or national health. This does not mean that the person to be admitted should be bookish or a bookworm. Therefore, his merit in the field of extra-curricular activities can also be taken into consideration, so as to judge the development of integrated personality of the candidate concerned. Further as observed by the Supreme Court in *Chitra Ghosh v. Union of India* AIR 1970 SC 35. It is for the Government which bears the financial burden of running medical college to lay down criteria for eligibility. The questions of policy must depend inter alia on the over-all assessment and survey and requirements of the residents of particular territory and other categories of persons for whom it is essential to provide facilities for medical education. Further the rules, which partake the character of legislation, conferring benefits on various categories of persons, it is no argument to say that if the petitioners had known of such rules, they would have taken care to see that they came within the category of persons who are entitled to such a benefit. In this background we will have to consider the challenge raised-before us.

...

7. Sub-rule (vii) provides for granting one additional mark for family planning. It was contended by the learned Counsel for the petitioners that this rule has no nexus with the object sought to be achieved. Such a rule is not there in the admission rules relating to the engineering colleges. It was seriously contended that such a rule has no nexus with the object sought to be achieved viz. admission of meritorious students to the medical colleges. It was also contended that a student cannot be punished for act or omission of his parents. On the other hand it is contended by the respondent-Government that it is the Ministry of Health which is concerned with the formation of rules to the medical colleges. The Ministry of Health though it fit to give such weightage in view of the national policy. According to the respondents to put check on population is the national policy and to implement this policy is mainly the responsibility of the Health Department and the persons concerned with it. The Division Bench of this Court in *Ku. Madhuvanti's case* had an occasion to consider the ambit and scope of this rule. This is what the Division Bench as observed in paras 19, 20 and 21 of the judgment.

“19. If, therefore, we interpret this rule in the spirit and in the broad sense in which it was intended to be worked, then we think the technical and formal insistence upon a formal sterilisation operation need not be enforced. It need not become a pre-condition. If there is a limited family and the limited family is achieved by means other than the sterilisation. We think, the benefit of the rule should not be denied merely because the parents have not shown the further circumspection in undergoing sterilisation operation just before making an application for admission to medical college.

20. It was urged by Mr. Aney, the learned Counsel before us that the petitioner's father or mother for the benefit of their daughter could have undergone this operation and secured for their daughter an addition of one mark. It was, therefore, urged that the technical and formal requirement should not be placed as a bar to achieve the object.

21. We think that the benefit of the rule is intended for children of those persons “who regulate their family and plan it in accordance with the national objective and goal. If that is so, then we

think that it is intended to be extended as an incentive and as a benefit which ought not to be denied in a particular case, merely because there was no formal compliance. The rule has to be interpreted in its broad sense and essentially in its spirit. If that is done, the petitioner would be entitled to one mark more to be added to her total.”

A candidate who is a member of planned family has a sense of involvement. He is a part and parcel of the said family. The Division Bench also found that this rule, was intended to be extended as an incentive to achieve the national objective and goal of family planning. Therefore, it is quite obvious that the rule has a nexus with the national policy of population control. Population control is closely connected with national health. Various ways and means invented for controlling population and the programme framed in that behalf has to be carried out by the medical practitioners. It cannot be said that the national policy of population control or planned family has no nexus with the medical education. Further only one additional mark is given on this count, which is wholly insignificant. The weightage given being microscopically insignificant, we do not propose to interfere with the said weightage.

...”

## IN THE HIGH COURT OF RAJASTHAN

**Mukesh Kumar Ajmera v. State of Rajasthan**

**AIR 1997 Raj 250**

**B.R. Arora and A.K. Singh, JJ.**

***Sections 19(L) and 39 of the Rajasthan Panchayati Raj Act, 1994 disqualified persons having more than two living children after a prescribed date from holding certain public offices in the Rajasthan Panchayat. The constitutional validity of these provisions was challenged before the Rajasthan High Court on the grounds of infringement of the candidates' privacy and right of procreation under Article 21 of the Indian Constitution.***

**Arora, J.:** “ This writ petition and the other eleven writ petitions mentioned in the Schedule, raise the common controversies, namely, (i) the validity of Section 19(L) read with Section 39 of the Rajasthan Panchayati Raj, Act, 1994; (ii) the legality and correctness of the orders passed by the respective Chief Executive Officer, by which the petitioners were declared disqualified; and (iii) the jurisdiction of the Chief Executive Officer to hold an enquiry in the matter of declaring a Panch or a Member of the Panchayat Raj Institution to continue as the Sarpanch as he has incurred the disqualification on account of birth of an additional child in the family raising the number of the children to more than two. As all these writ petitions involve the common questions of law and facts, therefore, they are being disposed of by this common judgment.

...

**8.** The striking feature of the new provisions inserted in the Constitution by Article 243 to 243(O) are that they are in the nature of basic provisions which are to be supplemented by law made by the respective State Legislatures because Local Government including the Self-Government Institutions for the rural areas, is an exclusive State Subject under Entry 5 of List II of Schedule VII. The Union, thus, cannot enact any law to create right and liability relating to these subjects. The Rajasthan Legislative Assembly, therefore, enacted this Rajasthan Panchayati Raj Act. The Rajasthan Panchayati Raj Act is an implementing legislation undertaken by the State of Rajasthan within the frame-work of the Scheme/Out-line set-out by the Union by inserting Part IX in the Constitution.

**9.** Section 19 of the Act deals with the qualification for election as a Panch or a Member and provides that every person registered as a voter in the List of Voters of a Panchayat Raj Institution, shall be qualified for election as a Panch or, as the case may be, a Member of such Panchayat Raj Institution unless such person is disqualified for the conditions mentioned in Sub-clauses (a) to (L). Sub-clause (L) of Section 19 provides that a person is disqualified to be elected as a Panch or a Member to the Panchayat Raj Institution if he has more than two children.

**10.** Proviso IV to Section 19 states that the birth during the period from the date of commencement of this Act, hereinafter in this proviso referred to as the date of such commencement to 27-11-95, of an additional child shall not be taken into consideration for the purpose of disqualification mentioned in Clause (L) and a person having more than two children (excluding the child; if any, born during the period from the date of such commencement to 27-11-95) shall not be disqualified under that Clause for so long as the number of children he/she had on the date of commencement of this Act, does not increase.

**11.** The Explanation appended to Section 19 (L) States that for the purpose of Clause (L) to Section 19 where the couple has only one child from the earlier delivery or deliveries on the date of commencement of this Act and thereafter any number of children born out of a single subsequent delivery, shall be deemed to be one entity.

**12.** Section 39 of the Act deals with the cession of Membership. The Section provides that subject to the provisions of Section 40, a Member of a Panchayat Raj Institution shall not be eligible to continue as the Member if (a) he is or becomes subject to any disqualification specified in Section 19...

...

**26.** Now coming to the validity of Section 19(L) read with Section 39 of the Act. The validity of the provisions has been challenged on the grounds that (i) there is no authorisation under the Constitution to the Legislature to legislate such provision; (ii) the provisions are arbitrary and discriminatory and are against the basic features of the Constitution; (iii) infringe the privacy and right of procreation of more than two children and thus violative of Article 21; (iv) there is no reasonable nexus with the object sought to be achieved; and (v) it is violative of Article 25 and 26 of the Constitution of India.

...

**36.** The validity of these provisions have, also, been challenged on the ground that they are violative of Article 21 of the Constitution of India as it puts restraint on the inherent and natural human right of procreation of third and subsequent child and infringes the right of privacy.

We have considered this aspect of the case, also. What is guaranteed under Article 21 is that no person shall be deprived of his life and personal liberty except according to the procedure established by law. Right to marry and right to procreation of third and subsequent child is neither a Common Law right nor a right recognised or embodied in the Constitution...

**37.** These provisions have been enacted by the Legislature to control the menace of population explosion. Growing population is one of the major problem which India is facing today. Population progresses by geometrical progress while the resources increase only at an arthematical rate. Rertrand Bussel has stated "Population explosion is more dangerous than the hydrogen bomb." The legislative power to deal with the population matter effectively, purposely, meaningfully, objectively and efficiently stem basically from the social policy contained in the Directive Principles of the State Policy enshrined in Article 39(e), (f), 41, 43, 45 and 47 of the Constitution of India. This social policy is designed to secure social order for the promotion of welfare of the people, adequate means of livelihood, raising the level of nutrition and standard of living, improving public health etc. These objectives can be achieved if the rapidly increasing population is controlled and the rate of population growth is essentially minimised otherwise all these policies will remain in vacuum. Imposing the conditions by providing the disqualification in the election of the Panchayat Raj Institution is a first step to achieve this goal. The Leaders at the grass-root level have to put an example before the electorates. The disqualification provided in Section 19(L) cannot be said to be against the basic human dignity or against the right to life and personal liberty. The right to be elected is neither a fundamental right nor a Common Law right. It is a statutory right which flows from the statute. A statutory right created under the statute is subject to the limitations provided under a particular statute...The right to be elected, thus, flows from Section 19 of the Act and, therefore, this right accrues to a person concerned is subject to the restrictions contained in Section 19 or other provisions of the Act.

...

**39.** Right to privacy and liberty are not absolute rights. A law imposing reasonable restrictions upon it for compelling interest of State must be, held to be valid. The restriction imposed in Section 19(L) does not outrage the dignity of the individual. The object of this provision is to control population growth and family planning and such type of interference is necessary in a democratic society in the economic welfare of the country. The restrictions have been laid down with a social purpose, i.e., to fulfil the mandate given in the Directive Principles enshrined in the Constitution. If the population growth is not controlled and family planning is not observed then looking to the limited sources available with the country, it will be difficult for the State to achieve these goals.

**40.** The Supreme Court, in *AIR India v. Nergesh Meerza* (5), considering the danger of over-population and the necessity of the family planning programme, observed:—

"In the first place the provision preventing the third pregnancy with two existing children would be in the larger interest of the health of the Air Hostesses concerned as also for the good upbringing of the children. Secondly, as indicated above, while dealing with the rule regarding prohibition of marriage within four years, same considerations would apply to a bar of third pregnancy where two children

are already there because when the entire world is facing with the problem of population explosion, it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of over-population which, if not controlled, may lead to serious social and economic problems throughout the world.”

**41.** Law is enacted to serve the need of the society. It has to keep pace with the aspirations and need of the society as well as to take into consideration the changing concept of the value. It is only with an intention to serve the social purpose, namely, to control the problem of population explosion that these provisions have been enacted. We fail to find any constitutional infirmity or any element of arbitrariness in these provisions. There is no invasion of any constitutional right of any person. There is, also, no invasion on the part of the Legislature in marital right of a person concerned or a right or procreation of children. It is a statutory right guaranteed under the Panchayati Raj Act to be elected but that right is with certain restrictions and if somebody wants to assert that right, he has to abide by such restrictions because this statutory right is subject to statutory restrictions contained in the Act. We are, therefore, of the opinion that the restrictions imposed in Section 19(L) neither outrage the dignity of a person nor it infringe any of the fundamental rights, Common Law right or a marital right of procreation of a child.

**42.** We, also, fail to understand how the provisions of Section 19(L) and Section 39 of the Act are against the basic structure or features of the Constitution. There is a reasonable nexus in framing these provisions with the object sought to be achieved. The object which is sought to be achieved is to implement the family planning programme and restrict the family to check the population explosion which is one of the major problems which India is facing today. Though having more than two children does not, in any way, affect the workings of the Sarpanch, Panch or a Member of a Panchayat Raj Institution but the population explosion has affected the economic condition of the State and it is with the purpose to implement the mandate of the Directive Principles of the State Policy that this measure was considered necessary. These provisions according to us also, do not violate Articles 25 and 26 of the Constitution of India as there is no invasion of any of the right to freedom of conscience and free profession, practice and propagation of religion. These provisions, also, do not invade the right of petitioners of freedom to profess his/her religious affairs. A person out of the marital life, can produce more than two children but in that case the statutory right conferred upon a voter under the Act will not be available to him as these are the rights created under the statute and are subject to the statutory limitations. There is, thus, no violation of Articles 25 and 26 of the Constitution of India.

**43.** We are, therefore, of the opinion that Section 19(1)(L) and Section 39 of the Rajasthan Panchayati Raj Act, 1994 are not violative of any of the provisions of the Constitution of India.

**44.** In the result, the writ petitions filed by the petitioners are partly allowed. The validity of Section 19(1)(L) and Section 39 of the Rajasthan Panchayati Raj Act, 1994 is up-held but the order Annexure 3 in this writ petition, as well as the orders passed in the writ petitions mentioned in the Schedule, declaring the petitioners as ‘disqualified’, are quashed and set-aside as being passed by the Chief Executive Officer without an enquiry being conducted by the Judicial Authority under Section 40 of the Act.”

## IN THE HIGH COURT OF GUJARAT

**Kanaiyalal Narandas Patel v. State of Gujarat & Ors.****(1999) 1 GLR 126****K.G. Balakrishnan, C.J. and J.M. Panchal, J.**

***A government resolution with effect from a certain date denied teachers working in government-aided schools, having more than two children, the benefit of encashing their leave travel concessions. A teacher with more than two children challenged this resolution before the Gujarat High Court on the ground that it violated Article 14 of the Indian Constitution by treating employees with more than two children unequally on the basis of date of entering into service. However, the resolution was upheld by a Single Judge and an appeal against this order came before a Division Bench of the High Court.***

**Balakrishnan, C.J.:** "...The appellant is a teacher working in an aided school. He challenged the Government resolution, dated 27 July 1989. The Government servants as well as the teachers working in aided schools are given leave travel concessions. In 1984, the Government liberalised its scheme for L.T.C., and even permitted to claim encashment of the leave travel facility. As regards the encashment of the L.T.C. for the block period of 1992-95, the Government issued a resolution on 1 January 1992. Under Cl. (7) of the Resolution, it was stated that the L.T.C. would not be available to the employees who have entered in service after 1 April 1989, who have more than two living children. This resolution was challenged by the appellant before the learned Single Judge.

2. The appellant contended that he is having a family having more than two living children and as he entered service after 1 April 1989, he is being denied the facility of L.T.C. whereas employees who joined service prior to 1 April 1989 and who have more than two living children, are given this benefit and this is violative of Art. 14 of the Constitution as there is unequal treatment...

3. The learned Single Judge held that the Government has taken a policy decision in furtherance of the Government policy of family planning as a population control measure and as it is absolutely necessary for the Government to provide such a decision, the restriction imposed by the Government cannot be said to be bad. The view taken by the learned Single Judge is assailed before us.

4. ...It may be noted that the Government passed the resolution as early as on 27 July 1989, a copy of which is produced as Annexure B. The resolution states that the benefit of leave travel concession to Government employees entering in service thereafter is restricted up to two children. In the resolution, it is further stated that in furtherance of the concept of small family norm of two children. Government is pleased to decide that the leave travel concession (including encashment) for new entrants in Government service shall be restricted to families not having more than two living children. In other words, the Government employees who have more than two living children, shall not be entitled for L.T.C. (including encashment) for himself/herself and as well as for other members of the family. The concerned Government employees would be required to give a certificate to this effect each time they claim leave travel concession. This order was made applicable to the Panchayat employees in the educational institutions. Government Corporations, Boards and to the grant-in-aid institutions. So, right from 1989, the Government had issued such a direction that the employee having more than two living children are not entitled to other benefit of L.T.C. The appellant has not challenged the said resolution in the special civil application, but has chosen to challenge only the later resolution passed in 1992, wherein Cl. (7) was included. Therefore, it is clear that Cl. (7) in 1992 resolution, which provided encashment facilities for the block period 1992-95, was on the basis of the earlier resolution passed on 27 July 1989. Therefore, it cannot be said that a privilege that was being enjoyed by the Government servants was taken away by the subsequent resolution.

5. ...In the instant case, it cannot be held that similar employees are given different treatment. The Government restricted the benefit to the employees, who have two living children and who joined after 1 April 1989. This policy was adopted as an incentive to encourage small family as a drive towards family planning. As it is a part of the policy of the Government, it cannot be said that the State has adopted an irrational basis for this policy. It is one of our important national policies that we should have a small family and the State Government is fully justified in adopting such a policy and giving incentives to persons who have small family. The appellant has chosen to challenge this policy after long lapse of time. The learned Single Judge was fully justified in holding that there was no discrimination or violation of Art. 14 of the Constitution of India. This Letters Patent Appeal is without any merit and it is accordingly dismissed.

..."

## IN THE HIGH COURT OF ANDHRA PRADESH

**B.K. Parthasarathi v. Govt. of Andhra Pradesh & Ors.**

**AIR 2000 AP 156**

**Motilal B. Naik and J. Chelameswar, JJ.**

***Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994 disqualified persons having more than two living children after a prescribed date from holding certain public offices in the Andhra Pradesh Panchayat. Three writ petitions were filed before the Andhra Pradesh High Court by the disqualified candidates challenging the constitutional validity of the provision arguing, inter alia, that it infringed their right to privacy under Articles 19 and 21 of the Indian Constitution.***

**Naik, J.:** “An important question of law as to the constitutional validity of Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994 is raised in this writ petitions.

...

**6.** ...The relevant section for the purpose of deciding the issue before us is sub-Section (3) of Section 19, which reads as under:

“A person having more than two children shall be disqualified for election or for continuing as member.

Provided that the birth within one year from the date of commencement of the Andhra Pradesh Panchayat Raj Act, 1994 hereinafter in this Section referred to as the date of such commencement of an additional child shall not be taken into consideration for the purpose of this section.

Provided further that a person having more than two children (excluding the child if any born within one year from the date of such commencement) shall not be disqualified under this Section for so long as the number of such commencement does not increase.

Provided also that the Government may direct that the disqualification in this Section shall not apply in respect of a person for reasons to be recorded in writing”.

**7.** As indicated above, in all these three writ petitions, the Constitutional validity of Section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994, is challenged, mainly on three grounds.

**8.** Leading the arguments on behalf of the writ petitioners, Shri S. Ramachandra Rao, learned senior counsel, firstly, submitted that the impugned provision is in the nature of violating the right of privacy of the petitioners as enshrined under Articles 19 and 21 of the Constitution of India. It is secondly contended that the impugned provision has no nexus with the purpose which is sought to be achieved through the said Act. It is thirdly argued that the impugned provision violates Article 14 of the Constitution of India. In support of his submissions, the learned senior counsel has taken us to few decisions of the Supreme Court of India as well as the Supreme Court of America.

...

**10.** The “right of privacy” as a constitutionally protected right is not to be found in the express language of the Constitution of India. However, the said right is recognised as a facet of Article 21 of the Constitution of India. In *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295 and in *Govind v. State of Madhya Pradesh*, AIR 1975 SC 1378, the Supreme Court while examining this aspect held that the right to privacy is only a facet of Article 21 of the Constitution.

The American Supreme Court, in a series of decisions considered the ambit and scope of ‘right of privacy’ and the various facets thereof. The broad contours of this right are ‘repose’, ‘sanctuary’ and ‘intimate decision’...

**11.** Coming to the view of the Supreme Court of India, in a separate but concurring judgment in *Kharak Singh’s case*, (AIR 1963 SC 1295) (supra), Subba Rao, J. while examining the ‘right of privacy’ as a part of Article 21 of the Constitution of India, held thus:

“.....If physical restraints on a person’s movements affect his personal liberty, physical encroachments on his private life would affect in a larger degree. Indeed, nothing is more deleterious to a man’s physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Art. 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures.....”

**12.** Justice Mathew in *Govind's case*, (AIR 1975 SC 1378) (supra) while recognising the existence of the 'right of privacy' under the Indian Constitution and the need to protect such a right, held thus:

"The right to privacy in any event will necessarily have to go through a process of case by case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."

**13.** Various attempts of the State to invade the personality — contents and process of mind either by way of bodily intrusion or control, public command or deliberate omission became the subject-matters of debate before the American Supreme Court in various cases. The laws through which Government attempted to shape the minds of the subjects in the areas of liberty and conscience, education and freedom of enquiry, screening the sources of consciousness, coercive conditioning, intrusion on the body like physical invasion or gross neglect, decisions about the birth and babies, the liberty of the individual in the areas of risk taking, vocation, travel, appearance and apparel, the reputation and records are some of the specific areas which were considered by the American Supreme Court in the context of "right of privacy".

**14.** The personal decisions of the individual about the birth and babies called the right of reproductive autonomy' is a facet of a 'right of privacy'. The American Supreme Court in *Skinner v. Oklahoma*, (1941) 316 US 535 characterised the right to reproduce as a "one of the basic civil rights of man".

**15.** The right to make a decision about reproduction is essentially a very personal decision either on the part of the man or woman. Necessarily, such a right includes the right not to reproduce. The intrusion of the State into such a decision making process of the individual is scrutinised by the constitutional Courts both in this country and in America with great care.

**16.** In *Griswold v. Connecticut*, (1965) 381 US 479 the constitutionality of a statute which sought to restrict the right of married persons to use contraceptive devices fell for the consideration of the Court. The majority of the American Supreme Court held that this statute impermissibly limited the 'right of privacy' of the married persons. Justice Douglas (sic) who delivered the majority opinion, traced this 'right of privacy' to several guarantees of the bill of rights. The Court held that the impugned statute regulated a personal marital relationship without an identifiable and legitimate relationship and would expose the married couple to an inquiry into the intimate details of their relationship.

**17.** In *Eisenstadt v. Baird*, (1972) 405 US 438, the Supreme Court invalidated a statute which prohibited the distribution of contraceptives to unmarried persons on the ground that it violated the equal protection clause as the Court found no rationale or legitimate distinction between use of contraceptives by married or unmarried persons.

**18.** In *Roe v. Wade*, (1973) 410 US 113 the Court held that the right to have an abortion was a part of the fundamental constitutional right of privacy of the woman and such a right could be interfered with by the State only to promote a compelling interest of the State. The protection of the health of the woman was held to be a compelling interest of the State.

**19.** All the above-mentioned cases, of course, deal with the right of the individual either a man or a woman to take a decision not to reproduce and where the State sought to interfere with such a decision making process. Irrespective of the conclusion reached by the Court in each of the individual cases, the Court recognised in all these decisions that the 'right of privacy' is not an absolute right and such a right could be restricted if required to promote some compelling interest of the State.

**20.** As discussed above, 'the right of privacy' which is held to be a facet of Article 21 of the Constitution, in this country must also be subjected to similar restrictions which are held constitutionally permissible in the context of the other facets of the right guaranteed under Article 21 of the Constitution of India. The Supreme Court in *Govind's case*, (AIR 1975 SC 1378) (supra) held that even the right under Article 21 is not an absolute right.

**21.** Applying these principles, the challenge to the impugned provisions of the Andhra Pradesh Panchayat Raj Act, 1994 must be examined.

**22.** The impugned provision, viz., sub-Section (3) of Section 19 of the said Act does not directly curtail or directly interfere with the right of any citizen to take a decision in the matter of procreation. It only creates a legal disability on the part of any person who has procreated more than two children as on the relevant date of seeking an elected office under the Act. The substance of the provision is that it does not compel directly anyone to stop procreation, but only disqualifies any person who is otherwise eligible to seek election to various public offices coming within the ambit of the Andhra Pradesh Panchayat Raj Act, 1994 or declares such persons who have already been holding such offices to be disqualified from continuing in such offices if they procreate more than two children.

...

**25.** Whether creation of a restriction such as the one created in this case, would in fact achieve the object sought to be achieved, cannot be demonstrated in proceedings like this, but however, the legislative measure is reasonably be connected with the object sought to be achieved. In our considered view, the inquiry must stop there and this Court would not be justified in making a further inquiry as to what extent such a purpose would be achieved. The fact remains that the population growth is one of the major problems facing this country and any measure to control the population growth unless it impermissibly violates some constitutionally protected right must be upheld as a legally permissible exercise of legislative power...

**26.** What is sought to be curtailed by the Legislature in this case is not the right to procreation but the right to seek certain elected offices created under the Andhra Pradesh Panchayat Raj Act, 1994 if one begets more children than the prescribed limit. Right from the earliest decision in *N.P. Ponnuswami v. Returning Officer, Namakkal*, AIR 1952 SC 64, it has always been held that the right to contest in election is a statutory and not a fundamental right. In *Jamuna Prasad v. Lachhi Ram*, AIR 1954 SC 686, Bose, J. speaking for the Constitutional Bench of the Supreme Court in the context of a challenge to certain provisions of the Representation of the Peoples Act, as violating the fundamental right to freedom of speech, held thus:

“.....The laws do not stop a man from speaking. They merely prescribe conditions which must be observed if he wants to enter Parliament.

The right to stand as a candidate and contest an election is not a common law right. It is a special right created by the statute and can only be exercised on the conditions laid down by the Statute. The Fundamental Rights Chapter has no bearing on a right like this created by Statute. The appellants have no fundamental right to be elected as members of Parliament. If they want that, they must observe the rules they prefer to exercise their right of free speech outside these rules, the impugned sections do not stop them. We hold that these sections are ‘intra vires’.

**27.** This has been the consistent view of the Supreme Court till today. Therefore, the submission made on behalf of the petitioners by the learned senior counsel that the petitioners ‘right to privacy’ is infringed, is untenable and must be rejected.

...

**32.** On the various propositions supporting the contentions of the learned counsel appearing for all the parties and the learned Additional Advocate General appearing on behalf of the official respondents, we have given our consideration to the genesis of the problem vis-a-vis the legislative intention which is brought under Section 19(3) of the A.P. Panchayat Raj Act, 1994. As is evident from the various decisions which are discussed by us, the privacy of a person to lead a life according to his desire has been well recognised by Courts. However, there is no reason for us to hold that through the impugned legislation, the privacy of an individual is attacked or sought to be taken away. The Legislature, through the impugned legislation, prescribed certain disqualifications for a person either to hold or contest the elected office under the Act if he procreates more children than the prescribed limit. At the cost of repetition, we must say that choosing to contest an elected office is not a fundamental right but only a right arising out of a Statute. That being so, no grievances could be made out on the ground that the right to liberty and right to privacy of an individual are deprived by the impugned legislation. The Legislature, however, has visualised a contingency arising out of birth of an additional child, during holding of an elected office, which disqualifies a person from holding such office, by empowering the Government to hold that such disqualification may not apply in respect of a person, by recording reasons in writing. Therefore, notwithstanding the fact of giving birth to an additional child than the prescribed limit by a person holding the office under the Act, still the Government is empowered to permit such person to continue in office, by recording reasons in writing. When the Legislature has provided this remedy, it cannot be said that the impugned provision is a draconian act of the Legislature whereby the right to privacy of a person is deprived and such deprivation offends Articles 19 and 21 of the Constitution of India.

**33.** Challenge to a similar provision arising out of the Rajasthan Panchayat Raj Act was made before the Rajasthan High Court in *Mukesh Kumar Ajmera v. State of Rajasthan*, AIR 1997 Raj 250(251). The Rajasthan High Court repelled the contentions made against such provision and upheld the validity of the said provision while considering various decisions of the Supreme Court and other High Courts.

**34.** For the foregoing reasons, we find no merits in these writ petitions and we accordingly dismiss the same holding that the rigour of the provision as brought out under Sec. 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994 is not violative of any fundamental rights or it is in the nature of depriving the privacy of an individual...”



## IN THE HIGH COURT OF ANDHRA PRADESH

Elkapalli Latchaiah &amp; Anr. v. Govt. of Andhra Pradesh &amp; Ors.

(2001) 5 ALT 410 (DB)

S.B. Sinha, C.J. and V.V.S. Rao, J.

***The constitutional validity of section 19(3) of the Andhra Pradesh Panchayat Raj Act, 1994, which disqualified persons having more than two living children after a prescribed date from holding certain public offices in the Andhra Pradesh Panchayat, was challenged in this case. The petitioners were candidates for the post of Sarpanch, whose nominations had been rejected since they had more than two children.***

**Sinha, J.:** “The *vires* of sub-section (3) of Section 19 of the Andhra Pradesh Panchayat Raj Act, 1994 (Act No. 13 of 1994), hereinafter referred to as ‘the Act’ for the sake of brevity, falls for consideration in this writ petition.

2. The fact of the matter lies in a very narrow compass. The petitioners have filed their nominations for contesting to the post of Sarpanch and their nominations have not been accepted on the ground that a person who is having more than two children is disqualified from contesting the election... *Mr. S. Ramachandra Rao*, the learned Counsel appearing on behalf of the petitioners, submits that having regard to the fact that the persons having more than two children are entitled to contest the election to the Legislative Assemblies and Parliament, the restriction imposed in terms of sub-section (3) of Section 19 is unreasonable. The learned Counsel would contend that clause (1) of Article 243-F providing for disqualification of membership and thus, sub-clause (b) clause (1) of Section 243 providing for disqualification of membership must be confined to sub-clause (a) and no law purported to have been made in terms of sub-clause (b) can impose a condition which is not provided for in terms of sub-clause (a).

3. The learned Advocate-General appearing on behalf of the State, however, would submit that the question is covered by two decisions of this Court in *B.K. Parthasarathi v. Govt. of A.P.*, 1999 (5) ALT 715 (DB), *Are Gangadhar v. Zilla Praja Parishad, Karimnagar*, 1999 (5) ALT 585.

4. It is not in dispute that a Division Bench of this Court in *B.K. Parthasarathy*(supra) has declared the said provision to be *intra vires*. The learned Counsel, *Mr. Ramachandra Rao*, who incidentally had appeared before the Division Bench, however, would submit that, as this aspect of the matter had not been taken into consideration, the said decision must be held to have been rendered *per incuriam*. The learned Counsel further contends that right to privacy, which would include the right to procreation, being a basic feature of the Constitution, cannot be taken away. The right to privacy, contends the learned Counsel, is guaranteed to the citizen in terms of Article 21 and thus sub-section (3) of Section 19 of the Act must be held to be unconstitutional. Strong reliance, in this connection, has been placed on the decisions of the Apex Court in *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632, *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301 and *Gobind v. State of M.P.*, (1975) 2 SCC 148. It was submitted that control of population is not one amongst the objectives of the Act and by reason of the said provision an element of arbitrariness has been introduced and thus the said provision must be held to be violative of Article 14 of the Constitution of India.

...

8. Right to privacy or a right to marriage may be a right under Article 21 of the Constitution of India, but such a right is not absolute. It is one thing to say that the person has a right to privacy or right to marriage and consequently right to procreation, but the same would not mean that no restriction as regards the said right can be put for other purposes whatsoever. Population explosion is a matter of great concern of the State. If certain measures are effected for controlling the population explosion, it cannot be said that such law would be unconstitutional.

...

10. In *Mukesh Kumar Ajmera v. State of Rajasthan*, AIR 1997 Raj. 250, a question arose whether Section 19(L) of the Rajasthan Panchayat Raj Act was *ultra vires*. The Division Bench answered the question in the negative...

...

12. The learned Judges opined: “...We, also, fail to understand how the provisions of Section 19(L) and Section 39 of the Act are against the basic structure or features of the Constitution. There is a reasonable nexus in framing these provisions with the object sought to be achieved. The object which is sought to be achieved is to implement the family planning programme and restrict the family to check the population explosion which is one of the major problems which India

is facing today. Though having more than two children does not, in any, affect the workings of the Sarpanch, Panch or a Member of a Panchayat Raj Institution but the population explosion has affected the economic condition of the State and it is with the purpose to implement the mandate of the Directive Principles of the State Policy that this measure was considered necessary. These provisions according to us also, do not violate Articles 25 and 26 of the Constitution of India as there is no invasion of any of the right to freedom of conscience and free profession, practice and propagation of religion. These provisions, also, do not invade the right of petitioners of freedom to profess his/her religious affairs. A person out of the marital life, can produce more than two children but in that case the statutory right conferred upon a voter under the Act will not be available to him as these are the rights created under the statute and are subject to the statutory limitations. There is, thus, no violation of Articles 25 and 26 of the Constitution of India”.

**13.** The said decision, therefore, is an authority for the proposition to the effect that such a provision is not unconstitutional. This aspect of the matter has been considered by a Division Bench of this Court in *B.K. Parthasarathi v. Govt. of A.P.*(supra), *Are Gangadhar v. Zilla Praja Parishad, Karimnagar* (supra).

**14.** In *Parthasarathy* (supra), the Division Bench of this Court has held that Section 19(3) merely creates a legal disability on the part of any person who has procreated more than two children as on the relevant date of seeking an elected office under the Act...

**15.** We agree with the said decision. The said decision, in our opinion, cannot be said to have been rendered *per incuriam* only because certain aspects of the matter had not been brought to its notice...

...

**17.** The decisions cited by the learned Counsel may now be noticed. In *R. Rajagopal* (supra), the Apex Court upholding the right to privacy as being implicit in right to life and guaranteed to the citizens of this country by Article 21, it was held to be right to life alone. In *People's Union for Civil Liberties* (supra), it was held that right to privacy is a part of Article 21 of the Constitution of India.

**18.** In *Gobind* (supra), it has been held:

“The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterise as a fundamental right, we do not think that the right is absolute”.

**19.** In *State of Maharashtra v. Madhukar N. Gardikar*, (1991) 1 SCC 57, it was held that even a woman of easy virtue is entitled to right to privacy. In *Neera Mathur v. Life Insurance Corporation of India*, (1992) 1 SCC 286, it was held:

“..... It is said that she gave a false declaration regarding the last menstruation period with a view to suppress her pregnancy. The modesty and self respect may perhaps preclude the disclosure of such personal problems like whether her menstrual period is regular or painless, the number of conceptions taken place; how many have gone full term *etc.* The Corporation would do well to delete such columns in the declaration. If the purpose of the declaration is to deny the maternity leave and benefits to a lady candidate who is pregnant at the time of entering the service (the legality of which we express no opinion since not challenged).”

**20.** By reason of Section 19(3) of the Act, no person's right to privacy has been taken away. The right to contest election is merely a statutory right and not a constitutional right. In terms of Article 243-F of the Constitution of India, the State is entitled to make law providing for disqualification. Right to vote and right to contest the elections by the petitioners having flown from the Act, such a right can also be curtailed by reasons thereof, particularly having regard to clause (1) of Article 243-F of the Constitution of India. In any event, as noticed hereinbefore, right to privacy is not an absolute right. In *Mr. 'X' v. Hospital 'Z'*, 1999 (1) ALD (S.C.S.N.) 9 : (1998) 8 SCC 296 : AIR 1999 SC 495, the Apex Court has held that such a right is subject to the right of others. The submission of the learned Counsel to the effect that sub-section (3) of Section 19 is violative of Article 14 of the Constitution of India is misplaced. By reason of the said provision, no classification has been made, which is impermissible under the Constitution of India. It is not a case where class legislation has been made. The persons who answer the description of Section 19(3) stand on equal footing. Only because the petitioners had married earlier or their children were born prior to coming into force of the Act would not mean that such a right is absolute.

**21.** For the reasons aforementioned, there is no merit in this writ petition, which is accordingly dismissed...”

## IN THE SUPREME COURT OF INDIA

**Javed & Ors v. State of Haryana & Ors.****(2003) 8 SCC 369****R.C. Lahoti, Ashok Bhan, and Arun Kumar, JJ.**

*Petitioners challenged the constitutional validity of the provisions of the Haryana Panchayati Raj Act, 1994 which disqualified persons having more than two living children from holding certain public offices in Haryana Panchayats. The stated objective of these disqualification provisions was to popularize the family planning programs of the government. The Supreme Court examined, inter alia, whether these provisions were violative of Article 14 for treating those who had more than two children differently from those who did not; whether they violated personal liberty with respect to the number of children one wishes to have; as well as whether the provisions had a disparate impact on women in Indian society as they often lack independence in decisions about having a child.*

Lahoti, J.: “...

2. In this batch of writ petitions and appeals the core issue is the vires of the provisions of Sections 175(1)(q) and 177(1) of the Haryana Panchayati Raj Act, 1994 (Act 11 of 1994) (hereinafter referred to as the Act for short). The relevant provisions are extracted and reproduced hereunder:

“175. (1) No person shall be a Sarpanch, Up-Sarpanch or a Panch of a Gram Panchayat or a member of a Panchayat Samiti or Zila Parishad or continue as such who—

\*\*\*

(q) has more than two living children:

Provided that a person having more than two children on or up to the expiry of one year of the commencement of this Act, shall not be deemed to be disqualified.

\*\*\*

177. (1) If any member of a Gram Panchayat, Panchayat Samiti or Zila Parishad—

(a) who is elected, as such, was subject to any of the disqualifications mentioned in Section 175 at the time of his election;

(b) during the term for which he has been elected, incurs any of the disqualifications, mentioned in Section 175,

shall be disqualified from continuing to be a member, and his office shall become vacant.

(2) In every case, the question whether a vacancy has arisen, shall be decided by the Director.

The Director may give its decision either on an application made to it by any person, or on its own motion. Until the Director decides that the vacancy has arisen, the members shall not be disqualified under sub-section (1) from continuing to be a member. Any person aggrieved by the decision of the Director may, within a period of fifteen days from the date of such decision, appeal to the Government and the orders passed by Government in such appeal shall be final:

Provided that no order shall be passed under this sub-section by the Director against any member without giving him a reasonable opportunity of being heard.”

3. ...One of the objectives set out in the Statement of Objects and Reasons is to disqualify persons for election to Panchayats at each level, having more than two children after one year of the date of commencement of this Act, to popularize family welfare/family planning programme [vide clause (m) of para 4 of SOR].

...

5. Several persons (who are the writ petitioners or appellants in this batch of matters) have been disqualified or proceeded against for disqualifying either from contesting the elections for, or from continuing in the office of Panchas/Sarpanchas in view of their having incurred the disqualification as provided by Section 175(1)(q) or Section 177(1) read with Section 175(1) (q) of the Act. The grounds for challenging the constitutional validity of the abovesaid provision are very many, couched

differently in different writ petitions. We have heard all the learned counsel representing the different petitioners/appellants. As agreed to at the Bar, the grounds of challenge can be categorized into five: (i) that the provision is arbitrary and hence violative of Article 14 of the Constitution; (ii) that the disqualification does not serve the purpose sought to be achieved by the legislation; (iii) that the provision is discriminatory; (iv) that the provision adversely affects the liberty of leading personal life in all its freedom and having as many children as one chooses to have and hence is violative of Article 21 of the Constitution; and (v) that the provision interferes with the freedom of religion and hence violates Article 25 of the Constitution.

...

### DOES THE LEGISLATION NOT SERVE ITS OBJECT?

**9.** It was submitted that the number of children which one has, whether two or three or more, does not affect the capacity, competence and quality of a person to serve on any office of a Panchayat and, therefore, the impugned disqualification has no nexus with the purpose sought to be achieved by the Act. There is no merit in the submission. We have already stated that one of the objects of the enactment is to popularize family welfare/family planning programme. This is consistent with the National Population Policy.

**10.** Under Article 243-G of the Constitution, the legislature of a State has been vested with the authority to make law endowing the Panchayats with such powers and authority which may be necessary to enable the Gram Panchayats to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Panchayats, at the appropriate level, subject to such conditions as may be specified therein. Clause (b) of Article 243-G provides that Gram Panchayats may be entrusted the powers to implement the schemes for economic development and social justice including those in relation to matters listed in the Eleventh Schedule. Entries 24 and 25 of the Eleventh Schedule read:

“24. Family welfare.

25. Women and child development.”

In pursuance of the powers given to the State Legislatures to enact laws, the Haryana Legislature enacted the Haryana Panchayati Raj Act, 1994 (Haryana Act 11 of 1994). Section 21 enumerates the functions and duties of Gram Panchayat. Clause XIX(1) of Section 21 reads:

“XIX. Public Health and Family Welfare—

Implementation of family welfare programme.”

Family welfare would include family planning as well. To carry out the purpose of the Act as well as the mandate of the Constitution the legislature has made a provision for making a person having more than two living children ineligible to either contest for the post of Panch or Sarpanch. Such a provision would serve the purpose of the Act as mandated by the Constitution. It cannot be said that such a provision would not serve the purpose of the Act.

**11.** In our opinion, the impugned disqualification does have a nexus with the purpose sought to be achieved by the Act. Hence it is valid.

...

**20.** We are clearly of the opinion that the impugned provision is neither arbitrary nor unreasonable nor discriminatory. The disqualification contained in Section 175(1)(q) of Haryana Act 11 of 1994 seeks to achieve a laudable purpose — socio-economic welfare and health care of the masses — and is consistent with the National Population Policy. It is not violative of Article 14 of the Constitution.

### SUBMISSIONS (IV) AND (V): THE PROVISION IF IT VIOLATES ARTICLE 21 OR 25?

**21.** Before testing the validity of the impugned legislation from the viewpoint of Articles 21 and 25, in the light of the submissions made, we take up first the more basic issue — whether it is at all permissible to test the validity of a law which enacts a disqualification operating in the field of elections on the touchstone of violation of fundamental rights.

**22.** Right to contest an election is neither a fundamental right nor a common law right. It is a right conferred by a statute. At the most, in view of Part IX having been added in the Constitution, a right to contest election for an office in Panchayat may be said to be a constitutional right — a right originating in the Constitution and given shape by a statute. But even so, it cannot be equated with a fundamental right. There is nothing wrong in the same statute which confers the right to

contest an election also to provide for the necessary qualifications without which a person cannot offer his candidature for an elective office and also to provide for disqualifications which would disable a person from contesting for, or holding, an elective statutory office.

...

**25.** In our view, disqualification on the right to contest an election by having more than two living children does not contravene any fundamental right nor does it cross the limits of reasonability. Rather it is a disqualification conceptually devised in national interest.

...

### THE DISQUALIFICATION, IF VIOLATES ARTICLE 21?

**27.** Placing strong reliance on *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248] and *Kasturi Lal Lakshmi Reddy v. State of J&K* [(1980) 4 SCC 1] it was forcefully urged that the fundamental right to life and personal liberty emanating from Article 21 of the Constitution should be allowed to stretch its span to its optimum so as to include in the compendious term of the article all the varieties of rights which go to make up the personal liberty of man including the right to enjoy all the materialistic pleasures and to procreate as many children as one pleases.

**28.** At the very outset we are constrained to observe that the law laid down by this Court in the decisions relied on is either being misread or read divorced of the context. The test of reasonableness is not a wholly subjective test and its contours are fairly indicated by the Constitution. The requirement of reasonableness runs like a golden thread through the entire fabric of fundamental rights. The lofty ideals of social and economic justice, the advancement of the nation as a whole and the philosophy of distributive justice — economic, social and political — cannot be given a go-by in the name of undue stress on fundamental rights and individual liberty. Reasonableness and rationality, legally as well as philosophically, provide colour to the meaning of fundamental rights and these principles are deducible from those very decisions which have been relied on by the learned counsel for the petitioners.

**29.** It is necessary to have a look at the population scenario of the world and of our own country.

**30.** India has the (dis)credit of being second only to China at the top in the list of the 10 most populous countries of the world. As on 1-2-2000 the population of China was 1277.6 million while the population of India as on 1-3-2001 was 1027.0 million (Census of India, 2001, Series I, India — Paper I of 2001, p. 29).

**31.** The torrential increase in the population of the country is one of the major hindrances in the pace of India's socio-economic progress. Everyday, about 50,000 persons are added to the already large base of its population. The Karunakaran Population Committee (1992-93) had proposed certain disincentives for those who do not follow the norms of the development model adopted by the national public policy so as to bring down the fertility rate. It is a matter of regret that though the Constitution of India is committed to social and economic justice for all, yet India has entered the new millennium with the largest number of illiterates in the world and the largest number of people below the poverty line. The laudable goals spelt out in the directive principles of State policy in the Constitution of India can best be achieved if the population explosion is checked effectively. Therefore, population control assumes a central importance for providing social and economic justice to the people of India (Usha Tandon, Reader, Faculty of Law, Delhi University — *Research Paper on Population Stabilization*, Delhi Law Review, Vol. XXIII, 2001, pp. 125-31).

...

**35.** The growing population of India had alarmed the Indian leadership even before India achieved independence. In 1940 the Sub-Committee on Population, appointed by the National Planning Committee set up by the President of the Indian National Congress (Pandit Jawaharlal Nehru), considered "family planning and a limitation of children" essential for the interests of social economy, family happiness and national planning. The Committee recommended the establishment of birth-control clinics and other necessary measures such as raising the age of marriage and a eugenic sterilization programme. A Committee on Population set up by the National Development Council in 1991, in the wake of the census result, also proposed the formulation of a national policy. (Source — Seminar, March 2002, p. 25.)

**36.** Every successive five-year plan has given prominence to a population policy. In the first draft of the First Five-Year Plan (1951-56) the Planning Commission recognized that population policy was essential to planning and that family planning was a step forward for improvement in health, particularly that of mothers and children. The Second Five-Year Plan (1956-61) emphasized the method of sterilization. A Central Family Planning Board was also constituted in 1956 for

the purpose. The Fourth Five-Year Plan (1969-74) placed the family planning programme, “as one amongst items of the highest national priority”. The Seventh Five-Year Plan (1985-86 to 1990-91) has underlined “the importance of population control for the success of the plan programme ...”. But, despite all such exhortations, “the fact remains that the rate of population growth has not moved one bit from the level of 33 per thousand reached in 1979. And in many cases, even the reduced targets set since then have not been realised”. (*Population Policy and the Law*, *ibid.*, pp. 44-46.)

**37.** The above facts and excerpts highlight the problem of population explosion as a national and global issue and provide justification for priority in policy-oriented legislations, wherever needed.

**38.** None of the petitioners has disputed the legislative competence of the State of Haryana to enact the legislation. Incidentally, it may be stated that the Seventh Schedule List II — State List, Entry 5 speaks of “Local Government, that is to say, the constitution and powers of Municipal Corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.” Entry 6 speaks of “Public health and sanitation” *inter alia*. In List III — Concurrent List, Entry 20-A was added which reads “Population control and family planning”. The legislation is within the permitted field of State subjects. Article 243-C makes provision for the legislature of a State enacting laws with respect to constitution of Panchayats. Article 243-F in Part IX of the Constitution itself provides that a person shall be disqualified for being chosen as, and for being, a member of a Panchayat if he is so disqualified by or under any law made by the legislature of the State. Article 243-G casts one of the responsibilities of Panchayats as preparation of plans and implementation of schemes for economic development and social justice. Some of the schemes that can be entrusted to Panchayats, as spelt out by Article 243-G read with the Eleventh Schedule are schemes for economic development and social justice in relation to health and sanitation, family welfare, women and child development and social welfare. Family planning is essentially a scheme referable to health, family welfare, women and child development and social welfare. Nothing more needs to be said to demonstrate that the Constitution contemplates Panchayat as a potent instrument of family welfare and social welfare schemes coming true for the betterment of people’s health, especially women’s health and family welfare coupled with social welfare. Under Section 21 of the Act, the functions and duties entrusted to Gram Panchayats include “public health and family welfare”, “women and child development” and “social welfare”. Family planning falls therein. Who can better enable the discharge of functions and duties and such constitutional goals being achieved than the leaders of Panchayats themselves taking a lead and setting an example?

**39.** Fundamental rights are not to be read in isolation. They have to be read along with the chapter on directive principles of State policy and the fundamental duties enshrined in Article 51-A. Under Article 38 the State shall strive to promote the welfare of the people and developing a social order empowered at distributive justice — social, economic and political. Under Article 47 the State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular, the constitutionally downtrodden. Under Article 47 the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties. None of these lofty ideals can be achieved without controlling the population inasmuch as our materialistic resources are limited and claimants are many. The concept of sustainable development which emerges as a fundamental duty from several clauses of Article 51-A too dictates the expansion of population being kept within reasonable bounds.

**40.** The menace of growing population was judicially noticed and constitutional validity of legislative means to check the population was upheld in *Air India v. Nergesh Meerza* [(1981) 4 SCC 335 : 1981 SCC (L&S) 599]. The Court found no fault with the rule which would terminate the services of air hostesses on the third pregnancy with two existing children, and held the rule both salutary and reasonable for two reasons: (SCC p. 374, para 101)

“In the first place, the provision preventing third pregnancy with two existing children would be in the larger interest of the health of the air hostess concerned as also for the good upbringing of the children. Secondly, ... when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of overpopulation which, if not controlled, may lead to serious social and economic problems throughout the world.”

**41.** To say the least, it is futile to assume or urge that the impugned legislation violates right to life and liberty guaranteed under Article 21 in any of the meanings, howsoever expanded the meanings may be.

## THE PROVISION IF IT VIOLATES ARTICLE 25?

**42.** It was then submitted that the personal law of Muslims permits performance of marriages with four women, obviously for the purpose of procreating children and any restriction thereon would be violative of the right to freedom of religion enshrined in Article 25 of the Constitution... The relevant part of Article 25 reads as under:

*“25. Freedom of conscience and free profession, practice and propagation of religion.—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.*

*(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—*

*(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;*

*(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.”*

...

**44.** The Muslim law permits marrying four women. The personal law nowhere mandates or dictates it as a duty to perform four marriages. No religious scripture or authority has been brought to our notice which provides that marrying less than four women or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy would be irreligious or offensive to the dictates of the religion. In our view, the question of the impugned provision of the Haryana Act being violative of Article 25 does not arise...

...

**59.** In our view, a statutory provision casting disqualification on contesting for, or holding, an elective office is not violative of Article 25 of the Constitution.

**60.** Looked at from any angle, the challenge to the constitutional validity of Section 175(1)(q) and Section 177(1) must fail. The right to contest an election for any office in Panchayat is neither fundamental nor a common law right. It is the creature of a statute and is obviously subject to qualifications and disqualifications enacted by legislation. It may be permissible for Muslims to enter into four marriages with four women and for anyone whether a Muslim or belonging to any other community or religion to procreate as many children as he likes but no religion in India dictates or mandates as an obligation to enter into bigamy or polygamy or to have children more than one. What is permitted or not prohibited by a religion does not become a religious practice or a positive tenet of a religion. A practice does not acquire the sanction of religion simply because it is permitted. Assuming the practice of having more wives than one or procreating more children than one is a practice followed by any community or group of people, the same can be regulated or prohibited by legislation in the interest of public order, morality and health or by any law providing for social welfare and reform which the impugned legislation clearly does.

**61.** If anyone chooses to have more living children than two, he is free to do so under the law as it stands now but then he should pay a little price and that is of depriving himself from holding an office in Panchayat in the State of Haryana. There is nothing illegal about it and certainly no unconstitutionality attaches to it.

## SOME INCIDENTAL QUESTIONS

**62.** It was submitted that the enactment has created serious problems in the rural population as couples desirous of contesting an election but having living children more than two, are feeling compelled to give them in adoption. Subject to what has already been stated hereinabove, we may add that disqualification is attracted no sooner a third child is born and is living after two living children. Merely because the couple has parted with one child by giving the child away in adoption, the disqualification does not come to an end. While interpreting the scope of disqualification we shall have to keep in view the evil sought to be cured and purpose sought to be achieved by the enactment. If the person sought to be disqualified is responsible for or has given birth to children more than two who are living then merely because one or more of them are given in adoption the disqualification is not wiped out.

**63.** It was also submitted that the impugned disqualification would hit the women worst, inasmuch as in the Indian society they have no independence and they almost helplessly bear a third child if their husbands want them to do so. This contention need not detain us any longer. A male who compels his wife to bear a third child would disqualify not

only his wife but himself as well. We do not think that with the awareness which is arising in Indian womenfolk, they are so helpless as to be compelled to bear a third child even though they do not wish to do so. At the end, suffice it to say that if the legislature chooses to carve out an exception in favour of females it is free to do so but merely because women are not excepted from the operation of the disqualification it does not render it unconstitutional.

64. Hypothetical examples were tried to be floated across the Bar by submitting that there may be cases where triplets are born or twins are born on the second pregnancy and consequently both of the parents would incur disqualification for reasons beyond their control or just by freak of divinity. Such are not normal cases and the validity of the law cannot be tested by applying it to abnormal situations. Exceptions do not make the rule nor render the rule irrelevant. One swallow does not make a summer; a single instance or indicator of something is not necessarily significant.

## CONCLUSION

65. The challenge to the constitutional validity of Sections 175(1)(q) and 177(1) fails on all the counts. Both the provisions are held intra vires the Constitution. The provisions are salutary and in public interest. All the petitions which challenge the constitutional validity of the abovesaid provisions are held liable to be dismissed.

...

## IN THE HIGH COURT OF ALLAHABAD

**Dr. Sukha Raj Singh Rathore v. State of U.P.**

**2004 Cri LJ 4553**

**Amar Saran, J.**

***This writ petition was filed for quashing of the FIR and stay of arrest of a doctor in connection with the death of a woman immediately after a sterilization procedure. After dealing with the issue, the Court commented on the manner in which sterilization is incentivized and promoted over other forms of contraception, and the dangers of such a policy.***

Saran, J.: "..."

3. The facts of the present case are that when her husband Kallu was away in village Garhna, in Panna, M.P. to do the work of a labourer, Smt. Sunita, a Harijan woman, and mother of four little children appears to have been induced by the Basic Health Worker, Suman Raj co-accused, apparently on a promised incentive of Rs. 150, to get herself sterilised at the health camp at the State Allopathic Dispensary, Atarra, Banda. Smt. Sunita was operated on 12-3-2004 by the petitioner, who was the in-charge, CHC, Atarra. Only the consent of Smt. Sunita appears to have been taken for this operation, as her husband was absent. Also no laboratory tests appear to have been done before the operation.

4. It appears that Sunita's condition deteriorated on the operation table itself. After ligation of both the tubes Smt. Sunita appeared to have started gasping, her pulse became feeble, skin cold and her respiration slowed down. The petitioner rushed her to the District hospital at Banda on an ambulance with oxygen after preliminary medication. Written information was also given to the CMO Banda. However the Emergency Officer at the District Hospital, Banda declared her dead on arrival there. The Inspector incharge, Kotwali, Banda was informed and post mortem was conducted by 3 doctors on Sunita's dead body on 13-2-2004.

5. According to the post mortem report, there was no fault with the operation procedures. As the cause of death could not be ascertained, the viscera was preserved. The mandatory investigation by the Medical Board consisting of the CMO, Banda, an Anaesthetist, Gynaecologist and Surgeon, opined that cause of death could not be ascertained and that no action was proposed, and no defaulter was indicated. However, this report also noted a diagnosis of vaso vagal shock.

6. Initially after the operation the Respondent No. 5 appears to have been silenced by Rs. 10,000 incentive which is the price of life that is paid after an unsuccessful (sic) operation and which was paid to him on 13-2-2004. However either on his own, or due to motivation from someone the Respondent No. 5 appears to have moved an application under S. 156(3), Cr PC against the health worker and the petitioner on 17-4-2004, before the JM I, Atarra, after an earlier S. 156(3) Cr PC application dated 27-3-04 was rejected by the CJM, Banda for want of jurisdiction.



7. The JM I, Atarra called for a preliminary report from the SHO, PS Atarra, who submitted (sic) a report on 19-4-2004, favouring the doctor and the Basic Health Worker. The report concluded that whilst the operation had been performed as alleged, however the deceased had voluntarily opted for the operation without any illegal inducement from the Health worker. The petitioner had also not been negligent in the conduct of the operation and that the team of 3 doctors who conducted the post mortem had exonerated him. In spite of this report the Magistrate was inclined to direct registration and investigation of a case under Section 304-A, IPC against the petitioner and the health worker by the police by his order dated 1-6-2004. This has resulted in the present writ petition being filed by the doctor for averting his possible arrest.

8. At the moment as credible evidence is wanting for showing the complicity of the petitioner in any offence. I have no option but to stay the arrest of the petitioner in Case Crime No. C-5/2004 under Section 304-A, IPC, PS, Kotwali, Atarra until further orders or until credible evidence is available or charge-sheet is submitted, whichever is earlier.

9. However as we find that an apparently healthy woman of 28 years has died after an operation, and three doctors who conducted the post mortem have found no fault with the operation procedures, and no cause of death, either natural or unnatural, and they have simply sent the viscera for chemical examination, and the Medical Board headed by the CMO has also given a clean chit to the petitioner, it becomes incumbent to look for the circumstances which caused the death of Smt. Sunita, as normally a young healthy woman is not expected to die without cause. The SP Banda, Respondent No. 2 is directed to obtain the viscera report within 3 weeks. In case the viscera report is also negative, the Respondent No. 2 is directed to get an investigation made under his supervision by a senior officer for ascertaining the true causes for the death of Sunita and whether all the needed medical tests were conducted prior to the operation, whether the deceased was properly motivated, and whether the precautions needed for the operation and proper procedures were followed. He may seek the opinion of qualified gynaecologists and others in this regard. He should also probe whether a clean chit has been given to the petitioner by the 3 doctors who conducted the post mortem examination and by the medical board in a bona fide manner, or they have acted with improper motives and sought to screen the petitioner or any one else who may be responsible for the death of Smt. Sunita. In case any material is available suggestive of a conspiracy on part of the doctors who conducted the post mortem or any other authority to screen the petitioner or anyone else from punishment, if there are reasons to suspect any negligence in the procedures for sterilisation of Smt. Sunita, the Respondent No. 2, SP Banda will take appropriate action against the petitioner and the offending doctors or other authorities. The Respondent No. 2 is directed to submit a report to this Court on the action taken in compliance with this order within a period of two months.

10. Before parting I must point out that this case, in which a woman has died after undergoing sterilisation under the government's programme for mass sterilisation, illustrates the dangers of forced or induced sterilisation of a poor person without taking the needed precautions, health checks, and without considering whether the person was eligible for sterilisation under government criteria, or informing the patient of the risks of undergoing the sterilisation operation.

11. The problem appears to have arisen because for promoting the needed and laudable objective of family planning, the government and its functionaries have concentrated on a strategy of promoting sterilisations alone, to the exclusion of any other methods of birth control. This is not to say that this Court is undermining the importance of programmes for sterilisation of persons with large families. Family planning is indeed the absolute need of the hour. But hurried sterilisations, without proper precautions, in defiance of criteria and guidelines set out by government itself, without properly motivating and acquainting people of the problems and risks involved, and advising them on the appropriate family planning technique for persons in varying situations, is proving counter-productive. Presently family planning staff, doctors etc. are given awards on the basis of the numbers of sterilisations done, and are taken to task for not meeting sterilisation targets, whilst other techniques for birth control are consistently devalued. For meeting these targets poor persons, who may not be healthy or who would otherwise be ineligible under the official criteria fixed are offered petty incentives, and forced or motivated by hook or by crook to undergo sterilisation.

12. The present petitioner, who is a doctor, actually seeks credit for being (sic) an expert in sterilisations and for having done 50,000 operations, and for having met 75% of Banda district's annual target single handedly. Even on the fateful day when Smt. Sunita died 20 persons had been sterilised. This per se creates a situation of risk, and one is left wondering whether proper attention could be given to individual cases, when tubectomies are conducted at such a large scale. Where deaths as in the present case or other problems arise, there is a set back and grave negative publicity for the family planning programme. The backlash provoked by Sanjay Gandhi's programme of forced sterilisations during the emergency are still stained in public memory.

...

## IN THE SUPREME COURT OF INDIA

**Ramakant Rai v. Union of India**

**(2009) 16 SCC 565**

**Ruma Pal, Arijit Pasayat, and C.K. Thakker, JJ.**

***In this writ petition, the Supreme Court noted that no uniform procedures or norms were being followed by States for ensuring implementation of Union of India's guidelines on sterilization procedures. It issued various directions taking cue from the best practices followed by some States in this regard.***

**Pal, Pasayat, and Thakker, JJ.:** “1. Several States have filed affidavits setting out the steps taken by them to regulate sterilisation procedures with regard to the male and female patients in their respective States. However, it is apparent that there is no uniformity with regard to the procedures nor the norms followed for ensuring that the guidelines laid down by the Union of India in this regard are being followed. Taking the best of what is being followed by some States, we direct that the States shall:

(1) Introduce a system of having an approved panel of doctors and limiting the persons entitled to carry on sterilisation procedures in the State to those doctors whose names appear on the panel.

The panel may be prepared either on a Statewise, districtwise or regionwise basis. The criteria for including the names of the doctors on such panel must be laid down by the Union of India as indicated subsequently. Until the Union of India lays down uniform qualification criterion for the empanelment of doctors, for the time being no doctor without gynaecological training for at least 5 years' post-degree experience should be permitted to carry out the sterilisation programmes.

(2) The State Government shall also prepare and circulate a checklist which every doctor will be required to fill in before carrying out sterilisation procedure in respect of each proposed patient. The checklist must contain items relating to (a) the age of the patient, (b) the health of the patient, (c) the number of children, and (d) any further details that the State Government may require on the basis of the guidelines circulated by the Union of India. The doctors should be strictly informed that they should not perform any operation without filling in this checklist.

(3) The State Governments shall also circulate uniform copies of the pro forma of consent. Until the Union Government certifies such pro forma, for the time being, the pro forma as utilised in the State of U.P., shall be followed by all the States.

(4) Each State shall set up a Quality Assurance Committee which should, as being followed by the State of Goa, consist of the Director of Health Services, the Health Secretary and the Chief Medical Officer, for the purpose of not only ensuring that the guidelines are followed in respect of preoperative measures (for example, by way of pathological tests, etc.), operational facilities (for example, sufficient number of necessary equipment and aseptic conditions) and postoperative follow-ups. It shall be the duty of the Quality Assurance Committee to collect and publish six-monthly reports of the number of persons sterilised as well as the number of deaths or complications arising out of the sterilisation.

(5) Each State shall also maintain overall statistics giving a break-up of the number of the sterilisations carried out, particulars of the procedure followed (since we are given to understand that there are different methods of sterilisation), the age of the patients sterilised, the number of children of the persons sterilised, the number of deaths of the persons sterilised either during the operation or thereafter which is relatable to the sterilisation, and the number of persons incapacitated by reason of the sterilisation programmes.

(6) The State Government shall not only hold an enquiry into every case of breach of the Union of India guidelines by any doctor or organisation but also take punitive action against them. As far as the doctors are concerned, their names shall, pending enquiry, be removed from the list of empanelled doctors.

(7) The State shall also bring into effect an insurance policy according to the format followed by the State of Tamil Nadu until such time the Union of India prescribes a standard format.

(8) The Union of India shall lay down within a period of four weeks from date, uniform standards to

be followed by the State Governments with regard to the health of the proposed patients, the age, the norms for compensation, the format of the statistics, checklist and consent pro forma and insurance.

(9) The Union of India shall also lay down the norms of compensation which should be followed uniformly by all the States. For the time being until the Union Government formulates the norms of compensation, the States shall follow the practice of the State of Andhra Pradesh and shall pay Rs 1 lakh in case of the death of the patient sterilised, Rs 30,000 in case of incapacity and in the case of postoperative complications, the actual cost of treatment being limited to a sum of Rs 20,000.

2. All the States have responded except the State of Jammu and Kashmir. Needless to say that the State of Jammu and Kashmir will also follow this order.

...

## IN THE SUPREME COURT OF INDIA

**People's Union for Civil Liberties v. Union of India & Ors.**

**(2009) 16 SCC 149**

**Arijit Pasayat and S.H. Kapadia, JJ.**

***Through an earlier order in this case, the Supreme Court had directed that the National Maternity Benefit Scheme ("NMBS") shall not be discontinued or restricted without its prior approval. The Union of India filed an interim application seeking permission to modify the NMBS and introduce a new scheme called Janani Suraksha Yojana ("JSY"). PUCL filed an application questioning the legality of the discontinuation of the cash benefit under NMBS pursuant to introduction of JSY. The Court ruled that the benefits under the NMBS should continue and cash assistance should be provided to women who are below poverty line, irrespective of their age and number of children. Meanwhile, the Court directed Union of India to consider if the grant of such benefit would go against the national population policy.***

**Pasayat, J.:** "By this order two IAs Nos. 37 of 2004 and 54 of 2005 stand disposed of. IA No. 37 of 2004 is an application by the Union of India for permission to modify the National Maternity Benefit Scheme (in short "NMBS") and to introduce a new scheme called Janani Suraksha Yojana (in short "JSY"). IA No. 54 of 2005 is an application by the petitioner questioning legality of the discontinuation of the benefit under NMBS due to introduction of JSY. By order dated 27-4-2004 [*People's Union for Civil Liberties v. Union of India*, (2009) 16 SCC 598] this Court directed as follows:

"No Scheme ... in particular ... National Maternity Benefit Scheme shall be discontinued or restricted in any way without prior approval of the Court."

2. Again, by order dated 9-5-2005 [*People's Union for Civil Liberties v. Union of India*, (2009) 16 SCC 614] this Court directed as follows:

"By IA No. 37, permission is sought to modify the National Maternity Benefit Scheme (NMBS) and to introduce a new scheme, namely, Janani Suraksha Yojana (JSY). Whereas in IA No. 54, the prayer is that the Scheme should not be modified by reducing, abridging or qualifying in any way the social assistance entitlements created under the original scheme of NMBS for expecting BPL mothers, including cash entitlement of Rs 500 provided therein. We have requested learned Additional Solicitor General to place on record further material in the form of affidavit to effectively implement the new Scheme sought to be introduced. The further material shall include the approximate distance of Public Health Centre from the residential complexes and the facility of transportation, etc. The Commissioner shall also examine the matter in depth and file a report. The response to the application may be filed within eight weeks. Meanwhile, the existing National Maternity Benefit Scheme will continue."

3. The Government set a numerical ceiling of 57.5 lakh beneficiaries as the annual target for NMBS. However, the number of beneficiaries under JSY in 2006-2007 was only 26.2 lakhs i.e. 45.5% and in the year 2005-2006 this was as

low as 5.7 lakhs i.e. 10%. While there has been an improvement in the last one year, the coverage under this Scheme is still way below the target number of women to be covered by NMBS.

4. According to the Union of India, JSY was introduced to put a premium on the willingness of poor women to go in for institutional delivery instead of home delivery. But it was recognised that in the States with lower institutional delivery rates, one of the reasons for low performance have been lesser availability of facilities in the health centres, which acts as disincentive for the poor illiterate women to seek the service

...

14. At the time of hearing of the applications, learned counsel for the petitioner and the Union of India highlighted various aspects. Considering the submissions and the material data placed on record we direct as follows:

(a) The Union of India and all the State Governments and the Union Territories shall (i) continue with NMBS, and (ii) ensure that all BPL pregnant women get cash assistance 8-12 weeks prior to the delivery.

(b) The amount shall be Rs 500 per birth irrespective of number of children and the age of the woman.

...

15. At this juncture it would be necessary to take note of certain connected issues which have relevance. It seems from the Scheme that irrespective of number of children, the beneficiaries are given the benefit. This in a way goes against the concept of family planning which is intended to curb the population growth. Further, the age of the mother is a relevant factor because women below a particular age are prohibited from legally getting married. The Union of India shall consider this aspect while considering the desirability of the continuation of the Scheme in the present form. After considering the aforesaid aspects and if need be, necessary amendments may be made.

..."

## IN THE SUPREME COURT OF INDIA

**Suchita Srivastava & Anr. v. Chandigarh Administration**  
(2009) 9 SCC 1

**K.G. Balakrishnan, C.J., and P. Sathasivam and B.S. Chauhan, JJ.**

*A “mentally retarded” woman became pregnant as a result of rape while she was living as an inmate in a government run welfare home in Chandigarh. The Chandigarh Administration had received approval from the Punjab and Haryana High Court to terminate her pregnancy (of 19 weeks), as it was considered by the court to be in her best interest. In this appeal, the Supreme Court examined the validity of the High Court's order which did not take into account the woman's consent. It also considered what should be the appropriate approach for a court while ascertaining the “best interests” of an intellectually disabled woman in exercise of its “parens patriae” jurisdiction.*

**Balakrishnan, C.J.:** “22. There is no doubt that a woman's right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children.”

## IN THE HIGH COURT OF KERALA

**Krupa Prolifers & Ors. v. State of Kerala & Ors.**  
MANU/KE/0499/2009

**S. R. Bannurmath, C.J. and A. K. Basheer, J.**

*An organization claiming that its main aim and object is to protect, preserve and uphold the dignity of every human being, right from fallopian tube till natural death occurs filed a writ petition in the Kerala High Court seeking a ban on advertisement, sale and distribution of i-pill, an emergency contraceptive, and a declaration that use of emergency contraceptive without prescription is illegal. The High Court decided to adjudicate the case by looking at the effect of the i-pill to determine whether it is a contraceptive tablet or a termination pill.*

**Bannurmath, C.J.:** “1. This Writ Petition, as a public interest litigation, is filed, seeking the following reliefs:

- (a) Immediate action against advertisement in T.V. Channels, newspapers, magazines etc., of ‘i-pill’, manufactured by the 4th respondent, which is alleged to be causing termination of pregnancy (abortion).
- (b) To declare the use of emergency contraceptive pills without prescription, as illegal.
- (c) To ban the sale and distribution of i-pill.

2. The petitioner, a registered educational and charitable Trust, claims that its main aim and object is to protect, preserve and uphold the dignity of every human being, right from fallopian tube till natural death occurs, irrespective of consideration, such as creed, colour, language, religion, gender, politics etc., and also prevent abortion at any stage by all means.

3. According to the petitioner, with the help of media, such as television, newspapers, weeklies, magazines etc., the Pharmaceutical Company, the 4th respondent herein, is promoting abortion among women, by advertising that the use of the tablet named “i-pill” within 72 hours of fertilization will prevent pregnancy and also giving assurance that it will be available from any Medical Store without the prescription of a medical practitioner. It is vehemently argued that the law in this regard, especially, the Medical Termination of Pregnancy Act, 1971 (hereinafter called as “M.T.P. Act”) allows/permits only registered medical practitioners to terminate the pregnancy of a woman, that too, in unavoidable circumstances, that too, in accordance with the provisions of the Act. It is submitted that the availability of these types of tablets, without any restriction, would adversely affect the younger generation of the nation and in the long run, it would destroy the morality and the society will fall into anarchy.

4. The learned counsel for the petitioner has, in this regard, apart from the provisions of the M.T.P Act, also relied upon the advertisements and the decision of the Apex Court in the case of *Dr. Jacob George v. State of Kerala* [(1994)3 SCC 430]. The learned counsel has also relied upon certain medical texts, to contend that within 12 hours of a successful sexual intercourse by male and female, there must be a pregnancy and at the time of fertilization itself or union of the sperm and the egg, there is a beginning of human life and as such, in view of the claim of the 4th respondent that no pregnancy can take place within 72 hours of sexual intercourse, is a misleading statement and in effect it amounts to abortion, as the life is terminated prematurely.

5. On the other hand, the 4th respondent, who entered appearance, has filed a detailed counter, along with the permission issued to the Company by the Drugs Controller General, Directorate General of Health Services and the recommendations submitted by the Consortium on National Consensus for Emergency Contraception, contending that the tablet i-pill does not cause any abortion and it is only a contraceptive pill, to prevent the pregnancy itself.

6. We have heard both the counsels at length and perused the documents produced. At the outset, it has to be noted that the conflict between the moralists and the medical science is going on, as to when life begins in the womb, when is an embryo said to have been formed and the conflict regarding the moral aspect of abortion. In our view, we are not required to go into the morality aspect, but only consider the medical consequences of the i-pill drug, that is to say, whether it is a contraceptive tablet or it is a medicine for causing abortion.

7. Though the M.T.P Act is enacted to prevent illegal abortions and even though termination of pregnancy or abortion is made a crime under the Indian Penal Code, the word “pregnancy” is not defined nor there is any definition of abortion, that is to say, when exactly pregnancy takes place and at what stage of beginning of life abortion takes place or said to have been induced.

8. As such, we have to depend upon the medical science. It is to be noted that undisputedly, according to the medical science, the beginning of pregnancy is at the stage when there is implantation of a fertilized egg into the lining of woman’s uterus and this implantation takes 5 to 7 days after fertilization and is completed several days later. There is also no dispute that after sexual intercourse, millions of spermatozoa or sperms are released in the reproductive canal of the woman and if there is a mature ovum whose life span is 12 to 36 hours, the sperms try to unite with the said ovum. It is only one sperm out of millions may succeed and in that case, both ovum and sperm unite and become one and then start dividing and is called as Zygote. Thereafter, when this Zygote gets attached to the lining of the ovary, it starts taking shape as embryo. Till the Zygote attaches itself to the ovary (sic) and starts taking shape, it is called as pre-embryonic stage. It is also to be noted that there is considerable confusion even among experienced health care people about abortion and the contraceptive measures. There is no dispute that abortion is caused when pregnancy is terminated. On the other hand, contraceptive measures are to prevent the pregnancy itself. There are a number of contraceptive measures, like use of condom, I.U.T method or contraceptive pills, both for male and female. By use of these contraceptive measures, the sperms released by male in the re-production (sic) system of female are prevented from uniting with the ovum released by female. As already noted, unless there is fertilization and the united cell (pre-embryo) completes implantation into the lining of the uterus, it cannot be said, as per the medical science, pregnancy has taken place. Hence we find there is vast difference between contraceptive measures on one hand and abortion on the other. By contraceptive measures, fertilization itself is prevented whereas, by causing abortion the pre-embryo or embryo attached to the lining of the uterus is medically or mechanically tried to be dislodged and removed from the female body.

9. On perusal of the literature about the i-pill, the certificate in this regard issued by the medical authority, it is clear that it is only intended to avoid pregnancy after unprotected intercourse and is not effective, if the female taking the same is already pregnant.

10. As per the report of the Consortium on National Consensus for Emergency Contraception in collaboration with World Health Organization, Ministry of Health and Family Welfare and Indian Council of Medical Research, most of the women in India, following an accidental undesired sexual exposure and not wanting to conceive, do not even know that unwanted pregnancy can still be avoided; they just wait with anxiety, for the period to come and by the time they come to know that they are pregnant, it is too late. However, to avoid unwanted pregnancy, they resort to abortion, either with the help of Quacks or old women, who are known to be experts in causing abortion, or in some cases, abortion induced by medicines. It is also known that in this unscientific use of abortion, many women lost their lives and that is why the Medical Termination of Pregnancy Act, 1971 was enacted to prevent illegal prevention of pregnancy. It is also not much in dispute that for want of sufficient knowledge or awareness on the part of Indians, the population is increasing at enormous and alarming rate and because of the vast growth of population, the State Governments are not able to provide the basic requirements to all these people.

11. As such, in our view and as reported by the Consortium on National Consensus for Emergency Contraception, it is necessary to provide information to all the people as to the availability of contraceptive measures. In fact, the Government itself has come forward with Family Planning Schemes, by freely providing contraceptives, like Nirodh and also contraceptive pills at cheaper rate.

12. Keeping in view these objects and as we find that the tablet i-pill manufactured by the 4th respondent is only a contraceptive pill and does not cause abortion, the apprehension of the petitioner is misconceived. Though the individual morality concept based on religious faith may prohibit even the contraceptive measures, the courts cannot go into it. In the light of what we have observed above, since i-pill is only a contraceptive pill meant for preventing fertilization and not meant for causing abortion, we find no merit in the writ petitioner's case.

For the reasons stated above, the Writ Petition is dismissed, as devoid of any merits."

## IN THE HIGH COURT OF RAJASTHAN

**Smt. Renuka Sahal & Anr. v. State of Rajasthan & Ors.**

and

**Smt. Priyanka Panwar v. Rajasthan Public Service Commission & Ors.**

**2015 SCC OnLine Raj 6581**

**Ajit Singh and Anupinder Singh Grewal, JJ.**

***These writ petitions filed before the Rajasthan High Court challenged the constitutionality of service rules framed by the Government of Rajasthan which rendered the candidates having more than two children, on or after the prescribed date, ineligible for appointment or promotion to the service. The petitioners argued that the rules violated their fundamental rights, including those guaranteed under Articles 16 and 21 of the Indian Constitution.***

Grewal, J.: "...

2. ...The petitioners have challenged the Service Rules framed by the Government of Rajasthan under proviso to Article 309 of the Constitution of India. ...[These Rules] provided that in all the services no candidate shall be eligible for appointment/promotion to the service who has more than two children on or after 01.06.2002. It is also contended that as per the original amendment dated 20.06.2011 under Schedule new sub-rule has been added regarding the qualifications for promotion that no person shall be considered for promotion for five recruitment years from the date on which his promotion becomes due if he/she has more than two children on or after 01.06.2002.

3. The learned counsel for the petitioners have argued that the aforementioned rules are ultra vires the Constitution of India as several fundamental rights including those enshrined under Article 16 and 21 of the Constitution of India have been violated.

...

5. We have heard the learned counsel for the parties at some length and are of the view that the issue has already been adjudicated upon by the Division Bench of this court. The relevant extract of the judgment of the Division Bench in Civil Writ Petition No. 18662/2012 decided on 13.12.2013 is reproduced hereunder:-

9. A bare perusal of the notification quoted above would reveal that a candidate shall not be eligible for appointment to the service, who has more than two children on or after 1<sup>st</sup> June, 2002; as is evident from text of the notification as extracted herein above, which shall be deemed to come into force w.e.f. 20<sup>th</sup> June, 2001 (Annexure-2). The rule has also imposed an embargo on the government servants, already in service, for not considering them for promotion for five 8 recruitment years from the date on which the promotion becomes due, if he/she procreate more than two children on or after 1<sup>st</sup> June, 2002.

10. It hardly needs reiteration that Article 14 of the Constitution forbids class legislation and not reasonable classification for the purpose of legislation. The twin conditions required to be satisfied for such a legislation are: (i) that the classification is founded on an intelligible differentia, which

distinguishes persons or things that are grouped together from others left out of the group and (ii) that such differentia has a rational relation to the object sought to be achieved by the statute in question; as has been held by the Hon'ble Apex Court of the land in a catena of judgments.

11. The classification, which can be perceived, is well defined between the persons having more than two living children, who are clearly distinguishable from persons having not more than two living children on or after 1<sup>st</sup> June, 2002. Further, the persons, who are not government servants and are seeking appointment to a post in government service, are clearly distinguishable from those, who are already holding post in government service (sic).

12. The object sought to be achieved is inherent in the legislation i.e., to encourage family welfare and family planning programme. Thus, the disqualification enacted by the amendment in the Rules of 2001; seeks to achieve the objective by creating a distinction between the candidates, who have more than two children on or after 1<sup>st</sup> June, 2002 as well as in between the persons seeking appointment to Government Service and those who are already in Government Service, governed by the relevant rules. We are afraid, if the classification could be termed as arbitrary or violative of any of the provisions of the Article 14 of the Constitution of India. Be that as it may, the permissible number of children to a couple is based on legislative wisdom and in our view, is a matter of policy decision, which is not open to judicial scrutiny.

...

8. It is, thus, patent that family planning is the need of the hour and the two child norm is being promoted through the National Population Policy. There is no gainsaying that alarming rise in the Nation's Population has offset the gains of socio-economic growth to a considerable extent. Hence, the impugned rules barring persons having more than two children from appointment or promotion in services under the state cannot be termed unconstitutional.

9. We, therefore, have no hesitation in holding that there is absolutely no basis to doubt the correctness of the view taken by the Division Bench in CWP No. 18662/2012. We are in respectful agreement with the view taken therein. Hence, the law laid down by the Division Bench is the correct law and does not require reconsideration by a larger bench."

## IN THE SUPREME COURT OF INDIA

**Devika Biswas v. Union of India**

**(2016) 10 SCC 733**

**Madan B. Lokur and Uday U. Lalit, JJ.**

***This writ petition was filed before the Supreme Court seeking directions to ensure the conduct of sterilization procedures in accordance with existing legal norms and medical procedures across the country and provision of adequate compensation in case of failure to do so. The Court took note of unsafe and unsanitary conduct of sterilization procedures and resulting deaths in sterilization camps in various states and issued supplementary directions for the effective implementation of its directions in Ramakant Rai (1) v. Union of India. In doing so, the Court placed the right to make a choice regarding sterilization on the basis of informed consent within the framework of reproductive rights under Article 21 of the Indian Constitution.***

**Lokur, J.:** "This public interest petition raises very important issues concerning the entire range of conduct and management, under the auspices of State Governments, of sterilisation procedures wherein women and occasionally men are sterilised in camps or in accredited centres. The issues raised also include pre-operation procedures and post-operative care or lack of it. A sterilisation surgery does not appear to be complicated and yet several deaths have taken place across the country over the years. Undoubtedly, this needs looking into by the Government of India and the State Governments and remedial and corrective steps need to be taken. Persons who are negligent in the performance of their duties must be held accountable and the victims and their family provided for. It is time that women and men are treated with respect and dignity and not as mere statistics in the sterilisation programme.

...



**26.** Sometime in 2005 the issue of sterilisation procedures for females and males under the Population Control and Family Planning Programme or the Public Health Programme of the Government of India came up for consideration before this Court in a petition filed by Ramakant Rai. The petition was substantially decided by this Court on 1-3-2005 by passing several directions. The directions are reported as *Ramakant Rai (1) v. Union of India* [*Ramakant Rai (1) v. Union of India*, (2009) 16 SCC 565] .

**27.** Pursuant to the directions given by this Court, the Government of India published a Quality Assurance Manual for Sterilisation Services (in 2006); Standards for Female and Male Sterilisation (in 2006); and Standard Operating Procedures for Sterilisation Services in Camps (in 2008). These manuals really form the procedural and substantive basis for conducting sterilisation procedures both of females and males in the country under the Population Control and Family Planning Programme or the Public Health Programme.

**28.** What seems to have provoked Devika Biswas in filing a writ petition under Article 32 of the Constitution in this Court is that on 7-1-2012 as many as 53 women underwent a sterilisation procedure in a camp in highly unsanitary conditions in Kaparfora Government Middle School, Kursakanta, Araria District in Bihar between 8 p.m. and 10 p.m. through a single surgeon. In fact, some of the broad issues concerning the sterilisation camp held on 7-1-2012 as found on investigation by Devika Biswas, included an absence of pre-operative tests on the women or proposed patients; they were not given any counselling of any kind at all; they had no idea about the potential dangers and outcomes of the sterilisation procedure; the sterilisation procedures were carried out in a school and not in a government hospital or a private accredited hospital; running water was not available at the site; the sterilisation procedures were carried out under torchlight with the women being placed on a school desk; the surgeon did not have any gloves or at least did not change the gloves available with him; no emergency arrangements were made, etc. etc. Essentially, the entire camp was conducted in unsanitary conditions, in an unprofessional and unethical manner. What is worse is that the camp was conducted under the auspices of an NGO called Jai Ambey Welfare Society which had been granted accreditation by the District Health Society only a few months earlier, that is, on 29-11-2011 apparently without following any formal and transparent procedure.

**29.** As a result of the sterilisation camp, many women who were operated upon underwent tremendous physical pain and anguish and were traumatised. Consequently, a series of complaints were filed...Some of these complaints were inquired into by the State authorities and it was found that the sterilisation camp was a success except that an expired medicine had been given to the women. On the other hand, the study and the investigations carried out by Devika Biswas along with a journalist called Francis Elliott concluded that the sterilisation camp did not meet any of the requirements laid down by this Court or by the Government of India and that this was confirmed by the women who were operated upon as well as their relatives.

**30.** Devika Biswas then felt compelled to file a public interest litigation in this Court to ensure that sterilisation procedures nationwide are conducted in accordance with accepted legal norms, medical procedures and the provisions of the manuals and that those women and men who suffer due to the failure or complications in implementing the norms, procedures and provisions are given adequate compensation. That is really the core issue raised by Devika Biswas and that such instances are not repeated.

**31.** In this context, Devika Biswas says in her writ petition that on 9-2-2008 the State Health Society in Bihar issued a memorandum to the Civil Surgeons in each district in the State. The result of this memorandum was that sterilisation procedures could now be conducted in accredited private health facilities also in a camp mode. The memorandum also mentioned that the State Government would provide funds to the private facilities and the motivators as per the Government of India norms for conducting sterilisation procedures. However it was made clear that extra funds for camp management, transportation, etc. would not be provided by the Government to the accredited private facilities.

**32.** This was followed by another memorandum dated 9-2-2009 regarding sterilisation procedures carried out at government institutions by empanelled private doctors. The memorandum issued by the State Health Society of Bihar to the Civil Surgeons in all districts stated that an empanelled private doctor might also be permitted to carry out family planning sterilisation procedures in government institutions. The Quality Assurance Committee of the district was entitled to employ private doctors including contractual doctors whose term had expired for carrying out the sterilisation procedures.

**33.** The petition filed by Devika Biswas goes on to say that in 2010 a non-government organisation (NGO) called the Centre for Health and Social Justice released a report concerning the quality of care and consequences of female sterilisation procedures in Bundi District of Rajasthan in 2009-2010. According to the report 749 women (mainly underprivileged) were sterilised at Public Health Centres, Community Health Centres or Camps. They were interviewed

by researchers who found that a significant number of them were not counselled about the permanent nature of the sterilisation procedure and almost 88% of them told the researchers that they did not receive any information about potential complications, failures or side effects of the sterilisation procedure. The report indicated that while the internationally accepted failure rate is 0.5% the failure rate in Bundi District in Rajasthan was 2.5%, that is, 5 times the acceptable international standard.

**34.** Similarly, in February 2012 a Fact Finding Mission by a social activist reported that sterilisation procedures carried out in three districts in Maharashtra, that is, Nagpur, Chandrapur and Gadchiroli found that sterilisation camps were routinely conducted in unsanitary and unsafe facilities.

**35.** Again in February 2012 a sterilisation camp in Madhya Pradesh was conducted in Balaghat District without following any of the established procedures and tribals were lured into sterilisation camps by motivators who collected a substantially large amount over and above the financial norms fixed by the Government of India.

**36.** In Kerala also a similar story was repeated in July 2011 highlighting that sterilisation procedures were not conducted in accordance with the prescribed requirements of law or the procedures laid down by the Government of India. In para 40 of the writ petition, Devika Biswas submits that:

“In July 2011, a local journalist in Wayanad and the Chief of Kattunayakan Tribe, who serves as the President of the Primitive Tribal Association, met with health workers in Kerala. They shared stories of men and women who were told by the government health workers that it was compulsory to undergo sterilisation. The Chief is concerned about government coercion and compulsion in sterilisation and its effect on the tribe’s population.”

**37.** In this background, Devika Biswas prayed for a series of directions including setting up a committee to investigate the facts relating to the sterilisation camp held on 7-1-2012 and to initiate departmental and criminal proceedings against those who were involved in the sterilisation camp. It is also prayed that the guidelines given in the manuals prepared by the Government of India should be scrupulously adhered to so that such incidents do not recur in any part of the country and if they do, additional compensation should be paid to the women in distress.

**38.** In this writ petition, we are primarily concerned with the affidavits of the Union of India, the States of Bihar, Kerala, Madhya Pradesh, Maharashtra and Rajasthan since allegations have been made in respect of sterilisation camps held in these States only. However, during the course of hearing of this writ petition, allegations surfaced with regard to sterilisation camps conducted in Bilaspur District, Chhattisgarh (between 8-11-2014 and 10-11-2014) and so we are also concerned with the allegations made in respect of the camps conducted in that State as well.

**39.** What was brought to our notice with regard to the sterilisation camps conducted in Bilaspur District was that as many as 137 women were subjected to a sterilisation procedure and unfortunately 13 of them died. Many others complained of problems such as vomiting, difficulty in breathing, severe pain, etc. They were taken to nearby hospitals and discharged after necessary treatment. It appeared that some women who had not undergone a sterilisation procedure also had similar complaints and some of them died thereby increasing the number of deaths to over 13. Undoubtedly, this was a matter of great concern brought to our notice during the pendency of the writ petition.

...

## IS IT A PUBLIC HEALTH ISSUE?

**93.** The fundamental error that the Union of India is making (and it has repeated that in its affidavits) is by asserting that the effective implementation of the sterilisation programme is the concern of each State since it is a “public health” issue covered by Schedule VII List II Entry 6 (the State List) of the Constitution. Apart from the fact that the various entries in the Seventh Schedule relate to legislative power, the error made by the Union of India is in completely overlooking the more appropriate Entry in the Concurrent List, that is, Entry 20-A which is “Population Control and Family Planning”. This was inserted by the Constitution (Forty-second) Amendment Act, 1976. If the sterilisation programme is intended for population control and family planning (which it undoubtedly is) there is no earthly reason why the Union of India should refer to and rely on Entry 6 of the State List and ignore Entry 20-A of the Concurrent List.

**94.** Population control and family planning has been and is a national campaign over the last so many decades. Therefore, the responsibility for the success or failure of the population control and Family Planning Programme (of which sterilisation procedure is an integral part) must rest squarely on the shoulders of the Union of India. It is for this reason that the Union of India has been taking so much interest in promoting it and has spent huge amounts over the years

in encouraging it. It is rather unfortunate that the Union of India is now treating the sterilisation programme as a public health issue and making it the concern of the State Government. This is simply not permissible and appears to be a case of passing the buck.

**95.** As regards Entry 20-A of the Concurrent List, the Justice Sarkaria Commission had this to say in Chapter II titled Legislative Relations in Para 2.21.08:

“Only one State Government has suggested that this Entry should be transferred to the State List. According to them family planning facilities should be an integral part of the health facilities which is a State subject and the present dichotomy between the two facilities hampers their adequate integration.

Population control and family planning are a vital part of the national effort at development. This entry was inserted by the Forty-second Amendment to the Constitution recognising the importance of this matter. It is well known that a significant part of the fruits of development is neutralised by the high growth in population. With more mouths to feed, less savings are available for development. Large addition to the population has its impact on every aspect of the nation's life. Many of the ills of the society can be traced back to large numbers who are unable to find a rewarding employment. It is necessary to recognise this interdependence between family planning and other sectors. We are, therefore, of the view that Population Control and Family Planning is a matter of national importance and of common concern of the Union and the States.”

Notwithstanding the view of that one State Government, the Union of India did not transfer Entry 20-A to the State List, thereby making its intentions quite clear and obvious.

**96.** When the Union of India formulates schemes of national importance such as family planning, their implementation is undoubtedly dependent on the State Governments since they have the requisite mechanism for implementing the schemes and can also take into account the needs that are particular to the State and its people. In this manner, the cooperation of the Union of India and all State Governments is indispensable to the success of such national programmes. Adverting to the provisions of the Constitution that allow for such coordination between the Union and States, the Justice Sarkaria Commission held that these provisions are not repugnant to but instead further the principle of federalism.

**97.** In the same manner, it is imperative for both the Union of India and the State Governments to implement schemes announced by the Union of India in a manner that respects the fundamental rights of the beneficiaries of the scheme. Given the structure of cooperative federalism, the Union of India cannot confine its obligation to mere enactment of a scheme without ensuring its realisation and implementation.

**98.** Apart from anything else, by not giving the sterilisation programme the importance it deserves (apart from other methods of population control and family planning) and trying to pass the buck to the State Governments, the Union of India is attempting to find an excuse for failure in its duty of effectively monitoring a programme of national importance. This game of passing the parcel and treating a national programme as a public health issue has to stop and somebody must take ownership of the Population Control and Family Planning Programme.

## DRAFT NATIONAL HEALTH POLICY

**99.** To compound the problem, and it is much more than a pity, our country does not seem to have any health policy. The draft of a National Health Policy, 2015 was put up on the website on the Ministry of Health and Family Welfare of the Government of India in December 2014 for comments, suggestions and feedback but even after more than one-and-a-half years, the website of the said Ministry shows that the National Health Policy has not been finalised.

...

**101.** With respect to sterilisation, it states that sterilisation related deaths are a direct consequence of poor health care quality and is a preventable tragedy. It also recognises that female sterilisations are safest if performed in an operation theatre which is functional throughout the year and by a professional team with support systems which are in constant use. Camp mode for such operations itself becomes a reason for unsatisfactory quality. More monetary and human resource investment is required for the National Rural Health Mission.

**103.** Under the head of “Governance” the Draft National Health Policy states:

“One of the most important strengths and at the same time challenges of governance in health is the distribution of responsibility and accountability between the Centre and the States. Though health is a State subject, the Centre has accountability to Parliament for Central funding — which is about 36% of all public health expenditure and in some States over 50%. Further it has its obligations under a number of international conventions and treaties that it is a party to. Further, disease control and family planning are in the Concurrent List and these could be defined very widely. Finally though State ownership has been used by some States to become domain leaders and march ahead setting the example for others, the Centre has a responsibility to correct uneven development and provide more resources where vulnerability is more.”

Surely, someone should be concerned that we do not have a National Health Policy or is it that we do not need a National Health Policy and ad hoc measures are good enough?

## FEMALE VERSUS MALE STERILISATION

**104.** A perusal of the various affidavits on record indicates that the sterilisation programme is virtually a relentless campaign for female sterilisation. This is more or less confirmed from the figures available on the website of the Ministry of Health and Family Welfare of the Government of India which indicate the following:

Year	2013	2014
Female sterilisations	1,57,431	1,49,262
Male sterilisations	8130	5085
Total sterilisations	1,65,561	1,54,347
% Female sterilisations	95.09%	96.7%
% Male sterilisations	4.91%	3.29%

**105.** The issue of male versus female sterilisations was debated and discussed during the course of the hearings and it was conceded by all the learned counsel that the sterilisation programme cannot be targeted primarily towards women but must also actively include the sterilisation of men as well. It appears to us, without going into the merits and demerits of the incentives given for undergoing the sterilisation procedure, the documents on record indicate that the incentive given to males for undergoing a sterilisation procedure is less than it is for females and that may perhaps be one of the reasons why the percentage of males being sterilised is so remarkably low as compared to females. This is an area that the Union of India must address itself to, if nothing else then at least for reasons of gender equity.

## RIGHT TO LIFE

**106.** The manner in which sterilisation procedures have reportedly been carried out endanger two important components of the right to life under Article 21 of the Constitution—the right to health and the reproductive rights of a person.

...

## (II) RIGHT TO REPRODUCTIVE HEALTH

**110.** Over time, there has been recognition of the need to respect and protect the reproductive rights and reproductive health of a person. Reproductive health has been defined as “the capability to reproduce and the freedom to make informed, free and responsible decisions. It also includes access to a range of reproductive health information, goods, facilities and services to enable individuals to make informed, free and responsible decisions about their reproductive behaviour”.<sup>22</sup> [...] The Committee on Economic, Social and Cultural Rights in *General Comment No. 22 on the Right to Sexual and Reproductive Health* under Article 12 of the International Covenant on Economic, Social and Cultural Rights<sup>23</sup> observed that “The right to sexual and reproductive health is an integral part of the right of everyone to the highest attainable physical and mental health.”<sup>24</sup>

**111.** This Court recognised reproductive rights as an aspect of personal liberty under Article 21 of the Constitution in *Suchita Srivastava v. Chandigarh Admn.* The freedom to exercise these reproductive rights would include the right to make a choice regarding sterilisation on the basis of informed consent and free from any form of coercion. The issue of informed consent in respect of sterilisation programmes was considered by *Committee on the Elimination of Discrimination Against Women in A.S.v. Hungary*,<sup>25</sup> where the Committee found Hungary to have violated Articles 10(h),

12 and 16 para 1(e) of the Convention on the Elimination of All Forms of Discrimination Against Women<sup>26</sup> by performing a sterilisation operation on A.S. while she was brought in for a Caesarean by making her sign a consent form that she did not fully understand. The Committee found that it was not plausible to hold that, in the brief period of 17 minutes commencing from her admission in the hospital to the completion of the surgical procedures, that the hospital personnel provided her with sufficient counselling and information about sterilisation, as well as alternatives, risks and benefits, to ensure that she could make a well-considered and voluntary decision to be sterilised. The Committee held:

“Compulsory sterilisation ... adversely affects women’s physical and mental health, and infringes the right of women to decide on the number and spacing of their children. The sterilisation surgery was performed on the author without her full and informed consent and must be considered to have permanently deprived her of her natural reproductive capacity.”

**112.** It is necessary to reconsider the impact that policies such as the setting of informal targets and provision of incentives by the Government can have on the reproductive freedoms of the most vulnerable groups of society whose economic and social conditions leave them with no meaningful choice in the matter and also render them the easiest targets of coercion. The cases of *Paschim Banga Khet Mazdoor Samity* [*Paschim Banga Khet Mazdoor Samity v. State of W.B.*, (1996) 4 SCC 37] and *Bandhua Mukti Morcha* [*Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161] have emphasised that the State’s obligation in respect of fundamental rights must extend to ensuring that the rights of the weaker sections of the community are not exploited by virtue of their position. Thus, the policies of the Government must not mirror the systemic discrimination prevalent in society but must be aimed at remedying this discrimination and ensuring substantive equality. In this regard, it is necessary that the policies and incentive schemes are made gender neutral and the unnecessary focus on female sterilisation is discontinued.

## SUPPLEMENTARY DIRECTIONS

**113.** On the basis of the submissions before us, we have highlighted some key issues that need active consideration. In addition, our attention was repeatedly drawn to the guidelines given by this Court in *Ramakant Rai (1)* [*Ramakant Rai (1) v. Union of India*, (2009) 16 SCC 565] and while it is generally the case of the Union of India and all the States that the guidelines are being followed, we find that at least in respect of some of them, there is still much more that needs to be done for their effective implementation not only in letter but also in spirit. Some fine-tuning is also necessary in view of the passage of time, change in circumstances and the need to use technology to the optimum. Accordingly, we find it necessary to issue the following supplementary directions:

**113.1.** The State-wise, district-wise or region-wise panel of doctors approved for carrying out the sterilisation procedure, must be accessible through the website of the Ministry of Health and Family Welfare of the Government of India as well the corresponding Ministry or Department of each State Government and each Union Territory. The list should contain all necessary particulars of each doctor and not merely the name and designation. This exercise should be completed on or before 31-12-2016 and thereafter the list be updated every quarter, that is, by 31st March, 30th June, 30th September and 31st December of every year.

**113.2.** The contents of the checklist prepared pursuant to the directions given in *Ramakant Rai (1)* [*Ramakant Rai (1) v. Union of India*, (2009) 16 SCC 565] should be explained to the proposed patient in a language that he or she understands and the proposed patient should also be explained the impact and consequences of the sterilisation procedure. This can be achieved by

- (a) ensuring that the checklist is in the local language of the State;
- (b) it should contain a certificate duly signed by the doctor concerned that the proposed patient has been explained the contents of the checklist and has understood its contents as well as the impact and consequences of the sterilisation procedure;
- (c) in addition to the certificate given by the doctor, the checklist must also contain a certificate given by a trained counsellor (who may or may not be an ASHA worker) to the same effect as the certificate given by the doctor. This will ensure that the proposed patient has given an informed consent for undergoing the sterilisation procedure and not an incentivised consent.

Sufficient breathing time of about an hour or so should be given to a proposed patient so that in the event he or she has a second thought, time is available for a change of mind. The checklist prepared pursuant to the direction given in *Ramakant Rai (1)* [*Ramakant Rai (1) v. Union of India*, (2009) 16 SCC 565] with the aforesaid modifications should be prepared in the local or regional language on or before 31-12-2016.

**113.3.** The Quality Assurance Committee (QAC) as well as the District Quality Assurance Committee (DQAC) has been set up in every State and district in terms of the directions given in *Ramakant Rai (1)* [*Ramakant Rai (1) v. Union of India*, (2009) 16 SCC 565]. However, it is only the designation of its members that has been made available. The details and necessary particulars of each member of QAC and DQAC should be accessible from the website of the Ministry of Health and Family Welfare of the Government of India as well the corresponding Ministry or Department of each State Government and each Union Territory on or before 31-12-2016 and thereafter updated every quarter.

**113.4.** In addition to the six-monthly reports required to be published by QAC containing the number of persons sterilised as well as the number of deaths or complications arising out of the sterilisation procedure, as already directed in *Ramakant Rai (1)* [*Ramakant Rai (1) v. Union of India*, (2009) 16 SCC 565], QAC must publish an Annual Report (on the website of the Ministry of Health and Family Welfare of the Government of India as well the corresponding Ministry or Department of each State Government and each Union Territory) containing not only the statistical information as earlier directed, but also non-statistical information in the form of a report card indicating the meetings held, decisions taken, work done and the achievements of the year, etc. This will have a significant monitoring and supervisory impact on the sterilisation programme and will also ensure the active involvement of all the members of QAC and DQAC. The first such Annual Report covering the calendar year 2016 should be published on the websites mentioned above on or before 31-3-2017.

**113.5.** As many as 363 deaths have taken place due to sterilisation procedures during 2010-2013. This is a high figure. During this period, more than Rs 50 crores have been disbursed towards compensation in cases of death. Apart from steps taken by Bihar and Chhattisgarh during the pendency of the writ petition to mitigate the sufferings of the patients, we have not been told of any death audit conducted by any State Government or Union Territory in respect of any patient, nor have we been informed of any steps taken against any doctor or anybody else involved in the sterilisation procedure that has resulted in the death of a patient or any failure or any other complication connected with the sterilisation procedure. There is a need for transparency coupled with accountability and the death of a patient should not be treated as a one-off aberration. Therefore, it is directed that the Annual Report prepared by QAC must indicate the details of all inquiries held and remedial steps taken.

**113.6.** With regard to the implementation of the Family Planning Indemnity Scheme (FPIS), there does not seem to be any definitive information with regard to the number of claims filed, the claims accepted and in which category (death, failure, complication, etc.), claims pending (and since when) and claims rejected and the reasons for rejection. QAC is directed to include this information in the Annual Report and the Ministry of Health and Family Welfare of the Government of India as well as the State Governments should make this information accessible on the website, including the quantum of compensation paid under each category and to the number of persons. We have mentioned above that the learned Solicitor General had assured us on 20-3-2015 that full details of the funds utilised under FPIS would be furnished but that information has not been given as yet, necessitating the direction that we have passed. In addition to the direction relating to FPIS, the Ministry of Health and Family Welfare should conduct an audit to ensure that the funds given by the Government of India have been utilised for the purpose for which they were given for the period from 2013-2014 onwards.

**113.7.** The quantum of compensation fixed under the Family Planning Indemnity Scheme (FPIS) deserves to be increased substantially and the burden thereof must be equally shared by the Government of India and the State Government. The State of Chhattisgarh has shown the way in this regard and it would be appropriate if others follow the lead. Every death or failure or complication related to the sterilisation procedure is a setback not only to the patient and his or her family but also in the implementation of the national campaign. We decline to fix the quantum of compensation but would suggest, following the example of the State of Chhattisgarh, that the amount should be doubled and shared equally.

**113.8.** The Union of India is directed to persuade the State Governments to halt the system of holding sterilisation camps as has been done by at least four States across the country. In any event, the Union of India should adhere to its view that sterilisation camps will be stopped within a period of three years. In our opinion, this will necessitate simultaneous strengthening of the Primary Health Care Centres across the country both in terms of infrastructure and otherwise so that health care is made available to all persons. The significance of having well-equipped Primary Health Centres across the country certainly cannot be overemphasised. Therefore, we direct the Union of India to pay attention to this as well, since it is absolutely important that all citizens of our country have access to primary health care.

**113.9.** The Union of India should make efforts to ensure that sterilisation camps are discontinued as early as possible but in any case within the time-frame already fixed and adverted to above. The Union of India and the State Governments must simultaneously ensure that Primary Health Centres are strengthened.

**113.10.** Although the Union of India has stated that no targets have been fixed for the implementation of the sterilisation programme, it appears that there is an informal system of fixing targets. We leave it to the good sense of the each State Government and Union Territory to ensure that such targets are not fixed so that health workers and others do not compel persons to undergo what would amount to a forced or non-consensual sterilisation merely to achieve the target.

**113.11.** The decisions taken in the high-level meetings held on 15-5-2015 and 17-11-2015 as well as the National Summit on Family Planning held on 5-4-2016 and 6-4-2016 should be scrupulously implemented by the Ministry of Health and Family Welfare of the Government of India. The said Ministry should also ensure effective implementation of the decisions taken keeping in mind that the sterilisation programme is a part of a national campaign.

**113.12.** The Union of India is directed to ensure strict adherence to the guidelines and standard operating procedures in the various manuals issued by it. The sterilisation programme is not only a public health issue but a national campaign for Population Control and Family Planning. The Union of India has overarching responsibility for the success of the campaign and it cannot shift the burden of implementation entirely on the State Governments and the Union Territories on the ground that it is only a public health issue. As the Justice Sarkaria Commission put it “Population Control and Family Planning is a matter of national importance and of common concern of the Union and the States.”

**113.13.** We are pained to note the extremely casual manner in which some of the States have responded to this public interest petition. What stands out is the response of the States of Madhya Pradesh, Maharashtra, Rajasthan and Kerala in respect of which States allegations were made concerning mismanagement in at least one sterilisation camp. None of these States have given any acceptable response to the allegations and we have no option but to assume that the camps that have been referred to in the writ petition were mismanaged as alleged by Devika Biswas. However, the matter should not end here. We direct the Registry of this Court to transmit a copy of this judgment to the Registrar General of the High Court in the States of Madhya Pradesh, Maharashtra, Rajasthan and Kerala for being placed before the Chief Justice of the High Court. We request the Chief Justice to initiate a suo motu public interest petition to consider the allegations made by Devika Biswas in respect of the sterilisation camp(s) held in these States (the allegations not having been specifically denied) and any other similar laxity or unfortunate mishap that might be brought to the notice of the Court and pass appropriate orders thereon. We also direct the Registry of this Court to transmit a copy of this judgment to the Registrar General of the Patna High Court for being placed before the Chief Justice of the High Court. We request the Chief Justice to ensure speedy completion of the investigations and proceedings relating to the mishap on 7-1-2012 in the sterilisation camp in Kaparfora Government Middle School, Kursakanta, Araria District as well as the mishap in Chhapra in Saran District that led to cancellation of the accreditation of Gunjan Maternity and Surgical Clinic on 24-3-2012.

**113.14.** The State of Chhattisgarh is directed to implement the recommendations given in the Ms Anita Jha Commission Report at the earliest and with all sincerity.

**113.15.** We have already expressed our sadness at the fact that the National Health Policy has not yet been finalised despite the passage of more than one-and-a-half years. We direct the Union of India to take a decision on or before 31-12-2016 on whether it would like to frame a National Health Policy or not. In case the Union of India thinks it worthwhile to have a National Health Policy, it should take steps to announce it at the earliest and keep issues of gender equity in mind as well.

...”

## Endnotes

- 1 Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.
- 2 Note that cases on medical negligence during sterilization procedures, leading to death, injury, or unwanted pregnancy are discussed in Chapter 11, “Medical Negligence, Consumer Protection and Reproductive Health”.
- 3 (2009) 9 SCC 1.
- 4 The Supreme Court’s holding was reiterated in its later decisions, Meera Santosh Pal v. Union of India, (2017) 3 SCC 462 and Z v. State of Bihar, (2018) 11 SCC 572.
- 5 MANU/KE/0499/2009.
- 6 (2009) 16 SCC 565.
- 7 (2016) 10 SCC 726 / 733.
- 8 2004 Cri LJ 4553 (All).
- 9 AIR 1997 Raj 250. In Saroj Chotiya v. State of Rajasthan and Ors., AIR 1998 Raj 28, while adjudicating a writ petition challenging Section 26(XIV) Proviso (e) of the Rajasthan Municipalities Act that disqualified persons having more than two children from being elected as members, the Rajasthan High Court rejected the petition based on its reasoning in Mukesh Kumar Ajmera v. State of Rajasthan, AIR 1997 Raj 250.
- 10 AIR 2000 AP 156.
- 11 (2001) 5 ALT 410 (DB).
- 12 (2003) 8 SCC 369. The Gujarat High Court in Bharatbhai Dhanjibai Modi v. The Collector (Porbander), AIR 200 Guj 106 and the Bombay High Court in Mangesha Ashok Chavan v. Sayajirao Damodhar, (2010) 1 Bom CR 136, relying on the Javed case rejected a challenge to Section 11(1)(h) of the Gujarat Municipalities Act, 1963 and Section 14(1)(j-1) of the Bombay Village Panchayat Act, 1959 that imposed similar more than two child disqualifications.
- 13 (2017) 10 SCC 1.
- 14 AIR 1983 Bom 443.
- 15 AIR 1985 Bom 31.
- 16 2015 SCC OnLine Raj 6581.
- 17 (1999) 1 GLR 126.
- 18 (2009) 16 SCC 149.
- 19 U.N. Office of the High Commissioner for Human Rights, “Status of Ratification Interactive Dashboard—India,” available at <http://indicators.ohchr.org/>.
- 20 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained in U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001), Arts. 3-4.*
- 21 Vishaka v. State of Rajasthan, AIR 1997 SC 3011.
- 22 WHO, Sexual Health, Human Rights and the Law (2015) cited from Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), 2-5-2016, E/C.12/GC/22 at para 6.
- 23 India ratified this Convention on 10-4-1979.
- 24 General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22.
- 25 CEDAW/C/36/D/4/2004, UN Communication No. 4/2004, Committee on the Elimination of Discrimination against Women, Thirty-sixth session, 7-8-2006 to 25-8-2006.
- 26 “10. States parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women—\*\*\* (h) access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning. \*\*\* 12.1. States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. 2. Notwithstanding the provisions of para 1 of this article, States parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation. \*\*\* 16.1. States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women—\*\*\* (e) the same rights to decide 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;”





# CHAPTER THREE

# SEX DETERMINATION

The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse Act), 1994 (PNDT Act), was enacted to prevent misuse of preconception and prenatal diagnostic techniques for determining the sex of the foetus and to prevent disclosure of the sex to the pregnant woman or her relatives. In 2003, the PNDT Act was amended and renamed as the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PCPNDT Act), in order to strengthen the PNDT Act and take note of the development of preconception sex-selection techniques. The amended legislation places a ban on sex selection before and after conception and regulates the use of prenatal diagnostic techniques for detection of certain abnormalities or disorders.<sup>1</sup> The law does not discuss abortion or providers of abortion, which are distinctly regulated under the Medical Termination of Pregnancy Act, 1971 (MTP Act).

In this section, we discuss the following issues pertaining to sex determination in India:

- Implementation of the PNDT Act and the PCPNDT Act
- Ban on Online Advertisements for Sex Selection and Sex Determination
- Constitutional Challenges to the PCPNDT Act
- Applicability of the PCPNDT Act to Surrogacy Arrangements

## Implementation of the PNDT Act and the PCPNDT Act

The Supreme Court and High Courts have been approached frequently for issuance of directions to the concerned authorities for effective implementation of the PNDT Act and the PCPNDT Act.

In ***Centre for Enquiry into Health and Allied Themes (CEHAT) v. Union of India***,<sup>2</sup> the Supreme Court noted the non-implementation of the PNDT Act even after five years of its enactment. It passed multiple orders with directions to the Central and State Governments, as well as authorities under the PNDT Act to, amongst other things, ensure proper implementation of the Act and examine the necessity of amending the PNDT Act in light of the emerging technologies.<sup>3</sup>

Several directions of the Court were incorporated in the amended PCPNDT Act. In its final order passed in 2003,<sup>4</sup> the Court recounted its previous orders<sup>5</sup> and directed the authorities to ensure their compliance, while also directing the Central and State Governments to increase public awareness through advertisements and electronic media, appoint the authorities required under the PCPNDT Act, and monitor and publish periodic reports on the implementation of the PCPNDT Act.

Another writ petition was filed before the Supreme Court in ***Voluntary Health Association of Punjab v. Union of India***,<sup>6</sup> highlighting the continuance of the practice of sex selection and decline in the female sex ratio in several states. The Court passed directions addressing the non-implementation of its orders passed in ***CEHAT***; lack of proper supervision of diagnostic centres, genetic clinics, and counselling centres by the appropriate authorities; failure of concerned authorities to seize ultrasound machines of violators; low rate of conviction in PCPNDT cases; and the pendency of PCPNDT cases. The Court also emphasized the need to raise public awareness regarding the purpose and necessity of the PCPNDT Act.

In its final order disposing this writ petition,<sup>7</sup> the Supreme Court issued specific directions for “fast-tracking” disposal of PCPNDT cases, constituting a judicial committee by the High Court for periodic monitoring of Courts that are dealing with PCPNDT cases, and training of judicial officers to develop requisite sensitivity in line with the object of the PCPNDT Act. In a connected writ petition filed by medical practitioners alleging misuse of certain provisions of the PCPNDT Act and undue harassment by the authorities and seeking further guidelines, the Court rejected their prayer for reading down the provisions because the petition did not assail the validity of the law or its regulation and advised them to seek legal remedy for abuse of law.

## Ban on Online Advertisements for Sex Selection and Sex Determination

Section 22 of the PCPNDT Act prohibits advertisements relating to facilities of preconception and prenatal sex determination and selection. In *Sabu Mathew George v. Union of India*,<sup>8</sup> a writ petition was filed before the Supreme Court seeking directions for blocking all websites and online advertisements related to gender-biased sex selection. The Court in a series of orders gave directions on the issue. Pursuant to the directions of the Court in one of its orders,<sup>9</sup> a nodal agency was constituted to monitor and report such advertisements to search engines for removal.<sup>10</sup> In addition, the Court has directed the nodal agency and search engines to jointly devise a solution for filtering advertisements in violation of Section 22 of the PCPNDT Act.<sup>11</sup>

## Constitutional Challenges to the PCPNDT Act

High Courts have on multiple occasions ruled on the constitutional validity of the entire PCPNDT Act, as well as specific provisions of the Act. The Bombay High Court in *Vinod Soni v. Union of India*<sup>12</sup> held that right to life and personal liberty under Article 21 does not envisage a right to choose the sex of the offspring, rejecting the petitioners' argument that the PCPNDT Act violated their personal liberty to determine the nature of their family. It further held that the PCPNDT Act was in furtherance of the right of every child, whatever its sex may be, to full development guaranteed under Article 21 of the Indian Constitution.

Thereafter, in *Vijay Sharma v. Union of India*,<sup>13</sup> the petitioners contended that PCPNDT Act was violative of Article 14 of the Indian Constitution as it did not account for the grave mental injury caused to prospective mothers carrying an unwanted female or male foetus for the second time, while the MTP Act factored the mental injury caused by unwanted pregnancies. Upholding the constitutionality of the PCPNDT Act, the Bombay High Court observed that the two legislations operate in different spheres and have different objects. It held that sex selection offends the right to life and dignity of women as a group, and that mothers wishing to select the sex of their offspring form a different category from those desiring termination of pregnancy on grounds stipulated under the MTP Act.

In *Saksham Foundation Charitable Society v. Union of India*,<sup>14</sup> the petitioner challenged the constitutional validity of provisions prohibiting disclosure of sex of the foetus [Section 5(2)] and banning sex determination [Sections 6(a) and 6(b)] before the Allahabad High Court. The petition sought directions for legalization of sex determination and compulsory disclosure of the sex of the foetus on the premise that such measures would record and prevent sex selection. Dismissing the writ petition, the Court held that PCPNDT Act did not violate Articles 14 and 21 of the Constitution of India, and that the object of the statute was to ensure that diagnostic techniques are not misused for sex determination and sex selection.

## Applicability of the PCPNDT Act to Surrogacy Arrangements

In *Amy Antoinette McGregor & Anr. v. Directorate of Family Welfare Govt. of NCT of Delhi*,<sup>15</sup> an Australian couple desirous of having a male child and a female child through surrogacy approached the Delhi High Court seeking a declaration that the PCPNDT Act is *ultra vires* with respect to the surrogacy process. The High Court rejected the challenge to the PCPNDT Act made on the grounds of hostile discrimination and unreasonable classification and held that there was no basis to treat such intending parents desirous of balancing their family through surrogacy differently.

## Related Human Rights Standards and Jurisprudence

Below is a selection of human rights standards and jurisprudence relating to state obligations to ensure women's right to equality and non-discrimination, including both obligations to address discrimination in law and in practice that perpetuates the inferiority or superiority of either of the sexes and to ensure respect for women's reproductive rights. The selection below reflects the evolution in human rights law relating to discriminatory norms and harmful practices, such as son preference, to recognize that solutions should address systematic and structural root causes such as patriarchal attitudes while also emphasizing that such solutions should not violate women's rights, which would include reproductive rights and access to abortion.

The Government of India has committed itself to comply with obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention for the Elimination of All Forms of Discrimination

Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR).<sup>16</sup> Under international law, all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.<sup>17</sup> The Supreme Court has held that in light of the obligation to “foster respect for international law” in Article 51 (c) of the Indian Constitution “[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”<sup>18</sup>

## INTERNATIONAL TREATY STANDARDS

### TREATIES

- **ICESCR, Articles 2(2), 3, 12(1)** (prohibiting discrimination on the basis of sex and guaranteeing the right to health).
- **ICCPR, Articles 2(1), 17, 23(2)** (prohibiting discrimination on the basis of sex and other grounds and protecting the right to privacy).
- **CEDAW, Articles 1, 2(f), 3–5, 12(1), 16(e)** (protecting women’s right to equality with men in all fields including cultural life; obligating states to eliminate cultural patterns, prejudices, and customary practices “based on the idea of the inferiority or the superiority of either of the sexes”; urging the use of temporary special measures to realize de facto equality between men and women; and guaranteeing women the right to health and to decide the number and spacing of their children).

### SELECTED GENERAL COMMENTS

- **CEDAW Committee, *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19***, U.N. Doc. CEDAW/C/GC/35 (2017), paras. 18–19, 31(a), 34–35 (outlining that criminalization of abortion and other restrictions on women’s reproductive autonomy constitute gender-based violence; and instructing that states must repeal discriminatory laws, including those criminalizing abortion, and must implement laws that work to eliminate the underlying causes of gender-based violence, such as patriarchal attitudes and stereotypes and inequality in the family).
- **CEDAW Committee and the Committee on the Rights of the Child, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices***, U.N. Doc. CEDAW/C/GC/31-CRC/C/GC/18 (2014), paras. 6–7, 9, 16–17, 31–34, 49–51, 55–60, 70 (identifying preferential treatment of boys as a harmful practice rooted in discriminatory sex- and gender-based attitudes; stressing states’ duty to address the underlying systemic and structural causes of harmful practices, using demonstrably relevant, appropriate, and effective measures while “ensuring first and foremost that the human rights of women are not violated”; and recognizing that harmful practices should not be used to justify gender-based violence as a form of “protection” or control of women).
- **CEDAW Committee, *General Recommendation No. 24 on Article 12 of the Convention (women and health)***, U.N. Doc. A/54/38/Rev. 1 (1999), paras. 19, 22–23, 31 (establishing that ensuring the right to non-discrimination in health care requires that states must guarantee women’s access to health care that respects their dignity, their needs and perspectives, and their right to fully informed consent; and instructing states to ensure the removal of all barriers to women’s access to health services, education, and information, including by reforming laws that criminalize abortion).
- **CEDAW Committee, *General Recommendation No. 21: Equality in Marriage and Family Relations***, U.N. Doc. A/49/38 (1994), paras. 22, 40–44, 50 (elaborating women’s right to decide the number and spacing of their children on a basis of free and informed consent, without limitations from “spouse, parent, partner or Government”; and emphasizing states’ obligation to “discourage any notions of inequality of women and men”).
- **CEDAW Committee, *General Recommendation No. 19: Violence against women (1992)***, paras. 20, 22 (outlining that male child preference constitutes a harmful traditional cultural practice; and explaining that compulsory abortion infringes women’s right to decide the number and spacing of their children).

- **Human Rights Committee, *General comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life***, U.N. Doc. CCPR/C/GC/36 (2018), para. 8 (outlining that regulations that jeopardize women's access to safe abortion violate the right to life; recognizing that the right to life attaches only at birth; calling on states to prevent the stigmatization of women seeking abortion; and adding that states should not criminalize women who receive abortion or abortion providers).
- **Committee for Economic Social and Cultural Rights, *General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights)***, U.N. Doc. E/C.12/2005/4 (2005), paras. 15, 19, 21, 29 (reiterating states' duty to implement laws and policies that accelerate women's equality and help eliminate "prejudices, customary and all other practices that perpetuate the notion of inferiority or superiority of either of the sexes"; and outlining that states must remove legal restrictions on reproductive health and address the ways in which women may have unequal access to water, food, and medical care).

## UNITED NATIONS HUMAN RIGHTS EXPERT REPORTS

- **Working Group on the issue of discrimination against women in law and in practice, *Report of the Working Group on the issue of discrimination against women in law and in practice***, U.N. Doc. A/HRC/29/40 (2015), paras. 12–18, 65–67, 71–73 (highlighting the state's duty to counter social and cultural patterns that perpetuate gender inequality through awareness-raising and informational programmes; and instructing states to "set up effective services that respond to women's needs in the short, medium and long term").
- **Office of the High Commissioner on Human Rights et al., *Preventing Gender-Biased Sex Selection: An Interagency Statement OHCHR, UNFPA, UNICEF, UN Women and WHO*** (2011), p. V (emphasizing that states must address prenatal sex selection "without exposing women to the risk of death or serious injury by denying them access to needed services such as safe abortion to the full extent of the law," which would constitute further violations of their rights to life and health).
- **Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR Health), *Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. A/64/272 (2009), paras. 54–55, 57–60 (outlining that women may not be denied the right to consent-based health care on the basis of concerns about the best interests of an unborn child; calling for respect for women's rights to reproductive health care and emphasizing that "[g]uidance concerning situations of maternal-foetal conflict should capitalize on the potential of proper counselling and comprehensive support services through women's networks to mitigate restrictions of autonomous decision-making of the woman and any potentially harmful effects to the child").
- **Special Rapporteur on violence against women, its causes and consequences (SR VAW), *Report of the Special Rapporteur on violence against women, its causes and consequences***, Yakin Ertürk—Intersections between culture and violence against women, U.N. Doc. A/HRC/4/34 (2007), paras. 72(b), 72(c) (emphasizing that states should address the social, economic, and political factors that underpin harmful cultural practices against women, while avoiding "compartmentalized and selective approaches to the elimination of violence against women that de-link the problem from its underlying causes").
- **SR VAW, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that are violent towards women***, U.N. Doc. E/CN.4/2002/83 (2002), paras. 71–73, 79–80, 90 (outlining that prenatal sex selection is a manifestation of discriminatory son preference, which in turn reflects social and legal disempowerment of women; and reiterating that violations of women's sexual and reproductive health and rights constitute violence against women).

# RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

## IN THE HIGH COURT OF BOMBAY

**Vinod Soni & Anr. v. Union of India**

**2005 Cri LJ 3408 (Bom)**

**V.G. Palshikar and V.C. Daga, JJ.**

***This writ petition was filed by a married couple challenging the constitutionality of the PCPNDT Act on the ground that it violates their personal liberty to choose the sex of their offspring and determine the nature of their family. The Bombay High Court examined whether the PCPNDT Act, by placing a bar on sex determination and sex selection, violates their right to life and personal liberty under Article 21 of the Indian Constitution.***

**Palshikar, J.:** “By this petition, the petitioners who are married couple, seek to challenge the constitutional validity of Preconception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act of 1994 (hereinafter referred to Sex Selection Act of 1994). The petition contains basically two challenges to the enactment. First, it violates Article 14 of the Constitution and second, that it violates Article 21 of the Constitution of India. At the time of argument, the learned counsel appearing for the petitioners submitted that he does not press his petition insofar as the challenge via Article 14 of the Constitution of India is concerned.

**2.** We are, therefore, required to consider the challenge that the provisions of Sex Selection Act of 1994 are violative of Article 21 of the Constitution of India...

**3.** ...Article 21, according to the learned counsel has been gradually expanded to cover several facets of life pertaining to life itself and personal liberties which an individual has, as a matter of his fundamental right. Reliance was placed on several judgments of the Supreme Court of India to elaborate the submission regarding expansion of right to live and personal liberty embodied under Article 21, in (sic) our opinion, firstly we deal with protection of life and protection of personal liberty. Insofar as protection of life is concerned, it must of necessity include the question of terminating a life. This enactment basically prohibits termination of life which has come into existence. It also prohibits sex selection at pre-conception stage. The challenge put in nutshell is that the personal liberty of a citizen of India includes the liberty of choosing the sex of the offspring. Therefore he, or she is entitled to undertake any such medicinal procedure which provides for determination or selection of sex, which may come into existence after conception. The submission is that the right to personal liberty extends to such selection being made in order to determine the nature of family which an individual can have in exercise of liberty guaranteed by Article 21. It in turn includes nature of sex of that family which he or she may eventually decided (sic) to have and/or develop.

**4.** Reliance was placed, as already stated, on several judgments of the Supreme Court of India on the enlargement of the right embodied under Article 21...

**5.** ... These rights even if further expanded to the extremes of the possible elasticity of the provisions of Article 21 cannot include right to selection of sex whether preconception or post conception.

**6.** The Article 21 is now said to govern and hold that it is a right of every child to full development. The enactment namely Sex Selection Act of 1994 is factually enacted to further this right under Article 21, which gives to every child right to full development. A child conceived is therefore entitled to under Article 21, as held by the Supreme Court, to full development whatever be the sex of that child. The determination whether at preconception stage or otherwise is the denial of a child, the right to expansion, or if it can be so expanded right to come into existence. Apart from that the present legislation is confined only to prohibit selection of sex of the child before or after conception. The tests which are available as of today and which can incidentally result in determination of the sex of the child are prohibited. The statement of objects and reasons makes this clear. The statement reads as under.

“The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders.”

Then para 4 reads thus:

“Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to conception as well as the misuse of pre-natal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended.”

7. It will thus be observed that the enactment proposes to control and ban the use of this selection technique both prior to conception as well as its misuse after conception and it does not totally ban these procedures or tests. If we notice provisions of section 4 of the Act it gives permission in when any of these tests can be administered. Sub-section (2) says that no prenatal diagnostic techniques can be conducted except for the purposes of detection of any of the (1) chromosomal abnormalities, (2) genetic metabolic diseases, (3) hemoglobinopathies, (4) sex-linked genetic diseases, (5) congenital anomalies and (6) any other abnormalities or diseases as may be specified by the Central Supervisory Board. Thus, the enactment permits such tests if they are necessary to avoid abnormal child coming into existence.

8. Apart from that such cases are permitted as mentioned in sub-clause (3) of section 4 where certain dangers to the pregnant woman are noticed. A perusal of those conditions which are five and which can be added to the four, existence on which is provided by the Act. It will therefore be seen that the enactment does not bring about total prohibition of any such tests. It intends to thus prohibit user and indiscriminate user of such tests to determine the sex at preconception stage or post-conception stage. The right to life or personal liberty cannot be expanded to mean that the right of personal liberty includes the personal liberty to determine the sex of a child which may come into existence. The conception is a physical phenomena. It need not take place on copulation of every capable male and female. Even if both are competent and healthy to give birth to a child, conception need not necessarily follow. That being a factual medical position, claiming right to choose the sex of a child which is come into existence as a right to do or not to do something which cannot be called a right. The right to personal liberty cannot expand by any stretch of imagination, to liberty to prohibit coming into existence of a female foetus or male foetus which shall be for the Nature to decide. To claim a right to determine the existence of such foetus or possibility of such foetus come into existence, is a claim of right which may never exist. Right to bring into existence a life in future with a choice to determine the sex of that life cannot in itself to be a right. In our opinion, therefore, the petition does not make even a prima facie case for violation of Article 21 of the Constitution of India. Hence it is dismissed...”

## IN THE HIGH COURT OF BOMBAY

**Vijay Sharma & Anr. v. Union of India**

**AIR 2008 Bom 29**

**Swatanter Kumar, C.J. and Ranjana Desai, J.**

***In this writ petition challenging the constitutionality of PCPNDT Act, the petitioners contended that couples having children of same sex should be allowed to use preconception and prenatal diagnostic techniques to have a child of the opposite sex, in order to balance their family. They further argued that PCPNDT Act was discriminatory as it did not account for the mental injury caused to pregnant women carrying a female foetus or a male foetus for the second time, while the MTP Act allowed pregnant women to terminate their unwanted pregnancies. The Bombay High Court examined whether the provisions of PCPNDT Act violated the right to equality under Article 14 of the Indian Constitution.***

**Desai, J.:** “In this petition filed under Article 226 of the Constitution of India, the petitioners have challenged the constitutional validity of Sections 2, 3-A, 4(5) and 6(c) of the Pre-Conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short, “the said Act”) as amended by The Pre-Natal Diagnostic Techniques. (Regulation of Prevention of Misuse Amendment Act, 2002 (for short, “the Amendment Act, 2002)).

2. Before dealing with the contentions raised in the petition, it must be stated that challenge to the constitutional validity of the said Act on the ground of violation of Article 21 of the Constitution of India has been rejected by this Court in *Vinod Soni v. Union of India*, 2005 (3) MLJ 1131 : (2005 Cri LJ 3408). It is not open to the petitioners to raise the same challenge again. We shall, therefore, only deal with the petitioner's contention that the said Act violates the principle of equality of law enshrined in Article 14 of the Constitution of India.



3. The petitioners are a married couple having two female children. It is their case as disclosed in the petition that they are desirous of expanding their family provided they are in a position to select the sex of the child. It is obvious from the petition that the petitioners are desirous of having a male child. According to them, they can then enjoy the love and affection of both, son and daughter simultaneously and their existing children can enjoy the company of their own brother while growing up if they are allowed to select sex of their child and have a son. The petitioners have approached various clinics for treatment for the selection of the sex of the foetus by pre-natal diagnostic techniques. However, all clinics have denied treatment to them on the ground that it is prohibited under the said Act.

4. According to the petitioners, they have no intention to misuse the pre-natal diagnostic techniques. They contend that they are financially sound and capable of looking after and brining (sic) up one more child. They cannot be treated on par with other couples, who in order to have a male child, indulge in sex selective abortion. The provisions of the said Act cannot be made applicable without distinction. According to the petitioners, they only want to balance their family. They contend that a married couple, who is already having child belonging to one sex should be permitted to make use of the prenatal diagnostic techniques to have a child of the sex which is opposite to the sex of their existing child. In fact, ideal ratio of females to males can be maintained if the prenatal diagnostic techniques are allowed to be used. Burden of the song (sic) is that couples who are already having children of one sex should be allowed to have a child of the sex opposite to the sex of their existing children by use of the pre-natal diagnostic techniques at pre-conception stage.

...

7. It is necessary to quote Section 2 of the Amendment Act, 2002 and Sections 3-A, 4(5) and 6(c) of the said Act as inserted by the Amendment Act since the constitutional validity of the said provisions is under challenge. Section 2 of the Amendment Act, 2002 reads thus:

“2. Substitution of long title. — In the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (hereinafter referred to as the principal Act), for the long title, the following long title shall be substitute, namely:—

“An Act to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matter connected therewith or incidental thereto.”

Sections 3-A, 4(5) and 6(c) of the said Act read thus:

“3. Regulation of Genetic Counselling Centers, Genetic Laboratories and Genetic Clinics. — On and from the commencement of this Act,—

(1) to (3) xxxxxxxxx

((3-A) Prohibition of sex selection. — No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them).

(4) Regulation of pre-natal diagnostic techniques. — On and from the commencement of this Act,—

(1) to (4) xxxxxxxxx

(5) no person including a relative or husband of a woman shall seek or encourage the conduct of any sex-selection technique on her or him or both.

(6) Determination of sex prohibited. — On and from the commencement of this Act,—

(a) xxxxxxxxx

(b) xxxxxxxxx

(c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.”

8. It is necessary to first deal with the submission that the use of the words “Regulation & Prevention of Misuse” in the Amendment Act, 2002 is indicative of the legislative intent only to regulate and prevent misuse because these words substitute the words “Prohibition of Sex Selection” in the said Act. This, in our opinion, is a totally fallacious argument.

The title of the earlier Act was the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (for short, “the 1994 Act”). Its long title prior to its amendment by the Amendment Act, 2002 was as under:

1. Substituted by the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 (14 of 2003, S. 2, for long title (w.e.f. 14-2-2003). Prior to its substitution, long title read as under:— “An Act to provide for the regulation of the use of pre-natal diagnostic techniques for the purpose of detecting genetic or metabolic disorders or chromosomal abnormalities or certain congenital mal-formations or sex linked disorders and for the prevention of the misuse of such techniques for the purpose of pre-natal sex determination leading to female foeticide; and, for matters connected therewith or incidental thereto.”

By the Amendment Act, 2002, it was substituted by the following long title:

“An Act to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto.”

9. By the Amendment Act, 2002, the 1994 Act i.e. the Pre-natal Diagnostic Techniques (Regulation & Prevention of Misuse) Act was renamed as the said Act i.e. the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. The Statement of Objects and Reasons of the Amendment Act, 2002 must be quoted. It reads thus:

“Amendment Act 14 of 2003—Statement of Object and Reasons. — The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 seeks to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. During, recent years, certain inadequacies and practical difficulties in the administration of the said Act have come to the notice of the Government, which has necessitated amendments in the said Act.

2. The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders, etc. However, the amniocentesis and sonography are being used on a large scale to detect the sex of the foetus and to terminate the pregnancy of the unborn child if found to be female. Techniques are also being developed to select the sex of child before conception. These practices and techniques are considered discriminatory to the females (sic) sex and not conducive to the dignity of the women.

3. The proliferation of the technologies mentioned above may, in future, precipitate a catastrophe, in the form of severe imbalance in male-female ratio. The State is also duty bound to Intervene (sic) in such matters to uphold the welfare of the society, especially of the women and children. It as (sic), therefore, necessary to enact and implement in letter and spirit a legislation to ban the pre-conception sex selection techniques and the misuse of pre-natal diagnostic techniques for sex-selective abortions and to provide for the regulation of such abortions. Such a law is also needed to uphold medical ethics and initiate the process of regulation of medical technology in the larger interests of the society.

4. Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to conception as well as the misuse of prenatal diagnostic (sic) techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended.

5. The Bill seeks to achieve the aforesaid objects.”

10. The Statement of Objects and Reasons of the Amendment Act, 2002 therefore clearly indicates that the legislature was alarmed at the severe imbalance created in the male to female ratio on account of rampant use of the pre-natal diagnostic techniques made to detect sex of the foetus and to terminate the pregnancy of the unborn child if found to be female. The legislature took note of the fact that certain techniques are being developed whereby even at preconception stage, sex of the child can be selected and, therefore, the title of the 1994 Act was amended to include the words “Preconception” and “(Prohibition of Sex Selection)” in it. The legislature categorically stated that there was a need to ban pre-conception sex selective techniques and made it clear that the 1994 Act was sought to be amended with a view to banning the use of sex selection techniques prior to conception and as well as misuse of pre-natal diagnostic techniques for sex selective abortions.

**11.** A look at certain important provisions of the said Act persuade us to reject the submission of the petitioners that the legislative intent is to only regulate the use of the said pre-natal diagnostic techniques. “Prenatal diagnostic procedures” are defined under Section 2(1) of the said Act as all gynaecological or obstetrical or medical procedures such as ultrasonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, embryo blood or any other tissue or fluid of a man or of a woman before or after conception, for being sent to a Genetic Laboratory or Genetic Clinic for conducting any type of analysis or pre-natal diagnostic tests for selection of sex before or after conception.

**12.** “Pre-natal diagnostic test” is defined under Section 2(k) of the said Act as ultrasonography or any test or analysis of amniotic fluid, chorionic, villi, blood or any tissue or fluid of a pregnant woman or conceptus conducted to detect genetic or metabolic disorders or chromosomal abnormalities or congenital anomalies or haemoglobinopathies or sex-linked diseases.

**13.** Section 2(j) defines pre-natal diagnostic techniques. It states that pre-natal diagnostic techniques include all pre-natal diagnostic procedures and pre-natal diagnostic tests. Pre-natal diagnostic techniques (for convenience, hereinafter referred to as “the said techniques”) can detect the sex of the foetus. Section 3-A prohibits sex selection on a woman or a man or on both of them or on any tissue embryo, conceptus, fluid or gametes derived from either or both of them and Section 4 regulates use of the said techniques. Section 4(2) states that the said techniques shall not be conducted except for the purpose of detection of (i) chromosomal abnormalities; (ii) genetic metabolic diseases; (iii) haemoglobinopathies; (iv) sex linked genetic diseases; (v) congenital anomalies or any other abnormalities or diseases as may be specified by the Central Supervisory Board that too on fulfillment of any of the conditions laid down in sub-section (3). Thus the said techniques are to be used only to detect abnormalities in the foetus and not for sex-selection or sex-selective abortions. Section 5(2) states that no person including the person conducting pre-natal procedures shall communicate (sic) to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs or in any other manner. Section 6(c) prohibits determination of sex by stating that no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.

**14.** Under the said Act machinery is created to ensure that there is no sex selection at pre-conception stage or thereafter and there is no pre-natal determination of sex of foetus leading to female foeticide. Therefore, the submission that the use of the said techniques is only intended to be regulated, must be rejected.

**15.** The challenge on the ground of violation of Article 14 rests on the comparison between the said Act and the MTP Act which are Central Acts. In our opinion, the object of both the Acts and the mischief they seek to prevent differ. They cannot be compared to canvass violation of Article 14. We have already quoted the Statement of Objects and Reasons of the Amendment Act, 2002. What it seeks to ban is pre-conception sex selection techniques and use of pre-natal diagnostic techniques for sex-selective abortions. Having taken note of the alarming imbalance created in male to female ratio and steep rise in female foeticide legislature has amended the Act of 1994. It, inter alia, prohibits sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gamete (sic) derived from either or both of them. It prohibits any person to cause or allowed to be caused selection of sex before or after conception.

**16.** The MTP Act is an Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. Statement of Objects and Reasons of the MTP Act indicates that it concerns itself with the avoidable wastage of the mother's health, strength and sometimes life. It seeks to liberalize certain existing provisions relating to termination pregnancy as a health measure — when there is danger to the life or risk to physical or mental health of the woman, on humanitarian grounds — such as when pregnancy arises from a sex crime like rape or intercourse with a mentally ill woman, etc. and eugenic grounds — where there is substantial risk that the child, if born, would suffer from deformities and diseases. It does not deal with sex selective abortion after conception of sex selection before or after conception.

**17.** It is true that under Section 3(2) of the MTP Act, when two registered medical practitioners form an opinion that continuance of the pregnancy would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health, pregnancy can be terminated and, under Explanation II thereof, where any pregnancy occurs as a result of a failure of a device used by the couple for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy is presumed to constitute a grave injury to the mental health of the woman. It must be remembered that termination of pregnancy under the MTP Act is not promoted because of the unwanted sex of the foetus. It could be a male or a female foetus. The MTP Act does not deal with sex selection. The (sic) petitioners want to equate the situation of a prospective mother under the MTP Act with the prospective mother under the said Act. They contend that anguish caused to a woman who is carrying a second or third child of the same sex as that of her existing

children and who is desirous of having a child of the opposite sex also constitutes a grave injury to her mental health. According to the petitioners, this aspect has been overlooked by the legislature. They contend that an exception ought to have been carved out for such women. It is their contention that inasmuch as both these Acts are Central Acts and deal with prospective mothers if by MTP Act certain rights are conferred on a prospective mother, the same cannot be denied to the prospective mother by the said Act. We are unable to accept this submission. Apart from the fact that both the Acts operate in different fields and have different objects acceptance of the submissions of the learned counsel would frustrate the object of the said Act. A prospective mother who does not want to bear a child of a particular sex cannot be equated with a mother who wants to terminate the pregnancy not because of the foetus of the child but because of other circumstances laid down under the MTP Act. To treat her anguish as injury to mental health is to encourage sex selection which is not permissible. Therefore, by process of comparative study, the provisions of the said Act cannot be called discriminatory and, hence, violative of Article 14.

**18.** It is well settled that when a law is challenged as offending against the guarantee enshrined in Article 14, the first duty of the Court is to examine the purpose and the policy of the Act and then to discover whether the classification made by the law has a reasonable relation to the object which the legislature seeks to obtain. The purpose or object of the Act is to be ascertained from an examination of its' title, preamble and provisions. We have done that exercise in the preceding paragraphs and we are of the considered opinion that the said Act does not violate the equality clause of the Constitution.

...

**20.** That there is decline in the number of girls is not seriously disputed by the petitioners. According to them, the imbalance is caused by the couples who have no children and who by using the said techniques choose male child. In our opinion, no such distinction is permissible. It cannot be denied that in India there is strong bias in favour of a male child. Various causes have led to this preference. It is felt that son carries the name of the family forward and only he can perform religious rites at the time of cremation of the parents. Sons are said to provide support in the old age. Several socioeconomic and cultural factors are responsible for this craving for a son. It is unfortunate that people should still be under the influence of such outdated notions. As long as such notions exist, the girl child will always be unwanted because it is felt that she brings with her the burden of dowry. These hard realities will have to be kept in mind while dealing with the challenge raised to the constitutional validity of a statute which tries to ban sex selection before or after preconception and misuse of the said techniques leading to sex selective abortions. None can be allowed to use the said techniques for sex selection. The justification offered by the petitioners is totally unacceptable to us.

...

**22.** ...We have no doubt that if the use of the said techniques for sex selection is not banned, there will be unprecedented imbalance in male to female ratio and that will have disastrous effect on the society. The said Act must, therefore, be allowed to achieve its avowed object of preventing sex selection. In our opinion, the provisions of the said Act which are sought to be declared unconstitutional are neither arbitrary nor unreasonable and are not violative of Article 14.

**23.** It is then submitted that by sex selection before conception with the help of the said techniques, sex of the child is determined by using male/female chromosome before fertilization and the fertilized egg is inserted in the womb of the mother. There is, therefore, no foeticide and, hence it is not necessary to impose any ban on the said techniques.

**24.** It is not possible to accept this submission. Techniques like sonography which are useful-for the detection of genetic or chromosomal (sic) disorders or congenital malformations are being used to detect the sex of the foetus and to terminate the pregnancy in case the foetus is female. Similarly, preconception sex selection techniques which have now been developed make sex selection before conception possible. If prior to conception by choosing male or female chromosome sex of the child is allowed to be determined and fertilized egg is allowed to be inserted in the mother's womb that would again give scope to choose male child over female child. In such cases, even if it is assumed that there is no female foeticide, indirectly the same result is achieved. The whole idea behind sex selection before preconception is to go against the nature and secure conception of a child of one's choice. It can prevent birth of a female child. It is as bad as foeticide. It will also result in Imbalance in male to female ratio. The argument that sex selection at pre-conception is an innocent act must, therefore, be rejected.

**25.** We have so far laid stress on the possibility of severe imbalance in male to female ratio on account of artificial reduction in the number of female children caused by the use of the said, techniques. But there is yet another and more important fact of this problem That society should not want a girl child that efforts should be made to prevent the birth of a girl child and that society should given preference to a male child over a girl child is a matter of grave concern.

Such tendency offends dignity of women. It undermines their importance. It violates woman's right to life. It violates Article 39(e) of the Constitution which states the principle of state policy that the health and strength of women is not to be abused. It ignores Article 51A(e) of the Constitution which state that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. Sex selection is therefore against the spirit of the Constitution. It insults and humiliates woman hood. This is perhaps the greatest argument in favour of total ban on sex selection.

26. We are of the considered opinion that the provisions of the said Act as amended by the Amendment Act, 2002 are clear, unambiguous and in tune with their avowed object. There is no uncertainty in any of the provisions as alleged in the petition. Therefore, it is not necessary for the Central Government to issue any order in the Official Gazette under Section 31-A of the said Act for removal of difficulties on the grounds stated in the petition. This submission of the petitioners is, therefore rejected.

...

## IN THE SUPREME COURT OF INDIA

### Voluntary Health Association of Punjab v. Union of India & Ors.

(2013) 4 SCC 1

K.S.P. Radhakrishnan and Dipak Misra, JJ.

***The Supreme Court had in a series of cases, issued directions for the effective implementation of the PCPNDT Act. However, the orders of the Court, as also the provisions of the Act were not being effectively implemented by a number of State Governments. In this case, the Court issued notice to the State Governments seeking their response on the implementation of the Act, and of the orders of the Court.***

**Radhakrishnan, J.:** "Indian society's discrimination towards the female child still exists due to various reasons which has its roots in the social behaviour and prejudices against the female child and, due to the evils of the dowry system, still prevailing in the society, in spite of its prohibition under the Dowry Prohibition Act. The decline in the female child ratio all over the country leads to an irresistible conclusion that the practice of eliminating female foetus by the use of pre-natal diagnostic techniques is widely prevalent in this country. Complaints are many, where at least few of the medical professionals do perform sex selective abortion having full knowledge that the sole reason for abortion is because it is a female foetus..."

2. Parliament wanted to prevent the same and enacted the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short "the Act") which has its roots in Article 15(2) of the Constitution of India. The Act is a welfare legislation...Unfortunately, facts reveal that perpetrators of the crimes also belong to the educated middle class and often they do not perceive the gravity of the crime.

3. This Court, as early as, in 2001 in *Centre for Enquiry into Health and Allied Themes v. Union of India* [(2001) 5 SCC 577] had noticed the misuse of the Act and gave various directions for its proper implementation. The non-compliance with various directions was noticed by this Court again in *Centre for Enquiry into Health and Allied Themes v. Union of India* [(2003) 8 SCC 398] and this Court gave various other directions.

4. Having noticed that those directions as well as the provisions of the Act are not being properly implemented by the various States and Union Territories, we passed an order on 8-1-2013 [*Voluntary Health Assn. of Punjab v. Union of India*, (2013) 4 SCC 401] directing personal appearance of the Health Secretaries of the States of Punjab, Haryana, NCT of Delhi, Rajasthan, Uttar Pradesh, Bihar and Maharashtra, to examine what steps they have taken for the proper and effective implementation of the provisions of the Act as well as the various directions issued by this Court.

5. We notice that even though the Union of India has constituted the Central Supervisory Board and most of the States and Union Territories have constituted State Supervisory Boards, Appropriate Authorities, Advisory Committees, etc. under the Act, but their functioning are far from satisfactory.

6. The 2011 Census of India, published by the Office of the Registrar General and Census Commissioner of India, would show a decline in female child sex ratio in many States of India from 2001-2011. The Annual Report on Registration of Births and Deaths, 2009, published by the Chief Registrar of NCT of Delhi would also indicate a sharp decline in the female sex ratio in almost all the districts. Above statistics is an indication that the provisions of the Act are not properly

and effectively being implemented. There has been no effective supervision or follow-up action so as to achieve the object and purpose of the Act. Mushrooming of various sonography centres, genetic clinics, genetic counselling centres, genetic laboratories, ultrasonic clinics, imaging centres in almost all parts of the country calls for more vigil and attention by the authorities under the Act. But, unfortunately, their functioning is not being properly monitored or supervised by the authorities under the Act or to find out whether they are misusing the pre-natal diagnostic techniques for determination of sex of foetus leading to foeticide.

**7.** The Union of India has filed an affidavit in September 2011 giving the details of the prosecutions launched under the Act and the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (for short “the Rules”), up to June 2011. We have gone through the chart as well as the data made available by various States, which depicts a sorry and an alarming state of affairs. Lack of proper supervision and effective implementation of the Act by various States, are clearly demonstrated by the details made available to this Court. However, the State of Maharashtra has comparatively a better track record. Seldom, the ultrasound machines used for such sex determination in violation of the provisions of the Act are seized and, even if seized, they are being released to the violators of the law only to repeat the crime. Hardly few cases end in conviction. The cases booked under the Act are pending disposal for several years in many courts in the country and nobody takes any interest in their disposal and hence, seldom, those cases end in conviction and sentences, a fact well known to the violators of law. Many of the ultrasonography clinics seldom maintain any record as per rules and, in respect of the pregnant women, no records are kept for their treatment and the provisions of the Act and the Rules are being violated with impunity.

**8.** The Central Government vide GSR No. 80(E) dated 7-2-2002 issued a notification amending the Act and regulating usage of mobile machines capable of detecting the sex of the foetus, including portable ultrasonic machines, except in cases to provide birth services to patients when used within its registered premises as part of the mobile medical unit offering a bouquet or other medical and health services. The Central Government also vide GSR No. 418(E) dated 4-6-2012 has notified an amendment by inserting a new Rule 3.3(3) with an object to regulate illegal registrations of medical practitioners in genetic clinics, and also amended Rule 5(1) by increasing the application fee for registration of every genetic clinic, genetic counselling centre, genetic laboratory, ultrasound clinic or imaging centre and amended Rule 13 by providing that an advance notice by any centre for intimation of every change in place, intimation of employees and address. Many of the clinics are totally unaware of those amendments and are carrying on the same practices.

**9.** In such circumstances, the following directions are given:

**9.1.** The Central Supervisory Board and the State and Union Territories Supervisory Boards, constituted under Sections 7 and 16-A of PN & PNDT Act, would meet at least once in six months, so as to supervise and oversee how effective is the implementation of the PN & PNDT Act.

**9.2.** The State Advisory Committees and District Advisory Committees should gather information relating to the breach of the provisions of the PN & PNDT Act and the Rules and take steps to seize records, seal machines and institute legal proceedings, if they notice violation of the provisions of the PN & PNDT Act.

**9.3.** The committees mentioned above should report the details of the charges framed and the conviction of the persons who have committed the offence, to the State Medical Councils for proper action, including suspension of the registration of the unit and cancellation of licence to practice.

**9.4.** The authorities should ensure also that all genetic counselling centres, genetic laboratories and genetic clinics, infertility clinics, scan centres, etc. using pre-conception and pre-natal diagnostic techniques and procedures should maintain all records and all forms, required to be maintained under the Act and the Rules and the duplicate copies of the same be sent to the district authorities concerned, in accordance with Rule 9(8) of the Rules.

**9.5.** States and District Advisory Boards should ensure that all manufacturers and sellers of ultrasonography machines do not sell any machine to any unregistered centre, as provided under Rule 3-A and disclose, on a quarterly basis, to the State/Union Territory concerned and the Central Government, a list of persons to whom the machines have been sold, in accordance with Rule 3-A(2) of the Rules.

**9.6.** There will be a direction to all genetic counselling centres, genetic laboratories, clinics, etc. to maintain Forms A, E, H and other statutory forms provided under the Rules and if these forms are not properly maintained, appropriate action should be taken by the authorities concerned.

**9.7.** Steps should also be taken by the State Government and the authorities under the Act for mapping of all registered and unregistered ultrasonography clinics, in three months' time.

**9.8.** Steps should be taken by the State Governments and the Union Territories to educate the people of the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the State and district levels.

**9.9.** Special cell be constituted by the State Governments and the Union Territories to monitor the progress of various cases pending in the courts under the Act and take steps for their early disposal.

**9.10.** The authorities concerned should take steps to seize the machines which have been used illegally and contrary to the provisions of the Act and the Rules thereunder and the seized machines can also be confiscated under the provisions of the Code of Criminal Procedure and be sold, in accordance with law.

**9.11.** The various courts in this country should take steps to dispose of all pending cases under the Act, within a period of six months. Communicate this order to the Registrars of various High Courts, who will take appropriate follow-up action with due intimation to the courts concerned.

...

## IN THE HIGH COURT OF DELHI

**Amy Antoinette McGregor & Anr v. Directorate of Family Welfare Govt of NCT of Delhi & Anr.**  
(2013) 205 DLT 96

**N.V. Ramana, C.J. and Manmohan, J.**

***The petitioners, an Australian couple, were desirous of having children of opposite sex through surrogacy in India and wished to use prenatal diagnostic techniques for identifying the sex of the embryo before impregnation. They approached the Delhi High Court seeking a declaration that the PCPNDT Act is “ultra vires” in its applicability to the surrogacy process and a direction to the respondents to allow their application for exemption under it. The Court examined the constitutionality of the PCPNDT Act and whether there was a need to accord different treatment to intending parents wanting to balance their family through surrogacy.***

**Ramana, C.J.:** “1. This writ petition is filed by two petitioners, residents of Sydney, Australia. The first petitioner is the wife and the second is the husband. It appears that due to some medical problem the first petitioner cannot physically conceive a child...The doctors therefore advised her to proceed with a Gestational Surrogacy...According to the petitioners, though they want a child, yet they do not want two children of the same sex in view of their principle of balanced family and accordingly they want to control the birth of same sex by using the advanced prenatal techniques.

2. For this purpose, it appears that the petitioners made an application to respondent No. 1 seeking to forward it to the concerned department and in that application they made a request that the provisions of The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as ‘the said Act’) cannot be made applicable to them and it is also further stated that couples who have no children and wish to have a male or female children should be allowed to make use of the pre-natal diagnostic techniques to have a child of both sex to balance their family. So these couples cannot be treated at par with the couples, who choose the sex of foetus in order to have a male child leading to imbalance in male to female ratio.

3. It is further stated that the unconstitutionality of the said Act is visible to the class of couples who are not having child/children and wish to have both male and female babies. Even though they made an application seeking exemption of these couples from the said Act, there is no response from the respondent authorities. The present writ petition is, therefore, filed seeking following reliefs:-

*“i Issue a writ of mandamus or any other appropriate writ, order or direction directing the Respondent No. 1 to grant a ‘No Objection’ to the petitioners with reference to their application pending disposal in their office.*

*ii Issue a writ of mandamus or any other appropriate writ, order or direction thereby directing that the Pre-Natal Diagnostic Techniques Act as ultra vires with respect to its applicability to surrogacy process.”*

4. When the matter came up for admission, the learned counsel for the respondent No. 1 furnished a letter dated 17.09.2013 which is a reply to the representation submitted by the petitioners. Vide the said letter the request made by the petitioners has been declined stating that the said Act does not permit Sex selection on the pretext of family balancing as it would result in restricting the scope and meaning of the Act, to the detriment of the Government's endeavour to reverse the trend of declining female Child Sex Ratio.

5. Thus, in view of the above reply by respondent No. 1, the first relief sought by the petitioners has become infructuous. Now, for deciding the second prayer of the petitioners, let us examine the legal position.

6. The legislative purpose of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 reads as under:-

*“An Act to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto.”*

7. The intention is, therefore, clear that one of the integral purposes of the legislation is prevention of misuse of pre-natal diagnosis for sex determination, since such determination is legislatively perceived to lead to female foeticide.

8. From a reading of the writ petition filed by the petitioners, it is clear that the assumption and the reason given is speculative and factually misconceived. The assumption of the petitioners that it is possible to identify the gender of the foetus before impregnation, has no basis in the science of genetics or any established principle of sexual reproduction currently.

9. It is not contended that the legislation is beyond the authorized legislative field of the Parliament. The singular ground of challenge is that the legislation is arbitrary and does not accommodate the ‘exceptional category’ of the petitioners who desire to have a balanced family comprising a male and a female child, a challenge which in substance means that the Act is unsustainable for the vice of unreasonable classification.

10. It is a well settled principle of the Doctrine of Classification that:

***The Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.***

11. It is equally well settled principle of Doctrine of Classification that:

***In order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of the times and may assume every state of facts which can be conceived existing at the time of legislation.***

12. These principles are so well settled that they enjoy the status of being meta principles. These are also principles of classification uniformly declared without exception in all legal jurisdictions where rule of law or principles of equality are the cornerstones of a constitutional democracy, and have been reiterated in *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar* AIR 1958 SC 538.

13. The challenge to the provisions of the Act on the ground of hostile discrimination and unreasonable classification is, therefore, misconceived. We need say no more.

14. The writ petition is, accordingly, dismissed...”



## IN THE HIGH COURT OF ALLAHABAD AT LUCKNOW

**Saksham Foundation Charitable Society v. Union of India**  
(2014) 5 All LJ 496

**D. Y. Chandrachud, C.J. and D. K. Upadhyaya, J.**

***The petitioner challenged the constitutionality of Sections 5(2), 6(a) and 6(b) of the PCPNDT Act, which prohibit disclosure of the sex of the foetus and ban sex determination. The petitioner contended that prohibition of sex determination violated the right to life of the foetus and sought directions for legalization of sex-determination and compulsory disclosure of the sex of the foetus in order to record and prevent sex selection. The Allahabad High Court examined the validity of the said provisions in light of Articles 14 and 21 of the Indian Constitution.***

**Chandrachud, C.J. and Upadhyaya, J.:** “1. These proceedings have been instituted by a Society registered under the Societies Registration Act, 1860, seeking to challenge the constitutional validity of Section 5(2) and Clauses (a) and (b) of Section 6 of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994. Apart from challenging the constitutional validity of the provisions, the following reliefs have been sought:

“B. issue a writ, order or direction in the nature of mandamus, directing the Opposite Parties to legalize the sex determination and make it compulsory for the person conducting the sex determination test (specifically ultrasonography) to clearly and in detail disclose the sex of the foetus in the ultrasound report along with the print of the image of the foetus (which will be conclusive proof of the sex of the foetus) till the time it comes up with a better and more effective alternative provision for dealing with the evil practice of sex selection.”

2. The first ground of challenge is that the prohibition of sex determination violates the rights of the unborn child and is, therefore, contrary to Article 21 of the Constitution of India. In the alternate, the second submission is that, it is only when a compulsory disclosure is made by the medical professional conducting an ultrasonography test of the sex of the unborn foetus, can a record be maintained of the sex of the foetus. In the absence of disclosure, it has been submitted, there is only a moral duty of the doctor not to disclose and in consequence, the female foetus is ultimately aborted. The PC & PNDT Act, 1994 was specifically enacted to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto. The Statement of Objects and Reasons accompanying the Bill, which was introduced in Parliament, is to the following effect:

“It is proposed to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. Such abuse of techniques is discriminatory against the female sex and affects the dignity and status of women. A legislation is required to regulate the use of such techniques and to provide deterrent punishment to stop such inhuman act.

2. The Bill, inter alia (sic), provides for:—

- (i) prohibition of the misuse of pre-natal diagnostic techniques for determination of sex of foetus, leading to female foeticide;
- (ii) prohibition of advertisement of pre-natal diagnostic techniques for detection or determination of sex;
- (iii) permission and regulation of the use of pre-natal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorders;
- (iv) permitting the use of such techniques only under certain conditions by the registered institutions; and
- (v) punishment for violation of the provisions of the proposed legislation.

3. The Bill seeks to achieve the aforesaid objectives.”

The Act was amended by Amending Act 14 of 2003. The Statement of Object and Reasons is instructive:

“Amendment Act 14 of 2003-Statement of Object and Reasons.— The Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 seeks to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. During recent years, certain inadequacies and practical difficulties in the administration of the said Act have come to the notice of the Government, which has necessitated amendments in the said Act.

2. The pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders, etc. However, the amniocentesis and sonography are being used on a large scale to detect the sex of the foetus and to terminate the pregnancy of the unborn child if found to be female. Techniques are also being developed to select the sex of child before conception. These practices and techniques are considered discriminatory to the female sex and not conducive to the dignity of the women.

3. The proliferation of the technologies mentioned above may, in future, precipitate a catastrophe, in the form of severe imbalance in male-female ratio. The State is also duty bound to intervene in such matters to uphold the welfare of the society, especially of the women and children. It is, therefore, necessary to enact and implement in letter and spirit a legislation to ban the pre-conception sex selection techniques and the misuse of pre-natal diagnostic techniques for sex-selective abortions and to provide for the regulation of such abortions. Such a law is also needed to uphold medical ethics and initiate the process of regulation of medical technology in the larger interests of the society.

4. Accordingly, it is proposed to amend the aforesaid Act with a view to banning the use of both sex selection techniques prior to conception as well as the misuse of pre-natal diagnostic techniques for sex selective abortions and to regulate such techniques with a view to ensuring their scientific use for which they are intended.”

...

Sub-section (2) of Section 5 of the Act, which is sought to be challenged, is to the following effect:

“(2) No person including the person conducting pre-natal diagnostic procedures shall communicate to the pregnant woman concerned or her relatives or any other person the sex of the foetus by words, signs or in any other manner.”

Section 6 of the Act, is to the following effect:

“6. Determination of sex prohibited. — On and from the commencement of this Act,—

(a) no Genetic Counselling Centre or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Centre, Laboratory or Clinic, pre-natal diagnostic techniques including ultra-sonography, for the purpose of determining the sex of a foetus;

(b) no person shall conduct or cause to be conducted any pre-natal diagnostic techniques including ultra-sonography for the purpose of determining the sex of a foetus;

(c) no person shall, by whatever means, cause or allow to be caused selection of sex before or after conception.”

The expression ‘pre-natal diagnostic procedures’ is defined under Section 2(i) thus:

“2. (i) “pre-natal diagnostic procedures” means all gynaecological or obstetrical or medical procedures such as ultra-sonography, foetoscopy, taking or removing samples of amniotic fluid, chorionic villi, embryo, blood or any other tissue or fluid of a man, or of a woman before or after conception, for being sent to a Genetic Laboratory or Genetic Clinic for conducting any type of analysis or prenatal diagnostic tests for selection of sex before or after conception.”

Section 3-A of the Act contains a prohibition of sex selection to the effect that no person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them.

...

**3.** These provisions were enacted by Parliament in order to prohibit sex selection, before or after conception, and for regulating pre-natal diagnostic techniques for the purpose of detecting genetic abnormalities. The enactment of the legislation is to prevent the use of pre-natal diagnostic techniques which were being and continue to be misused for sex determination. The rapid decline in the ratio of females to the male population is widely attributed to the prevalent practice of sex selection. The prevalence of female foeticide constitutes the most egregious violation of human rights in our society. The Act has been enacted in this background. Sub-section (2) of Section 5 of the Act consequently contains a wholesome prohibition to the effect that no person shall communicate to a pregnant woman or her relatives or to any other person the sex of the foetus in any manner whatsoever including while conducting pre-natal diagnostic procedures. Similarly, clauses (b) and (c) of Section 6 of the Act ensure that no prenatal diagnostic techniques including ultrasonography shall be conducted for determining the sex of foetus and that no person shall cause or allow to be caused selection of sex before or after conception.

...

**6.** 'Sex' refers to the biological and physiological characteristics that define men and women. Gender is a social construct and comprehends roles, behaviours, activities and attributes that a society considers appropriate for men and women [ See in this context the Training Module and Handbook for Judicial Officers on Sex Selection and PC & PNDT Act —2014, published by the United Nations Population Fund — India.]. Dominant patriarchal notions have denied access to women to productive resources, decision making and social mobility. Opportunities within the family and at the workplace which are available to males are denied to females. These differences are not biological but reflect a deeply ingrained social attitude of a patriarchal society which denies equal status to women. In a patriarchal system, the dominance of men sanctified by social customs and conventions has resulted in an unequal access for women to social and economic opportunities that are available to men. Men control the productive and labour power of women, reproductive rights, sexuality, mobility and access to economic resources. A declining CSR is documented to have resulted in increasing violence against women and the denial of rights. Sex determination is known to lead to forced abortions. Women, both in the urban and rural areas, are subjected to psychological stress over the perceived pressure to produce a male child. Women are deserted, subjected to cruelty and deprived of their fundamental human rights in the process...

...

**12.** The Supreme Court in *Centre for Enquiry into Health and Allied Themes (CEHAT) v. Union of India* [ Writ Petition (Civil) No. 301 of 2000: ((2001) 5 SCC 577 : AIR 2001 SC 2007).] issued detailed guidelines for the implementation of the Act. The latest guidelines, which have been formulated by the Supreme Court in its judgment dated 4 March, 2013 in *Voluntary Health Association of Punjab v. Union of India* [ Writ Petition (Civil) No. 349 of 2006 : ((2013) 4 SCC 1 : AIR 2013 SC 1571).] are to the following effect:...

**13.** We now expect that the State, which is bound by the directions which have been issued by the Supreme Court, would ensure that the directions of the Supreme Court are implemented with the highest priority.

**14.** Articles 15 and 16 of the Constitution, prohibit discrimination on the basis of sex. In a recent judgment of the Supreme Court in *National Legal Services Authority v. Union of India* [ Writ Petition (Civil) No. 400 of 2012, decided on 15 April, 2014 : ((2014) 5 SCC 438 : AIR 2014 SC 1863).] the Supreme Court has held that the prohibition of discrimination on the ground of sex encompasses discrimination on the ground of gender identity:

"Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognizing that sex discrimination is a historical fact and needs to be addressed. Constitution makers, it can be gathered, give emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders. Both gender and biological attributes constitute distinct components of sex. Biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one's self image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of "sex" under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity. The expression 'sex' used in Articles 15 and 16 is not just limited to biological sex of male or female, but intended to include people who consider themselves to be neither male or female."

**15.** Gender identity has been held to be at the core of personal identity. Gender expression and presentation are, therefore, a component of the freedom of speech and expression protected by Article 19(1)(a) of the Constitution. Recognition of gender identity is a core of the fundamental right to dignity which is comprehended by the right to life under Article 21 of the Constitution:

“Recognition of one’s gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one’s sense of being as well as an integral part of a person’s identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.”

**16.** The constitutional validity of the PC & PNDT Act was upheld in a judgment of a Division Bench of the Bombay High Court in *Vijay Sharma v. Union of India* [AIR 2008 Bombay 29.] While rejecting the challenge, the Supreme Court (sic) observed that the hard realities of Indian social life were in the contemplation of the legislature when the law was enacted. The Bombay High Court held as follows:

“...It cannot be denied that in India there is strong bias in favour of a male child. Various causes have led to this preference. It is felt that son carries the name of the family forward and only he can perform religious rites at the time of cremation of the parents. Sons are said to provide support in the old age. Several socio-economic and cultural factors are responsible for this craving for a son. It is unfortunate that people should still be under the influence of such outdated notions. As long as such notions exist, the girl child will always be unwanted because it is felt that she brings with her the burden of dowry. These hard realities will have to be kept in mind while dealing with the challenge raised to the constitutional validity of a statute which tries to ban sex selection before or after preconception and misuse of the said techniques leading to sex selective abortions. None can be allowed to use the said techniques for sex selection if the use of the said techniques for sex selection is not banned, there will be unprecedented imbalance in male to female ratio and that will have disastrous effect on the society. The said Act must, therefore, be allowed to achieve its avowed object of preventing sex selection. In our opinion, the provisions of the said Act which are sought to be declared unconstitutional are neither arbitrary nor unreasonable and are not violative of Article 14... That society should not want a girl child, that efforts should be made to prevent the birth of a girl child and that society should give preference to a male child over a girl child is a matter of grave concern. Such tendency offends dignity of women. It undermines their importance. It violates woman’s right to life. It violates Article 39(e) of the Constitution which states the principle of State policy that the health and strength of women is not to be abused. It ignores Article 51 A(e) of the Constitution which states that it shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women. Sex selection is therefore against the spirit of the Constitution. It insults and humiliates womanhood. This is perhaps the greatest argument in favour of total ban on sex selection.”

**17.** We are in respectful agreement with the decision. A similar view has been taken by the Bombay High Court in another judgment in *Vinod Soni v. Union of India*. [2005 Cri LJ 3408.] The Delhi High Court has similarly upheld the constitutional validity of the provisions in *Amy Antoinette McGregor v. Directorate of Family Welfare, Govt. of NCT of Delhi* [(2013) 205 DLT 96 (DB).]

**18.** Having regard to the social evil, which Parliament sought to remedy by enactment of the provisions of the Act, we see no ground to hold that the provisions, which are under challenge, are unconstitutional. Parliament had the legislative competence to enact the law, in any event, under Entry 97 of List-I of the Seventh Schedule. The provisions are not either arbitrary or violative of Article 14 of the Constitution or for that matter, violative of Article 21 of the Constitution. On the contrary, the Act is designed to ensure that the fundamental human right of the mother and of the unborn foetus is not violated by the misuse of sex selection diagnostic procedures, resulting in female foeticide. The alternate submission is a point, which does not relate to constitutional validity, but to legislative, policy. The Court would not be justified in interfering with the wisdom of Parliament in implementing a legislative policy in a particular manner. Whether any alternate means would better implement the legislative policy, is for Parliament to determine. The constitutional validity of the Act cannot be struck down on that ground.

**19.** For these reasons, we find no ground to interfere in these proceedings. The petition is, accordingly, dismissed...”

## IN THE SUPREME COURT OF INDIA

**Voluntary Health Association of Punjab v. Union of India & Ors.**

**(2016) 10 SCC 275**

**Dipak Misra and Shiva Kirti Singh, JJ.**

***The petitioner in this case sought to bring to the attention of the Court the non-implementation of the PCPNDT Act and prayed for guidelines to be issued for proper implementation of the Act. Another petitioner, the Indian Medical Association, had contended that the provisions of the PCPNDT Act were being misused by authorities and were being used to harass medical professionals. The Association also sought guidelines and safeguards to ensure that the Act is not misused during its implementation.***

**Misra, J.:** “The two writ petitions being interconnected in certain aspects were heard together and are disposed of by the singular order...

...

**11.** Be it stated immediately that the issues raised in Writ Petition (Civil) No. 349 of 2006 are not agitated for the first time, for they had been raised on earlier occasions and dealt with serious concern and solemn sincerity. It is because they relate to the very core of existence of a civilised society, pertain to the progress of the human race, and expose the maladroitness to throttle the right of a life to feel the mother earth and smell its fragrance. And, if we allow ourselves to say, the issues have been highlighted with sincere rhetorics and balanced hyperboles and ring the alarm of destruction of humanity in the long run. It is not a group prophecy, but a significant collective predication. The involvement of all is obvious, and it has to be. The heart of the issue that is zealously projected by the petitioner is the increase of female foeticide, resultant imbalance of sex ratio and the indifference in the implementation of the stringent law that is in force. In essence, the fulcrum of the anguished grievance lays stress on the non-implementation of the provisions of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for brevity “the Act”) and the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Rules, 1996 (for short “the Rules”) framed under the Act by the competent authorities who are obliged to do so.

**12.** The grievance has a narrative, and it needs to be stated.

**13.** Realising the rise of prenatal diagnostic centres in urban areas of the country using prenatal diagnostic techniques for determination of sex of the foetus and that the said centres had become very popular and had tremendous growth, as the female child is not welcomed with open arms in many Indian families and the consequence that such centres became centres for female foeticide which affected the dignity and status of women, Parliament brought in the legislation to regulate the use of such techniques and to provide punishment for such inhuman act. The objects and reasons of the Act stated unequivocally that it was meant to prohibit the misuse of prenatal diagnostic techniques for determination of sex of the foetus, leading to female foeticide; to prohibit advertisement of prenatal diagnostic techniques for detection or determination of sex; to permit and regulate the use of prenatal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorders; to permit the use of such techniques only under certain conditions by the registered institutions; and to punish for violation of the provisions of the proposed legislation. The Preamble of the Act provides for the prohibition of sex selection before or after conception, and for regulation of prenatal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto. Be it noted when the Act came into force, it was named as the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 and after the amendments in 2001 and 2003, in the present incarnation, it is called the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.

...

**15.** ... Needless to emphasise, the predicament with regard to female foeticide by misuse of modern science and technology has aggravated and enormously affected the sex ratio. To eradicate the malady, Parliament, as stated earlier, had enacted the Act. In the first year of this century, a petition under Article 32 was moved for issuing directions to implement the provisions of the said Act by (a) appointing appropriate authorities at State and district levels and the Advisory Committees; (b) issuing direction to the Central Government to ensure that the Central Supervisory Board

meets every 6 months as provided under the PNDT Act; and for banning of all advertisements of prenatal sex selection including all other sex-determination techniques which can be abused to selectively produce only boys either before or during pregnancy.

**16.** Two-Judge Benches in *Centre for Enquiry into Health & Allied Themes v. Union of India* [*Centre for Enquiry into Health & Allied Themes v. Union of India*, (2001) 5 SCC 577] and *Centre for Enquiry into Health & Allied Themes v. Union of India* [*Centre for Enquiry into Health & Allied Themes v. Union of India*, (2003) 8 SCC 398] on 4-5-2001 and 10-9-2003 issued certain directions. Apart from the directions contained in the said orders, the Court, while finally disposing of the writ petition, issued the following directions: (*Centre for Enquiry into Health case* [*Centre for Enquiry into Health & Allied Themes v. Union of India*, (2003) 8 SCC 398] , SCC pp. 405-06, paras 6-7)

“(a) For effective implementation of the Act, information should be published by way of advertisements as well as on electronic media. This process should be continued till there is awareness in the public that there should not be any discrimination between male and female child.

(b) Quarterly reports by the appropriate authority, which are submitted to the Supervisory Board should be consolidated and published annually for information of the public at large.

(c) Appropriate authorities shall maintain the records of all the meetings of the Advisory Committees.

(d) The National Inspection and Monitoring Committee constituted by the Central Government for conducting periodic inspection shall continue to function till the Act is effectively implemented. The reports of this Committee be placed before the Central Supervisory Board and State Supervisory Boards for any further action.

(e) As provided under Rule 17(3), the public would have access to the records maintained by different bodies constituted under the Act.

(f) The Central Supervisory Board would ensure that the following States appoint the State Supervisory Boards as per the requirement of Section 16-A:

1. Delhi, 2. Himachal Pradesh, 3. Tamil Nadu, 4. Tripura, and 5. Uttar Pradesh.

(g) As per the requirement of Section 17(3)(a), the Central Supervisory Board would ensure that the following States appoint the multi-member appropriate authorities:

1. Jharkhand, 2. Maharashtra, 3. Tripura, 4. Tamil Nadu, and 5. Uttar Pradesh.

7. It will be open to the parties to approach this Court in case of any difficulty in implementing the aforesaid directions.”

**17.** Despite the directions issued by the Court in *Centre for Enquiry into Health case* [*Centre for Enquiry into Health & Allied Themes v. Union of India*, (2003) 8 SCC 398] , there had not been proper implementation and that compelled the present petitioner, namely, Voluntary Health Association of Punjab to file the present writ petition seeking various directions. The Court on 8-1-2013 [*Voluntary Health Assn. of Punjab v. Union of India*, (2013) 4 SCC 401 : (2013) 2 SCC (Cri) 424] took note of the fact that the provisions had not been adequately implemented by the various States and Union Territories and accordingly directed for personal appearance of the Health Secretaries of the States of Punjab, Haryana, NCT of Delhi, Rajasthan, Uttar Pradesh, Bihar and Maharashtra, to examine what steps they had taken for the proper and effective implementation of the provisions of the Act as well as the various directions issued by this Court.

**18.** At a later stage in *Centre for Enquiry into Health case* [*Centre for Enquiry into Health & Allied Themes v. Union of India*, (2003) 8 SCC 398] , a reference was made to 2011 Census of India to highlight that there had been a sharp decline in the female sex ratio in many States. It was also observed that there had been no effective supervision or follow-up action so as to achieve the object and purpose of the Act. It was observed that mushrooming of various sonography centres, genetic clinics, genetic counselling centres, genetic laboratories, ultrasonic clinics, imaging centres in almost all parts of the country called for more vigil and attention by the authorities under the Act. The Court also found that their functioning was not being properly monitored or supervised by the authorities under the Act or to find out whether they are misusing the prenatal diagnostic techniques for determination of sex of foetus leading to foeticide.

**19.** A reference was made to various facets of the Act and the Rules and ultimately the Court in *Voluntary Health Assn. of Punjab v. Union of India* [*Voluntary Health Assn. of Punjab v. Union of India*, (2013) 4 SCC 1 : (2013) 2 SCC (Cri) 287] issued the following directions: (SCC pp. 6-7, para 9)

“9.1. The Central Supervisory Board and the State and Union Territories Supervisory Boards, constituted under Sections 7 and 16-A of the PC & PNDT Act, would meet at least once in six months, so as to supervise and oversee how effective is the implementation of the PC & PNDT Act.

9.2. The State Advisory Committees and District Advisory Committees should gather information relating to the breach of the provisions of the PC & PNDT Act and the Rules and take steps to seize records, seal machines and institute legal proceedings, if they notice violation of the provisions of the PC & PNDT Act.

9.3. The committees mentioned above should report the details of the charges framed and the conviction of the persons who have committed the offence, to the State Medical Councils for proper action, including suspension of the registration of the unit and cancellation of licence to practice.

9.4. The authorities should ensure also that all genetic counselling centres, genetic laboratories and genetic clinics, infertility clinics, scan centres, etc. using pre-conception and prenatal diagnostic techniques and procedures should maintain all records and all forms, required to be maintained under the Act and the Rules and the duplicate copies of the same be sent to the district authorities concerned, in accordance with Rule 9(8) of the Rules.

9.5. States and District Advisory Boards should ensure that all manufacturers and sellers of ultrasonography machines do not sell any machine to any unregistered centre, as provided under Rule 3-A and disclose, on a quarterly basis, to the State/Union Territory concerned and the Central Government, a list of persons to whom the machines have been sold, in accordance with Rule 3-A(2) of the Rules.

9.6. There will be a direction to all genetic counselling centres, genetic laboratories, clinics, etc. to maintain Forms A, E, H and other statutory forms provided under the Rules and if these forms are not properly maintained, appropriate action should be taken by the authorities concerned.

9.7. Steps should also be taken by the State Government and the authorities under the Act for mapping of all registered and unregistered ultrasonography clinics, in three months' time.

9.8. Steps should be taken by the State Governments and the Union Territories to educate the people of the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the State and district levels.

9.9. Special cell be constituted by the State Governments and the Union Territories to monitor the progress of various cases pending in the courts under the Act and take steps for their early disposal.

9.10. The authorities concerned should take steps to seize the machines which have been used illegally and contrary to the provisions of the Act and the Rules thereunder and the seized machines can also be confiscated under the provisions of the Code of Criminal Procedure and be sold, in accordance with law.

9.11. The various courts in this country should take steps to dispose of all pending cases under the Act, within a period of six months. Communicate this order to the Registrars of various High Courts, who will take appropriate follow-up action with due intimation to the courts concerned.”

...

22. On 16-9-2014 [*Voluntary Health Assn. of Punjab v. Union of India*, (2014) 16 SCC 433] the Court took note of the directions already issued and proceeded to deal with IA No. 11 of 2013 and recorded the submission of Mr Sanjay Parikh, learned counsel that the Union of India has to animate itself in an appropriate manner to see that the sex ratio is maintained and does not reduce further. It was also urged by him that the Central Supervision Committee which is required to meet to take stock of the situation and the National Monitoring Committee who is required to monitor the activities, had failed in their duties.

23. Mr Parikh had also drawn the attention of the Court to the proviso to Section 4(3) of the Act which reads as follows:

“4. **Regulation of prenatal diagnostic techniques.**—On and from the commencement of this Act—(1)-(3) \*\*\*

Provided that the person conducting ultrasonography on a pregnant woman shall keep complete record thereof in the clinic in such manner, as may be prescribed, and any deficiency or inaccuracy found therein shall amount to contravention of the provisions of Section 5 or Section 6 unless contrary is proved by the person conducting such ultrasonography.”

**24.** It was propounded by him that the authorities concerned have not acted in accordance with the aforesaid provision in all seriousness as a result of which the nation has faced the disaster of female foeticide. On that day, Mr Colin Gonsalves, learned Senior Counsel, appearing for the writ petitioner, had drawn our attention to the affidavit filed by the petitioner contending, inter alia, that the sex ratio in most of the States had decreased and in certain States, there had been a minor increase, but the same is not likely to subserve the aims and objects of the Act. After referring to the history of this litigation which has been continuing in this Court since long, he had submitted that certain directions are required to be issued.

**25.** The Union of India was directed to file an affidavit of the Additional Secretary of Health and/or any other Additional Secretary concerned clearly stating what steps had been taken and on the basis of the steps taken, what results have been achieved. It was also directed that all the States shall file their responses through the Health Secretaries concerned. The direction further contained that the affidavits shall be comprehensive and must reflect sincerity and responsibility.

**26.** On 25-11-2014 [*Voluntary Health Assn. of Punjab v. Union of India*, (2014) 16 SCC 426 : (2014) 16 SCC 427] the Court noted that affidavits by certain States had been filed and certain States, namely, Assam, Arunachal Pradesh, Bihar, Goa, Gujarat, Kerala, Madhya Pradesh, Meghalaya, Mizoram, Odisha, Tripura, and UT of Daman and Nagar Haveli and Puducherry had not filed the affidavits. Two weeks' time was granted to file the necessary affidavits. At that juncture, it was thought appropriate to advert to the States by dividing them into certain clusters. It was decided to deal with the situation pertaining to the States of Uttar Pradesh, Haryana and NCT of Delhi first. The affidavit filed by the State of Uttar Pradesh was considered and in that context, it was observed that the census conducted in 2011 cannot be the guideline for the purposes of the PC & PNDT Act. It was felt that a different methodology was required to be adopted by the State....

...

**30.** Pursuant to the order dated 25-11-2014 [*Voluntary Health Assn. of Punjab v. Union of India*, (2014) 16 SCC 426 : (2014) 16 SCC 427], the Committee verified the data submitted by three States, namely, Uttar Pradesh, Haryana and Delhi. As far as the State of Uttar Pradesh was concerned, on a perusal of the report, it transpired that the figures that were submitted by the State of Uttar Pradesh had been verified by the Committee and found to be correct. On a perusal of the report, along with the documents that had been annexed to, it was noticed that certain cases were pending for trial before the trial court. Regard being had to the fact that they had been instituted long back, a direction was issued to the effect that the proceedings that were pending before for trial and where there was no stay order of the High Court or this Court, the same shall be taken up in quite promptitude and be disposed of within a period of three months commencing 20-1-2015. Be it stated, certain other directions were issued to be complied with by the State of Uttar Pradesh.

...

**34.** The data furnished by the NCT of Delhi was contested on the ground that it was collected from 50 major hospitals. The Court in *Voluntary Health Assn. case* [*Voluntary Health Assn. of Punjab v. Union of India*, (2015) 9 SCC 740 : (2015) 9 SCC 745] noticed that there had really been no improvement with regard to the sex ratio. The Court took note of the submissions of Mr Gonsalves, learned Senior Counsel for the petitioner and Mr Parikh, learned counsel for the impleaded respondent(s) and observed that under Sections 16(2)(i) and (ii) there should be eminent women activists from non-governmental organisations and eminent gynaecologists and obstetricians or experts of *stri-roga* or *prasuti tantra* to be the members and thought it apt to state that there can be eminent women activists from non-governmental organisations, eminent gynaecologists and obstetricians or experts of *stri-roga* or *prasuti tantra* and eminent radiologists or sonologists but care has to be taken that they do not have conflict of interest.

**35.** On 15-9-2015 [*Voluntary Health Assn. of Punjab v. Union of India*, (2015) 9 SCC 740 : (2015) 9 SCC 753], the Court noted the submission of Ms Anitha Shenoy, learned counsel appearing for Dr Sabu Mathew George, the newly impleaded party, that the appropriate authorities are not following the mandate enshrined under Rule 18-A of the Rules. Keeping in view the language employed in the said Rule, the Court directed that all the appropriate authorities including the State, districts and sub-districts notified under the Act shall submit quarterly progress report to the Government of India through the State Government and maintain Form H for keeping the information of all registrations readily available. The Court further directed that the States shall file the compliance report pertaining to sub-rule (6) of Rule 18-A of the Rules and also directed the counsel for the Union of India to apprise the Court about the information received from the various appropriate authorities.

...



**39.** We have adumbrated the history of the litigation, the directions issued by this Court from time to time and adverted to how this Court has appreciated the impact of sex ratio on a civilised society having regard to the legislative intendment under the Act, the suggestions given by the learned counsel for the petitioner, the verification done by the Monitoring Committee, and the crisis the country is likely to face if the obtaining situation is allowed to prevail. As is manifest, this Court had issued directions from 2001 onwards in different writ petitions and in the instant writ petition, as noticed earlier, number of directions were issued and, thereafter, certain clarifications were made. The narration shows the concern.

**40.** It needs no special emphasis that a female child is entitled to enjoy equal right that a male child is allowed to have. The constitutional identity of a female child cannot be mortgaged to any kind of social or other concept that has developed or is thought of. It does not allow any room for any kind of compromise. It only permits affirmative steps that are constitutionally postulated. Be it clearly stated that when rights are conferred by the Constitution, it has to be understood that such rights are recognised regard being had to their naturalness and universalism. No one, let it be repeated, no one, endows any right to a female child or, for that matter, to a woman. The question of any kind of condescension or patronisation does not arise.

**41.** When a female foetus is destroyed through artificial means which is legally impermissible, the dignity of life of a woman to be born is extinguished. It corrodes the human values. The legislature has brought a complete code and it subserves the constitutional purpose...

...

**43.** Having stated about the scheme of the Act and the purpose of the various provisions and also the Rules framed under the Act, the dropping of sex ratio still remains a social affliction and a disease.

**44.** Keeping in view the deliberations made from time to time and regard being had to the purpose of the Act and the far-reaching impact of the problem, we think it appropriate to issue the following directions in addition to the directions issued in the earlier order:

**44.1.** All the States and the Union Territories in India shall maintain a centralised database of civil registration records from all registration units so that information can be made available from the website regarding the number of boys and girls being born.

**44.2.** The information that shall be displayed on the website shall contain the birth information for each district, municipality, corporation or gram panchayat so that a visual comparison of boys and girls born can be immediately seen.

**44.3.** The statutory authorities, if not constituted as envisaged under the Act shall be constituted forthwith and the competent authorities shall take steps for the reconstitution of the statutory bodies so that they can become immediately functional after expiry of the term. That apart, they shall meet regularly so that the provisions of the Act can be implemented in reality and the effectiveness of the legislation is felt and realised in the society.

**44.4.** The provisions contained in Sections 22 and 23 shall be strictly adhered to. Section 23(2) shall be duly complied with and it shall be reported by the authorities so that the State Medical Council takes necessary action after the intimation is given under the said provision. The appropriate authorities who have been appointed under Sections 17(1) and 17(2) shall be imparted periodical training to carry out the functions as required under various provisions of the Act.

**44.5.** If there has been violation of any of the provisions of the Act or the Rules, proper action has to be taken by the authorities under the Act so that the legally inapposite acts are immediately curbed.

**44.6.** The courts which deal with the complaints under the Act shall be fast tracked and the High Courts concerned shall issue appropriate directions in that regard.

**44.7.** The judicial officers who are to deal with these cases under the Act shall be periodically imparted training in the judicial academies or training institutes, as the case may be, so that they can be sensitive and develop the requisite sensitivity as projected in the objects and reasons of the Act and its various provisions and in view of the need of the society.

**44.8.** The Director of Prosecution or, if the said post is not there, the Legal Remembrancer or the Law Secretary shall take stock of things with regard to the lodging of prosecution so that the purpose of the Act is subserved.

**44.9.** The courts that deal with the complaints under the Act shall deal with the matters in promptitude and submit the quarterly report to the High Courts through the Sessions and District Judge concerned.

**44.10.** The learned Chief Justices of each of the High Courts in the country are requested to constitute a committee of three Judges that can periodically oversee the progress of the cases.

**44.11.** The awareness campaigns with regard to the provisions of the Act as well as the social awareness shall be undertaken as per Direction 9.8 in the order dated 4-3-2013 passed in *Voluntary Health Assn. of Punjab*. [*Voluntary Health Assn. of Punjab v. Union of India*, (2013) 4 SCC 1 : (2013) 2 SCC (Cri) 287]

**44.12.** The State Legal Services Authorities of the States shall give emphasis on this campaign during the spread of legal aid and involve the para-legal volunteers.

**44.13.** The Union of India and the States shall see to it that appropriate directions are issued to the authorities of All-India Radio and Doordarshan functioning in various States to give wide publicity pertaining to the saving of the girl child and the grave dangers the society shall face because of female foeticide.

**44.14.** All the appropriate authorities including the States and districts notified under the Act shall submit quarterly progress report to the Government of India through the State Government and maintain Form H for keeping the information of all registrations readily available as per sub-rule (6) of Rule 18-A of the Rules.

**44.15.** The States and Union Territories shall implement the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) (Six Months Training) Rules, 2014 forthwith considering that the training provided therein is imperative for realising the objects and purpose of this Act.

...

**45 [Ed.: Para 45 corrected vide Official Corrigendum No. F.3/Ed.B.J./78/2016 dated 20-3-2017.]** . Before parting with the case, let it be stated with certitude and without allowing any room for any kind of equivocation or ambiguity, the perception of any individual or group or organisation or system treating a woman with inequity, indignity, inequality or any kind of discrimination is constitutionally impermissible. The historical perception has to be given a prompt burial. Female foeticide is conceived by the society that definitely includes the parents because of unethical perception of life and nonchalant attitude towards law. The society that treats man and woman with equal dignity shows the reflections of a progressive and civilised society. To think that a woman should think what a man or a society wants her to think tantamounts to slaughtering her choice, and definitely a humiliating act. When freedom of free choice is allowed within constitutional and statutory parameters, others cannot determine the norms as that would amount to acting in derogation of law. Decrease in the sex ratio is a sign of colossal calamity and it cannot be allowed to happen. Concrete steps have to be taken to increase the same so that invited social disasters do not befall on the society. The present generation is expected to be responsible to the posterity and not to take such steps to sterilise the birth rate in violation of law. The societal perception has to be metamorphosed having respect to legal postulates.

**46.** Now, we shall advert to the prayers in Writ Petition (Civil) No. 575 of 2014. The writ petition has been filed by Indian Medical Association (IMA). It is contended that Sections 3-A, 4, 5, 6, 7, 16, 17, 20, 23, 25, 27 and 30 of the Act and Rules 9(4), 10 and Form F (including footnote), which being the subject-matter of concern in the instant writ petition, are being misused and wrongly interpreted by the authorities concerned thereby causing undue harassment to the medical professionals all over the country under the guise of the “so-called implementation”. It is also urged that implementation of steps and scrutiny of records was started at large scale all over the country and lot of anomalies were found in records maintained by doctors throughout the country. It is, however, pertinent to mention here that the majority of the defaults were of technical nature as they were merely minor and clerical errors committed occasionally and inadvertently in the filing of Form F. It is also put forth that the Act does not classify the offences and owing to the liberal and vague terminology used in the Act, it is thrown open for misuse by the implementing authorities concerned and has resulted into taking of cognizance of non-bailable (punishable by three years) offences against doctors even in the cases of clerical errors, for instance non-mentioning of NA (not applicable) or leaving of any column in Form F concerned as blank. It is further submitted that the said unfettered powers in the hands of implementing authority have resulted into turning of this welfare legislation into a draconian novel way of encouraging demands for bribery as well as there is no prior independent investigation as mandated under Section 17 of the Act by these authorities. It is also set forth that the Act states merely that any contravention with any of the provisions of the Act would be an offence punishable under Section 23(1) of the said Act and further all offences under the Act have been made non-bailable and non-compoundable and the misuse of the same can only be taken care of by ensuring that the appropriate authority applies its mind to the fact of each case/complaint and only on satisfaction of a prima facie case, a complaint be filed rather than launching prosecution mechanically in each case. With these averments, it has been prayed for framing appropriate guidelines and safeguard parameters, providing for classification of offences as well, so as to prohibit the misuse of the PCPNDT Act during implementation and to read down this Sections 6, 23, 27 of the PCPNDT Act. That apart, it has been prayed to add certain provisos/exceptions to Sections 7, 17, 23 and Rule 9 of the Rules.

47. In our considered opinion, whenever there is an abuse of the process of the law, the individual can always avail the legal remedy. As we find, neither the validity of the Act nor the Rules has been specifically assailed in the writ petition. What has been prayed is to read out certain provisions and to add certain exceptions. We are of the convinced view that the averments of the present nature with such prayers cannot be entertained and, accordingly, we decline to interfere.

48. In the result, Writ Petition (Civil) No. 349 of 2006 stands disposed of in terms of the directions issued by us and Writ Petition (Civil) No. 575 of 2014 stands dismissed...”

## IN THE SUPREME COURT OF INDIA

**Dr. Sabu Mathew George v. Union of India & Ors.**

**(2018) 3 SCC 229**

**Dipak Misra C.J., and A.M. Khanwilkar and D.Y. Chandrachud, JJ.**

***This writ petition was filed seeking directions to the respondents to block all websites and advertisements appearing directly or indirectly on the respondent search engines, related to sex determination and sex selection.***

**Misra, C.J.:** “1. The instant writ petition has been filed by the petitioner, a public-spirited person, for issue of necessary directions for the effective implementation of the provisions of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for brevity “the 1994 Act”). The reliefs sought in the writ petition are to command Respondents 1 and 2, namely, Secretary, Ministry of Health and Family Welfare and Secretary, Ministry of Communication and Information Technology with the help of its agencies such as Computer Emergency Response Team (CERT) to block all such websites, including that of Respondents 3 to 5, namely, Google India, Yahoo! India and Microsoft Corporation (I) (P) Ltd. and to stop all forms of promotion of sex selection such as advertisement on their websites as these violate the provisions of the 1994 Act, and further to issue a writ of mandamus to the said respondents to post the directions of this Court on the front page of their search engines so that there is widespread public awareness and further constitute a separate monitoring committee of the CERT and civil society members to check against any future violations.

2. Before we address the *lis* that has arisen in the present writ petition and the orders passed on various occasions, it is necessary to state here that the 1994 Act was enacted by Parliament being conscious of the increase of female foeticides and resultant imbalance of sex ratio in the country. The Statement of Objects and Reasons of the 1994 Act reads as follows:

### ***“Statement of Objects and Reasons***

It is proposed to prohibit pre-natal diagnostic techniques for determination of sex of the foetus leading to female foeticide. Such abuse of techniques is discriminatory against the female sex and affects the dignity and status of women. A legislation is required to regulate the use of such techniques and to provide deterrent punishment to stop such inhuman act.

2. The Bill, inter alia, provides for—

- (i) prohibition of the misuse of pre-natal diagnostic techniques for determination of sex of foetus, leading to female foeticide;
- (ii) prohibition of advertisement of pre-natal diagnostic techniques for detection or determination of sex;
- (iii) permission and regulation of the use of pre-natal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorders;
- (iv) permitting the use of such techniques only under certain conditions by the registered institutions; and
- (v) punishment for violation of the provisions of the proposed legislation.”

3. Be it noted, initially the legislation was named as the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 and by Section 3 of the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 the nomenclature of the 1994 Act has been amended which now stands as the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 with effect from 1-1-1996. Preamble to the

1994 Act reads as follows:

“An Act to provide for the prohibition of sex selection, before or after conception, and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide and for matters connected therewith or incidental thereto.”

4. At this juncture, we may profitably reproduce the “Introduction” to the 1994 Act:

“In the recent past Pre-Natal Diagnostic Centres sprang up in the urban areas of the country using pre-natal diagnostic techniques for determination of sex of the foetus. Such centres became very popular and their growth was tremendous as the female child is not welcomed with open arms in most of the Indian families. The result was that such centres became centres of female foeticide. Such abuse of the technique is against the female sex and affects the dignity and status of women. Various organisations working for the welfare and upliftment of the women raised their heads against such an abuse. It was considered necessary to bring out a legislation to regulate the use of, and to provide deterrent punishment to stop the misuse of, such techniques. The matter was discussed in Parliament and the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Bill, 1991 was introduced in the Lok Sabha. The Lok Sabha after discussions adopted a motion for reference of the said Bill to a Joint Committee of both the Houses of Parliament in September 1991. The Joint Committee presented its report in December 1992 and on the basis of the recommendations of the Committee, the Bill was reintroduced in Parliament.”

5. The Introduction, the Statement of Objects and Reasons and the Preamble unmistakably project the scheme which is meant to prohibit the misuse of pre-conception diagnostic techniques for determination of sex; to permit and regulate the use of pre-natal diagnostic techniques for the purpose of detection of specific genetic abnormalities or disorders; to permit the use of such techniques only under certain conditions by the registered institutions; and punish for violation of the provisions of the proposed legislation. Prior to the present incarnation of the 1994 Act, a writ petition was filed before this Court by the Centre for Enquiry into Health and Allied Themes (CEHAT) and others which has been disposed of on 10-9-2003 in *CEHAT v. Union of India* [*CEHAT v. Union of India*, (2003) 8 SCC 398]. In the said case, the two-Judge Bench expressed its anguish over discrimination against girl child and how the sex selection/sex determination adds to the said adversity...

6. The Court referred to its earlier order dated 4-5-2001 in *CEHAT v. Union of India* [*CEHAT v. Union of India*, (2001) 5 SCC 577] and taking note of various other directions which find place in *CEHAT v. Union of India* [*CEHAT v. Union of India*, (2003) 8 SCC 409], *CEHAT v. Union of India* [*CEHAT v. Union of India*, (2003) 8 SCC 410] and *CEHAT v. Union of India* [*CEHAT v. Union of India*, (2003) 8 SCC 412], issued the following directions: (*Centre for Enquiry case* [*CEHAT v. Union of India*, (2003) 8 SCC 398], SCC pp. 405-06, paras 6-7)

“6. ... (a) For effective implementation of the Act, information should be published by way of advertisements as well as on electronic media. This process should be continued till there is awareness in the public that there should not be any discrimination between male and female child.

(b) Quarterly reports by the appropriate authority, which are submitted to the Supervisory Board should be consolidated and published annually for information of the public at large.

(c) Appropriate authorities shall maintain the records of all the meetings of the Advisory Committees.

(d) The National Inspection and Monitoring Committee constituted by the Central Government for conducting periodic inspection shall continue to function till the Act is effectively implemented. The reports of this Committee be placed before the Central Supervisory Board and State Supervisory Boards for any further action.

(e) As provided under Rule 17(3), the public would have access to the records maintained by different bodies constituted under the Act.

(f) The Central Supervisory Board would ensure that the following States appoint the State Supervisory Boards as per the requirement of Section 16-A:

1. Delhi, 2. Himachal Pradesh, 3. Tamil Nadu, 4. Tripura, and 5. Uttar Pradesh.

(g) As per the requirement of Section 17(3)(a), the Central Supervisory Board would ensure that the following States appoint the multi-member appropriate authorities:

1. Jharkhand, 2. Maharashtra, 3. Tripura, 4. Tamil Nadu, and 5. Uttar Pradesh.

7. It will be open to the parties to approach this Court in case of any difficulty in implementing the aforesaid directions.”

7. The aforesaid directions show the concern of this Court as regards the strict compliance with the 1994 Act.

8. Prior to proceeding to note the nature of interim directions that the Court has passed in the present case, it is necessary to refer to two other decisions. In *Voluntary Health Assn. of Punjab v. Union of India* [Voluntary Health Assn. of Punjab v. Union of India, (2013) 4 SCC 1 : (2013) 2 SCC (Cri) 287] (the 1st), the two-Judge Bench reflected on the sharp decline in the female sex ratio and observed thus: (SCC p. 5, para 6)

“6. ... There has been no effective supervision or follow-up action so as to achieve the object and purpose of the Act. Mushrooming of various sonography centres, genetic clinics, genetic counselling centres, genetic laboratories, ultrasonic clinics, imaging centres in almost all parts of the country calls for more vigil and attention by the authorities under the Act. But, unfortunately, their functioning is not being properly monitored or supervised by the authorities under the Act or to find out whether they are misusing the pre-natal diagnostic techniques for determination of sex of foetus leading to foeticide.”

9. The Court, after dwelling upon many an aspect, proceeded to issue certain directions. In the concurring opinion, Direction 9.8 was elaborated and in that context, the opinion stated: (*Voluntary Health Assn. case* [Voluntary Health Assn. of Punjab v. Union of India, (2013) 4 SCC 1 : (2013) 2 SCC (Cri) 287] , SCC p. 8, para 14)

“14. Female foeticide has its roots in the social thinking which is fundamentally based on certain erroneous notions, egocentric traditions, perverted perception of societal norms and obsession with ideas which are totally individualistic sans the collective good. All involved in female foeticide deliberately forget to realise that when the foetus of a girl child is destroyed, a woman of the future is crucified. To put it differently, the present generation invites the sufferings on its own and also sows the seeds of suffering for the future generation, as in the ultimate eventuate, the sex ratio gets affected and leads to manifold social problems. I may hasten to add that no awareness campaign can ever be complete unless there is real focus on the prowess of women and the need for women empowerment.”

...

10. Elaborating the concept of awareness, it has been noted: (*Voluntary Health Assn. case* [Voluntary Health Assn. of Punjab v. Union of India, (2013) 4 SCC 1 : (2013) 2 SCC (Cri) 287] , SCC p. 13, paras 33-34)

“33. It is difficult to precisely state how an awareness camp is to be conducted. It will depend upon what kind and strata of people are being addressed to. The persons involved in such awareness campaign are required to equip themselves with constitutional concepts, culture, philosophy, religion, scriptural commands and injunctions, the mandate of the law as engrafted under the Act and above all the development of modern science. It needs no special emphasis to state that in awareness camps while the deterrent facets of law are required to be accentuated upon, simultaneously the desirability of law to be followed with spiritual obeisance, regard being had to the purpose of the Act, has to be stressed upon. The seemingly synchronisation shall bring the required effect. That apart, documentary films can be shown to highlight the need; and instil the idea in the mind of the public at large, for when the mind becomes strong, mountains do melt.

34. The people involved in the awareness campaigns should have boldness and courage. There should not be any iota of confusion or perplexity in their thought or action. They should treat it as a problem and think that a problem has to be understood in a proper manner to afford a solution. They should bear in mind that they are required to change the mindset of the people, the grammar of the society and unacceptable beliefs inherent in the populace.”

11. As the matter was not finally disposed of, it came up on various dates and the Court issued further directions and eventually the matter stood disposed of by a judgment dated 8-11-2016 in *Voluntary Health Assn. of Punjab v. Union of India* [Voluntary Health Assn. of Punjab v. Union of India, (2016) 10 SCC 265 : (2016) 10 SCC 275 : (2017) 1 SCC (Cri) 56 : (2017) 1 SCC (Cri) 66] (the 2nd)...

**12.** ...After recording various directions issued in earlier judgments and scrutinising the provisions of the 1994 Act the Court held thus: (*Voluntary Health Assn. case [Voluntary Health Assn. of Punjab v. Union of India*, (2016) 10 SCC 265 : (2016) 10 SCC 275 : (2017) 1 SCC (Cri) 56 : (2017) 1 SCC (Cri) 66] , SCC p. 289, para 40)

“40. It needs no special emphasis that a female child is entitled to enjoy equal right that a male child is allowed to have. The constitutional identity of a female child cannot be mortgaged to any kind of social or other concept that has developed or is thought of. It does not allow any room for any kind of compromise. It only permits affirmative steps that are constitutionally postulated. Be it clearly stated that when rights are conferred by the Constitution, it has to be understood that such rights are recognised regard being had to their naturalness and universalism. No one, let it be repeated, no one, endows any right to a female child or, for that matter, to a woman. The question of any kind of condescension or patronisation does not arise.”

**13.** Speaking about the constitutional status of women and the brazen practice of sex identification and female foeticide, the Court stated: (*Voluntary Health Assn. case [Voluntary Health Assn. of Punjab v. Union of India*, (2016) 10 SCC 265 : (2016) 10 SCC 275 : (2017) 1 SCC (Cri) 56 : (2017) 1 SCC (Cri) 66] , SCC p. 293, para 45)

“45. Before parting with the case, let it be stated with certitude and without allowing any room for any kind of equivocation or ambiguity, the perception of any individual or group or organisation or system treating a woman with inequity, indignity, inequality or any kind of discrimination is constitutionally impermissible. The historical perception has to be given a prompt burial. Female foeticide is conceived by the society that definitely includes the parents because of unethical perception of life and nonchalant attitude towards law. The society that treats man and woman with equal dignity shows the reflections of a progressive and civilised society. To think that a woman should think what a man or a society wants her to think tantamounts to slaughtering her choice, and definitely a humiliating act. When freedom of free choice is allowed within constitutional and statutory parameters, others cannot determine the norms as that would amount to acting in derogation of law. Decrease in the sex ratio is a sign of colossal calamity and it cannot be allowed to happen. Concrete steps have to be taken to increase the same so that invited social disasters do not befall on the society. The present generation is expected to be responsible to the posterity and not to take such steps to sterilise the birth rate in violation of law. The societal perception has to be metamorphosed having respect to legal postulates.”

**14.** The purpose of our referring to the earlier judgments is only to emphasise upon the dignity, right and freedom of choice of a woman. It needs no special emphasis to assert that she has the equal constitutional status and identity...

**15.** That being the legal position with regard to status of woman under the Constitution, we are required to analyse the relevant statutory provisions of the 1994 Act. Section 22 of the 1994 Act that occurs in Chapter VII which deals with “Offences and Penalties” reads thus:...

**16.** Section 23 deals with offences and penalties. Section 26 deals with offences by companies. It is as follows:...

**17.** Referring to the said provisions, it is submitted by Mr Sanjay Parikh, learned counsel for the petitioner that the respondents cannot engage themselves in what is prohibited under the 1994 Act as it is their obligation to respect the law in letter and spirit and this Court should direct the respondent authorities to take stringent action against search engines.

**18.** At this juncture, it is relevant to state that the Court on 16-2-2017 [*Sabu Mathew George v. Union of India*, (2017) 7 SCC 657 : (2017) 7 SCC 658 : (2017) 4 SCC (Cri) 126 : (2017) 4 SCC (Cri) 127], after reflecting on the anguish expressed in *Voluntary Health Assn. of Punjab [Voluntary Health Assn. of Punjab v. Union of India*, (2016) 10 SCC 265 : (2016) 10 SCC 275 : (2017) 1 SCC (Cri) 56 : (2017) 1 SCC (Cri) 66] (the 2nd), adverted to various aspects and observed thus: (*Sabu Mathew case [Sabu Mathew George v. Union of India*, (2017) 7 SCC 657 : (2017) 7 SCC 658 : (2017) 4 SCC (Cri) 126 : (2017) 4 SCC (Cri) 127] , SCC pp. 659-62, paras 3-5)

“3. The present writ petition was filed in 2008 by the petitioner, a doctor in the field of Public Health and Nutrition, expressing his concern about the modus operandi adopted by Respondents 3 to 5 to act in detriment to the fundamental conception of balancing of sex ratio by entertaining advertisements, either directly or indirectly or as alleged, in engaging themselves in violation of Section 22 of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for brevity “the 1994 Act”). Times without number, this Court has dwelt upon how to curb the said

malady. In pursuance of our orders dated 5-7-2016 [*Sabu Mathew George v. Union of India*, (2016) 14 SCC 418 : (2016) 14 SCC 419 : (2016) 4 SCC (Cri) 402 : (2016) 4 SCC (Cri) 403] and 25-7-2016 [*Sabu Mathew George v. Union of India*, (2016) 14 SCC 418 : (2016) 14 SCC 420 : (2016) 4 SCC (Cri) 402 : (2016) 4 SCC (Cri) 404], an affidavit was filed by the competent authority of the Ministry of Electronics and Information Technology (MeitY), Government of India.

4. Be it noted, when the matter was taken up on 19-9-2016 [*Sabu Mathew George v. Union of India*, (2017) 2 SCC 514 : (2017) 2 SCC 516 (2) : (2017) 1 SCC (Cri) 754 : (2017) 1 SCC (Cri) 757], it was submitted by Mr Ranjit Kumar, learned Solicitor General that a meeting was held with the three software companies, namely, Google India (P) Ltd., Yahoo! India and Microsoft Corporation (I) (P) Ltd. and the companies were asked to respond to certain questions. For the sake of completeness, it is necessary to reproduce the said questions: (*Sabu Mathew case* [*Sabu Mathew George v. Union of India*, (2017) 2 SCC 514 : (2017) 2 SCC 516 (2) : (2017) 1 SCC (Cri) 754 : (2017) 1 SCC (Cri) 757], SCC p. 517, para 4)

(a) Whether the respondents feel obligated to comply with the provisions of the PC-PNDT Act, especially Section 22 of the Act as directed by this Hon'ble Court vide its order dated 28-1-2015 [*Sabu Mathew George v. Union of India*, (2015) 11 SCC 545 : (2015) 11 SCC 549: (2015) 4 SCC (Cri) 492 : (2015) 4 SCC (Cri) 495] ?

(b) Whether the respondents are ready to publish a "warning message" on top of search result, as and when any user in India submits any "keyword searches" in search engines, which relates to pre-conception and pre-natal determination of sex or sex selection?

(c) Whether the respondents are ready to block "autocomplete" failure for "keyword" searches which relates to pre-conception and/or pre-natal determination of sex or sex selection?

(d) Whether the words/phrases relating to pre-conception and pre-natal determination of sex or sex selection to be provided and regularly updated by the Government for the "keyword search" or shall it be the onus of the respondents providing search engine facilities?

(e) Whether it is feasible for the respondents to place this Hon'ble Court order dated 28-1-2015 [*Sabu Mathew George v. Union of India*, (2015) 11 SCC 545 : (2015) 11 SCC 549 : (2015) 4 SCC (Cri) 492 : (2015) 4 SCC (Cri) 495] on their respective home page(s), instead of placing them on terms of service (TOS) pages?

(f) What is the suggested timeline to incorporate "warning message", blocking of the "auto-complete" feature for keyword search and related terms, etc. relating to pre-conception and pre-natal determination of sex or sex selection?

(g) Any other information as the respondents would like to share?

5. The responses to those questions were given by Respondents 3 to 5 and, thereafter, delving into the submissions which were assiduously canvassed by the learned counsel for the respondents, the following order was passed: (*Sabu Mathew case* [*Sabu Mathew George v. Union of India*, (2017) 2 SCC 514 : (2017) 2 SCC 516 (2) : (2017) 1 SCC (Cri) 754 : (2017) 1 SCC (Cri) 757], SCC pp. 521-22, paras 7-10)

'7. Explaining the same, it is submitted by the learned Solicitor General that all the three Companies are bound to develop a technique so that, the moment any advertisement or search is introduced into the system, that will not be projected or seen by adopting the method of "auto block". To clarify, if any person tries to avail the corridors of these companies, this devise shall be adopted so that no one can enter/see the said advertisement or message or anything that is prohibited under the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (for short "the Act"), specifically under Section 22 of the said Act.

8. Mr Sanjay Parikh, learned counsel for the petitioner would contend that the Union of India should have taken further steps to see that the law of the country is totally obeyed by these three Companies, inasmuch as the commitment given by them or the steps taken by the Union of India are not adequate. He has pointed out from the affidavit filed by the petitioner that there are agencies

which are still publishing advertisements from which it can be deciphered about the gender of the foetus. The learned counsel would submit that Section 22 of the Act has to be read along with the other provisions of the Act and it should be conferred an expansive meaning and should not be narrowly construed as has been done by the respondents.

9. Mr Ranjit Kumar, learned Solicitor General at this juncture would submit that he has been apprised today only about the “proposed list of words” in respect of which when commands are given, there will be “auto block” with a warning and nothing would be reflected in the internet, as it is prohibited in India. We think it appropriate to reproduce the said “proposed list of words”. It reads as under:...

10. At this juncture, Mr C.A. Sundaram, Mr K.V. Viswanathan, learned Senior Counsel, Mr Anupam Lal Das, learned counsel appearing for Google India, Microsoft Corporation (I) (P) Ltd. and Yahoo! India, respectively, have submitted that apart from the aforesaid words, if anyone, taking recourse to any kind of ingenuity, feeds certain words and something that is prohibited under the Act comes into existence, the “principle of auto block” shall be immediately applied and it shall not be shown. The learned counsel appearing for the search engines/intermediaries have submitted that they can only do this when it is brought to their notice. In our considered opinion, they are under obligation to see that the “doctrine of auto block” is applied within a reasonable period of time. It is difficult to accept the submission that once it is brought to their notice, they will do the needful. It need not be overemphasised that it has to be an in-house procedure/method to be introduced by the Companies, and we do so direct.”

19. On the basis of the order passed, an affidavit was filed by the Union of India which reflected its understanding of Section 22 of the 1994 Act. Considering the same, on 16-11-2016 [*Sabu Mathew George v. Union of India*, (2017) 2 SCC 514 : (2017) 2 SCC 523 : (2017) 1 SCC (Cri) 754 : (2017) 1 SCC (Cri) 763], the following order was passed: (*Sabu Mathew case* [*Sabu Mathew George v. Union of India*, (2017) 7 SCC 657 : (2017) 7 SCC 658 : (2017) 4 SCC (Cri) 126 : (2017) 4 SCC (Cri) 127], SCC pp. 662-63, para 6)

“6. ... ‘19. ... “Section 22 and the Explanation appended to it is very wide and does not confine only to commercial advertisements. The intention of law is to prevent any message/communication which results in determination/selection of sex by any means whatsoever scientific or otherwise. The different ways in which the communication/messages are given by the internet/search engine which promote or tend to promote sex selection are prohibited under Section 22. The search engines should devise their own methods to stop the offending messages/advertisements/communication and if the compliance in accordance with law is not done Ministry of Electronics and Information Technology (MeitY), shall take action as they have already said in their affidavits dated 15-10-2015 and 8-8-2016. The Ministry of Health and Family Welfare is concerned about the falling child sex ratio and is taking all possible actions to ensure that the provisions of the PC-PNDT Act are strictly implemented.” (*Sabu Mathew case* [*Sabu Mathew George v. Union of India*, (2017) 2 SCC 514 : (2017) 2 SCC 523 : (2017) 1 SCC (Cri) 754 : (2017) 1 SCC (Cri) 763], SCC p. 526, para 19)”

20. Thereafter the matter was heard at some length and pending the debate, the Court directed as follows: (*Sabu Mathew case* [*Sabu Mathew George v. Union of India*, (2017) 7 SCC 657 : (2017) 7 SCC 658 : (2017) 4 SCC (Cri) 126 : (2017) 4 SCC (Cri) 127], SCC pp. 663-65, paras 7-14)

“7. ... ‘21. At this stage, pending that debate, in addition to the earlier directions passed by this Court, we direct that the Union of India shall constitute a “Nodal Agency” and give due advertisement in television, newspapers and radio by stating that it has been created in pursuance of the order of this Court and anyone who comes across anything that has the nature of an advertisement or any impact in identifying a boy or a girl in any method, manner or mode by any search engine shall be brought to its notice. Once it is brought to the notice of the Nodal Agency, it shall intimate the search engine or the corridor provider concerned immediately and after receipt of the same, the search engines are obliged to delete it within thirty-six hours and intimate the Nodal Agency. Needless to say, this is an interim arrangement pending the discussion which we have noted hereinbefore. The Nodal Agency shall put the ultimate action taken by the search engine on its website.’ (*Sabu Mathew case* [*Sabu Mathew George v. Union of India*, (2017) 2 SCC 514 : (2017) 2 SCC 523 : (2017) 1 SCC (Cri) 754 : (2017) 1 SCC (Cri) 763], SCC p. 527, para 21)



8. In pursuance of the said order, the Union of India has filed an affidavit of the Joint Secretary, Ministry of Health and Family Welfare, Government of India. Paras 3 and 4 of the said affidavit read as follows:

'3. In compliance with the court's directive, this Ministry has set up a single point contact for the Nodal Agency to receive the complaints on violation of Section 22 of the PC & PNDT Act, 1994. Details of the Nodal Agency are as under:...

4. That, further in compliance with directions, for advertising in television, newspaper and radio, appropriate steps are being undertaken and same shall be complied with at the earliest.'

In view of the aforesaid affidavit, we direct the Union of India to comply with Para 4 within a week hence. It shall be clearly mentioned that it is being done in pursuance of the order passed by this Court.

9. At this juncture, Mr Sanjay Parikh, learned counsel appearing for the petitioner, has drawn our attention to the additional affidavit filed on behalf of Respondent 3, especially to Paras 6(b) and (c). They read as follows:

'6. (b) There are innumerable activities banned by law, e.g. using a bomb to kill people, murder, rape, prostitution, pornography, etc., nevertheless, there is no dearth of information available under each of these heads in both the offline and online world. Just because a particular activity is morally repugnant, illegal or prohibited under the provisions of the Indian Penal Code and other applicable laws, does not mean that everyone in the world is disentitled from having any form of information about the subject.

(c) This would be in complete violation of Article 19(1)(a) of the Constitution of India, which firstly includes the right to know, secondly, right to receive and thirdly, right to access the information or any content, etc.'

10. Refuting Para 6(b) of the affidavit, learned Solicitor General has submitted that he will file a response to the same. His instant reaction was that the said paragraph contravenes the letter and spirit of Section 22 of the 1994 Act. Additionally, it is contended by him that Para 6(b) is not saved by Article 19(1)(a) of the Constitution of India as asserted in Para (c). At this juncture, Ms Ruby Ahuja, learned counsel appearing for Respondent 3, has submitted that the said respondent has no intention to disrespect or disobey or even remotely think of contravening any law(s) of this country and she undertakes to file a clarificatory affidavit within three weeks.

11. It is necessary to take note of another submission advanced by Mr Parikh, learned counsel with the assistance of Ms Ninni Susan Thomas, learned counsel for the petitioner. It is urged by him that despite the order passed on 19-9-2016 [*Sabu Mathew George v. Union of India*, (2017) 2 SCC 514 : (2017) 2 SCC 516 (2) : (2017) 1 SCC (Cri) 754 : (2017) 1 SCC (Cri) 757], that Respondents 3 to 5 shall undertake the exercise of principle of "auto block", the literature and write-ups that would tempt the people to go for male child which ultimately lead to reduction of sex ratio, is still being shown in certain websites. The said websites were shown to Mr K.V. Viswanathan, Mr Anupam Lal Das and Ms Ruby Ahuja. The learned counsel appearing for the respondents have submitted that they will verify the same and the context. Additionally, it is canvassed by Mr Viswanathan with immense vehemence that it does not come within the proposed list of words that find mention in the order dated 19-9-2016 [*Sabu Mathew George v. Union of India*, (2017) 2 SCC 514 : (2017) 2 SCC 516 (2) : (2017) 1 SCC (Cri) 754 : (2017) 1 SCC (Cri) 757], and, therefore, it cannot be construed as a violation. Be that as it may.

12. We reiterate our direction dated 19-9-2016 [*Sabu Mathew George v. Union of India*, (2017) 2 SCC 514 : (2017) 2 SCC 516 (2) : (2017) 1 SCC (Cri) 754 : (2017) 1 SCC (Cri) 757], and further add that Respondents 3 to 5 shall appoint their "in-house expert body" which shall take steps to see that if any words or any key words that can be shown in the internet which has the potentiality to go counter to Section 22 of the 1994 Act, should be deleted forthwith.

13. Presently, we shall advert to Paras 3 and 4 of the affidavit of the Union of India which we have reproduced hereinabove. As the Nodal Agency has already been constituted, it will be open to the petitioner or any person that the Nodal Agency shall take it up and intimate Respondents 3 to 5 so

that they will do the needful. That apart, the “in-house expert body” that is directed to be constituted, if not already constituted, shall on its own understanding delete anything that violates the letter and spirit of language of Section 22 of the 1994 Act and, in case there is any doubt, they can enter into a communication with the Nodal Agency appointed by the Union of India and, thereafter, they will be guided by the suggestion of the Nodal Agency of the Union of India. Be it clarified, the present order is passed so that Respondents 3 to 5 become responsive to the Indian law.

14. Let the matter be listed on 11-4-2017, for further hearing.”

21. On 13-4-2017 [*Sabu Mathew George v. Union of India*, (2017) 7 SCC 657 : (2017) 7 SCC 665 (2) : (2017) 4 SCC (Cri) 126 : (2017) 4 SCC (Cri) 133 (2)] taking note of the submissions of the learned counsel for the parties and Section 22 of the 1994 Act, the Court passed the following order: (*Sabu Mathew case* [*Sabu Mathew George v. Union of India*, (2017) 7 SCC 657 : (2017) 7 SCC 665 (2) : (2017) 4 SCC (Cri) 126 : (2017) 4 SCC (Cri) 133 (2)], SCC pp. 666-67, paras 20-25)

“20. Mr Parekh has drawn our attention to certain search results. One such result is “medical tourism in India”. It is pointed out by Mr Parekh that it deals with “gender determination” in India which is prohibited by the aforesaid provision.

21. At this juncture, Mr Salve, Dr Singhvi and Mr Das, learned counsel for the respondents submitted that the keywords are “medical tourism in India” which do not offend the provision. It is the “originator” of the blog who has used the offensive words in the contents of the website and in such a situation the Nodal Officer of the Union of India can block the website as per the Act.

22. Be it noted, in pursuance of the order [*Sabu Mathew George v. Union of India*, (2017) 2 SCC 514 : (2017) 2 SCC 516 (2) : (2017) 1 SCC (Cri) 754 : (2017) 1 SCC (Cri) 757] passed by this Court, the respondents have appointed their own “in-house” experts. It is accepted by the learned counsel for the respondents that they have never indulged in any kind of advertisement as contemplated under Section 22 of the Act and nor do they have any kind of intention to cause any violation of the said mandate. It is further accepted by them that they will not sponsor any advertisement as provided under Section 22 of the Act. The learned counsel for the respondents would contend, and rightly, that they do not intend to take an adversarial position with the petitioner but on the contrary to play a participative and cooperative role so that the law made by Parliament of India to control sex selection and to enhance the sex ratio is respected. It is further accepted by them that if the Nodal Officer of the Union of India communicates to any of the respondents with regard to any offensive material that contravenes Section 22, they will block it.

23. Needless to say, the intimation has to be given to the respondents. The Nodal Officers appointed in the States under the Act are also entitled to enter into communication with the respondents for which they have no objection. The action taken report, as further acceded to, shall be sent to the Nodal Officer. Be it stated, the names of the Nodal Officers have been mentioned in the affidavit filed by the Union of India dated 11-11-2016.

24. At this juncture, it is necessary to state that volumes of literature under various heads come within the zone of the internet and in this virtual world the idea what is extremely significant is “only connect”. Therefore, this Court has recorded the concession of the respondents so that the sanctity of the Act is maintained and there is no grievance on any score or any count by anyone that his curiosity for his search for anything is not met with and scuttled. To elaborate, if somebody intends to search for “medical tourism in India” he is entitled to search as long as the content does not frustrate or defeat the restriction postulated under Section 22 of the Act. It is made clear that there is no need on the part of anyone to infer that it creates any kind of curtailment in his right to access information, knowledge and wisdom and his freedom of expression. What is stayed is only with regard to violation of Section 22 of the Act. We may further add that freedom of expression included right to be informed and right to know and feeling of protection of expansive connectivity.

25. As agreed to by the learned counsel for the parties, let the matter be listed on 5-9-2017 so that the outcome of this acceptance will be plain as day.”

...

**23.** The said submissions are refuted by Dr Abhishek Manu Singhvi and Mr K.V. Viswanathan, learned Senior Counsel appearing for Google India and Microsoft Corporation (I) (P) Ltd. respectively. Mr Anupam Lal Das, learned counsel appearing on behalf of Yahoo! India, would submit that “content” can only be removed, once it is pointed out by the Nodal Agency and further there are generators who can make permutations and combinations, which will be very difficult on the part of the search engine to remove.

**24.** At this juncture, Mr Parikh has drawn our attention to Paras 12, 13, 14 and 19 of Annexure C to the affidavit filed on behalf of the petitioner. They are extracted below:

“12. Google also has automated systems that analyse the tens of millions of new ads created by advertisers every day. ...

13. Google also relies on its users and on other advertisers to report improper advertisements. ...

14. In 2014, Google has already disapproved over 428 million advertisements (most of which never generated a single impression), it has prevented ads from linking to over one million websites, and it has suspended or terminated over 9,00,000 advertiser accounts for violations of Google's AdWords policies. The vast majority of these actions were taken as a result of Google's proactive systems rather than as a result of outside complaints.

...

**25.** Ms Ruby Ahuja, learned counsel assisting Dr Abhishek Manu Singhvi, learned Senior Counsel, appearing for the Google India would submit that certain paragraphs which have been put forth in the affidavit filed by Mr Sanjay Parikh are not relevant as they do not relate to paid advertisements. Whether those paragraphs are relevant or not, we are directing the respondents to find out a solution. We make it clear that we have not expressed any opinion on the nature of the solution, which the experts of the abovementioned entities shall find and implement.

**26.** We have been apprised by Ms Pinky Anand, learned Additional Solicitor General appearing for the Union of India that pursuant to the directions of this Court, a Nodal Agency has already been constituted and it is working in right earnest and whenever it receives any complaint, it intimates the search engine and contents are removed.

**27.** Mr Parikh would submit that there are various other ways by which contents can be removed so that the impact would become evident.

**28.** Weighing the rivalised submissions at the Bar, we direct the Nodal Agency and the Expert Committee to hold a meeting and have the assistance of Mr Sanjay Parikh and his team so that there can be a holistic understanding and approach to the problem. The Nodal Agency and the Expert Committee shall also call upon the representatives of Google India, Yahoo! India and Microsoft Corporation (I) (P) Ltd., who are directed to appear before the Committee and offer their suggestions. There has to be a constructive and collective approach to arrive at a solution together with the Expert Committee and the search engine owners. They are obliged under law to find solutions if something gets projected in contravention of the 1994 Act. The effective solution is the warrant of the obtaining situation. We are using the word “solution”, keeping in view our earlier orders and the suggestions given by the competent authority of the Union of India. The duty of all concerned is to see that the mandate of the 1994 Act is scrupulously followed. Keeping the aforesaid in view, a meeting shall be held within six weeks hence. All the suggestions or possibilities must be stated in writing before the Committee so that appropriate and properly informed measures are taken.

**29.** We are sure that the Union of India and its Committee will be in a position to take appropriate steps so that the mandate of the 1994 Act is not violated and the falling sex ratio in the country, as has been noted in *CEHAT [CEHAT v. Union of India, (2003) 8 SCC 398]* · [*CEHAT v. Union of India, (2001) 5 SCC 577*] · [*CEHAT v. Union of India, (2003) 8 SCC 409*] · [*CEHAT v. Union of India, (2003) 8 SCC 410*] · [*CEHAT v. Union of India, (2003) 8 SCC 412*] , *Voluntary Health Assn. of Punjab [Voluntary Health Assn. of Punjab v. Union of India, (2013) 4 SCC 1 : (2013) 2 SCC (Cri) 287]* (the 1st) and *Voluntary Health Assn. of Punjab [Voluntary Health Assn. of Punjab v. Union of India, (2016) 10 SCC 265 : (2016) 10 SCC 275 : (2017) 1 SCC (Cri) 56 : (2017) 1 SCC (Cri) 66]* (the 2nd), does not remain a haunting problem.

**30.** We are constrained to say so as many are guided by inappropriate exposure to the internet. The respondents have a role to control it and if any concrete suggestion is given by the petitioner, the same shall be incorporated. We command Google India, Yahoo! India and Microsoft Corporation (I) (P) Ltd. to cooperate and give their point of view for the purpose of a satisfactory solution instead of taking a contesting stand before the Expert Committee.

**31.** With the aforesaid directions, the writ petition stands disposed of. If there will be any further grievance, liberty is granted to the petitioner to file a fresh writ petition...”

## Endnotes

- 1 Statement of Objects and Reasons, The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002.
- 2 (2001) 5 SCC 577.
- 3 Note that the case is not extracted in this chapter, since the guidelines issued by the Court were incorporated when the PNDT Act was amended subsequently.
- 4 (2003) 8 SCC 398.
- 5 CEHAT & Ors. v. Union of India & Ors., (2001) 5 SCC 577; CEHAT & Ors. v. Union of India & Ors., (2003) 8 SCC 406; CEHAT & Ors. v. Union of India & Ors., (2003) 8 SCC 409; CEHAT & Ors. v. Union of India & Ors., (2003) 8 SCC 410; CEHAT & Ors. v. Union of India & Ors., (2003) 8 SCC 412.
- 6 (2013) 4 SCC 1.
- 7 (2016) 19 SCC 275.
- 8 (2018) 3 SCC 229.
- 9 Sabu Mathew George v. Union of India, (2017) 2 SCC 514.
- 10 The setting up of such an agency was reported to the Court by an affidavit filed by the Union of India. This is noted in: Sabu Mathew George v. Union of India, (2017) 7 SCC 657, 663-664.
- 11 Sabu Mathew George v. Union of India, (2018) 3 SCC 229, 248.
- 12 2005 Cri LJ 3408 (Bom).
- 13 AIR 2008 Bom 29.
- 14 (2014) 5 All LJ 496.
- 15 (2013) 205 DLT 96.
- 16 U.N. Office of the High Commissioner for Human Rights, "Status of Ratification Interactive Dashboard—India," *accessed at* <http://indicators.ohchr.org/>.
- 17 *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained in U.N. Doc. A/56/49 (Vol. I)/Corr.4 (2001), Arts. 3–4.
- 18 Vishaka v. State of Rajasthan, AIR 1997 SC 3011.



# CHAPTER FOUR

# SURROGACY AND ASSISTED REPRODUCTIVE TECHNOLOGIES

India does not have statutory laws on surrogacy. Guidelines issued by the Indian Council of Medical Research were generally followed by artificial reproductive technologies<sup>1</sup> clinics<sup>2</sup>. It is only recently that the Government of India, through an executive order, prohibited transnational surrogacy.<sup>3</sup> Consequently, the implication is that only Indian nationals can enter into surrogacy contracts within the country. In this chapter, we discuss cases on three issues:

- Legality of Surrogacy Contracts
- Maternity Benefits for “Commissioning Mothers”
- Right to Avail of Assisted Reproductive Technologies (ART)

## Legality of Surrogacy Contracts

The first case before the Supreme Court on surrogacy was ***Baby Manji Yamada v. Union of India***.<sup>4</sup> A non-governmental organization (NGO) filed a petition before the Rajasthan High Court, against granting custody of Baby Manji (who had been born through a surrogacy arrangement) to the baby’s grandmother.<sup>5</sup> The NGO’s petition argued that the contract was unenforceable as surrogacy is not regulated under any law in India and as there are concerns about illegal activity being undertaken within the industry. The allegation made was that since there was no law governing surrogacy in India, various illegalities were occurring and the surrogacy contract was essentially a money-making racket and illegal. The High Court directed that the baby be produced before it in four weeks. This order of the High Court was challenged by the petitioner before the Supreme Court. The primary question in this case was who would be entitled to the custody of the baby born through a surrogacy contract. The Supreme Court, however, did not finally decide on the issue. This appears to be primarily because of questions regarding the *locus standi* of the NGO that had approached the Rajasthan High Court to challenge the custody of the child being given to the paternal grandmother of the child. The Court held that commissions for protection of child rights, constituted under the Commissions for Protection of Child Rights Act, 2005, would be the competent authority before whom complaints regarding custody should be made. In the judgment, the Court discussed the process of surrogacy and the various medical/legal terms associated with it.

## Maternity Benefits for “Commissioning Mothers”<sup>6</sup>

Whether the “commissioning mother” is entitled to maternity leave under the Central Civil Services (Leave) Rules, 1972 was the question before the Delhi High Court in ***Rama Pandey v. Union of India***.<sup>7</sup> The Court answered the question in the affirmative. It discussed the rationale behind granting maternity and paternity leave, and concluded that there is no difference between biological, adoptive, and commissioning mothers. It thus held that a commissioning mother is entitled to the same amount of leave that a biological mother is. In arriving at this conclusion, the court also ruled that the interpretation of statutes and rules should be updated in light of current technology and social norms.

## Right to Avail of ART Services

In ***Major Anamdeep Singh Dhingra v. Union of India***,<sup>8</sup> the Delhi High Court was approached by an Army officer who needed to avail of ART services in order to conceive. The medical facility was not available at the station he was being transferred to by the Army. The Court quashed his transfer on the grounds that the hardship faced by the petitioner and his wife trumps that of the Army.

## Related Human Rights Standards and Jurisprudence

Below is a selection of international and regional human rights standards and jurisprudence that explains states' obligations to ensure reproductive rights as they apply to assisted reproduction, including surrogacy. In the context of surrogacy and ART, states are at a minimum required to ensure that the human rights of all parties involved in ART are respected throughout the process, with regard to the real environment in which these interactions occur. This chapter focuses on human rights standards concerning the regulation of surrogacy and ART, including maternity benefit for women who act as surrogates; issues pertaining to legal parentage and the rights of children following birth are beyond the scope of this discussion.

The Government of India has committed itself to comply with the obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR).<sup>9</sup> Under international law, all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.<sup>10</sup> The Supreme Court has held that in light of the obligation to “foster respect for international law” in Article 51 (c) of the Indian Constitution “[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”<sup>11</sup>

### INTERNATIONAL TREATY STANDARDS

#### TREATIES

- **ICCPR, Articles 2, 3, 17, 23, 24, 26** (protecting the rights to equality, non-discrimination, privacy, and found a family).
- **CEDAW, Articles 1, 2, 5(1), 10(h), 11(3), 12(1), 14(2)–(b), 16(e)** (outlining women's right to non-discrimination and freedom from sex stereotyping, health, and to “decide 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”; and requiring states to establish, review, and revise “protective legislation” guaranteeing the right to equality at work, including on paid leave and maternity protections, “periodically in the light of scientific and technological knowledge”).
- **CRC, Articles 2(1), 7(1), 8(1), 24(2)(d), 24(2)(f), 24(4)** (outlining that, in order to ensure the right of the child to the highest attainable standard of health, states should ensure appropriate prenatal and post-natal health care for mothers, develop family planning education and services, and cooperate internationally between countries in order to realize these goals).
- **ICESCR, Articles 10, 12, 15** (protecting the rights to health and to “special protection” for women before and after childbirth; and to guarantee the right to “enjoy the benefits of scientific progress and its applications,” including by ensuring “the development and the diffusion of science”).
- **Convention on the Rights of Persons with Disabilities, Articles 23(1)(b), 25(d)** (obligating states to “require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent” and to ensure the rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to provide access to the information and means necessary to enable them to exercise these rights).

#### SELECTED GENERAL COMMENTS

- **CEDAW Committee, General Recommendation No. 24 on Article 12 of the Convention (women and health)**, U.N. Doc. A/54/38/Rev.1 (1999), para. 22 (in health care, guaranteeing women the right to fully informed consent, respect for their dignity, confidentiality, and sensitivity to their needs and perspectives).
- **Committee for Economic, Social and Cultural Rights (CESCR), General Comment No. 22 (2016) on the right to sexual and reproductive health**, U.N. Doc. E/C.12/GC/22 (2016), paras. 18, 39, 45 (with regard to the state's obligation to ensure the right to reproductive health, explaining that “[t]he failure or refusal to incorporate



technological advances and innovations in the provision of sexual and reproductive health services, such as [...] assisted reproductive technologies [...] jeopardizes the quality of care”; calling for states to provide information and health care without discrimination on treatments for infertility and fertility options).

- **CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)**, U.N. Doc. E/C.12/2000/4 (2000), para. 8 (recognizing the right to health includes the right to sexual and reproductive freedom; calling on states to provide access to the full range of high quality and affordable health care, including sexual and reproductive health services; defining reproductive health to mean that women and men have the freedom to decide if and when to reproduce).

## UNITED NATIONS HUMAN RIGHTS EXPERT AND WORKING GROUP REPORTS

- **Special Rapporteur on the sale of children, child prostitution and child pornography (SR Sale of Children), Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material**, U.N. Doc. A/HRC/37/60 (2018), paras. 10-11, 77-78 (calling for strict regulation of all intermediaries involved in surrogacy arrangements and protections for the rights, medical health, and safety of gestational mothers and children born through surrogacy; and urging that all steps of the process conform with the best interest of the child).
- **SR Sale of Children, Report of the Special Rapporteur on the sale of children, child prostitution and child pornography**, U.N. Doc. A/HRC/34/55 (2016), para. 52 (“The international regulatory vacuum that persists in relation to international commercial surrogacy arrangements leaves children born through this method vulnerable to breaches of their rights.”).

## SELECTED REGIONAL CASE LAW

### EUROPEAN COURT OF HUMAN RIGHTS

- **Costa and Pavan v. Italy, Application No. 54270/10 (2013)**, paras. 52–71 (finding that Italy violated applicants’ right to private and family life by banning their use of ART and preimplantation genetic diagnosis to conceive a child unaffected by a genetic disease which they both carried).
- **S.H. and Others v. Austria, Application No. 57813/00 (2011)**, paras. 80–82, 85–118 (where the law prohibited certain kinds of ARTs that were necessary for the applicants to become parents: finding that access to ARTs is protected by the right to private and family life; ruling that, because the events occurred in the mid-1990s, when the science and related legislation were in an early stage of development, Austria was entitled to a wide margin of appreciation *at that time* and therefore finding no violation; but emphasizing the need to keep this area under review as it is “subject to a particularly dynamic development in science and law”).
- **Dickson v. United Kingdom, Application No. 44362/04 (2007)**, paras. 65–66, 69–86 (where an imprisoned man and his wife were denied access to artificial insemination necessary for conception, finding a violation of the right to private and family life, as “the choice to become a genetic parent” constitutes “a particularly important facet of an individual’s existence or identity”).
- **Evans v. United Kingdom, Application No. 6339/05 (2007)**, paras. 56–75 (where the applicant and her former partner had created embryos with their respective eggs and sperm, then the partner withdrew his consent to the embryos’ development, depriving the applicant of any way to become a genetic parent: finding no violation of the applicant’s right to private and family life, on the basis that the applicant and her partner’s rights to decide on or against becoming a genetic parent held equal weight).

### INTER-AMERICAN COURT OF HUMAN RIGHTS

- **Artavia Murillo (“In Vitro Fertilization”) v. Costa Rica, Preliminary objections, merits, reparations and costs, Ser. C, No. 257 (2012)**, paras. 136, 142–151, 185–264, 272–317 (where Costa Rica had outlawed all forms of in-vitro fertilization (IVF), finding a violation of the rights to integrity, liberty, and private and family life because “the right to have access to scientific progress in order to exercise reproductive autonomy and the possibility to found a family gives rise to the right to have access to the best health-care services in assisted reproduction techniques, and, consequently, the prohibition of disproportionate and unnecessary restrictions, *de iure* or *de facto*, to exercise the reproductive decisions that correspond to each individual”; recognizing that embryos cannot be understood to be persons and are not rights holders; and discussing in depth the discriminatory effects of prohibiting IVF and calling for regulation).

# RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

## IN THE SUPREME COURT OF INDIA

**Baby Manji Yamada v. Union of India & Anr.**

**(2008) 13 SCC 518**

**Arijit Pasayat and M.K. Sharma, JJ.**

*Emiko Yamada, a Japanese national, the paternal grandmother of a child born through a surrogacy arrangement filed a petition before the Supreme Court seeking custody of the child. The commissioning parents had separated during the pregnancy. The intending mother was no longer interested in taking custody of the child, and the intending father had to leave the country due to expiration of his visa. The Rajasthan High Court had ordered that the baby be produced before it, after a habeas corpus petition was filed by an NGO arguing that custody of the child could not be given to the grandmother, since surrogacy was not permitted by the law. The Supreme Court in this case elaborates on the meaning of various terms associated with surrogacy.*

**Pasayat, J.:** “This petition under Article 32 of the Constitution of India (hereinafter for short “the Constitution”) raises some important questions.

2. Essentially, challenge is to certain directions given by a Division Bench of the Rajasthan High Court relating to production/custody of a child, Manji Yamada. Emiko Yamada, claiming to be the grandmother of the child, has filed this petition. The writ petition before the Rajasthan High Court was filed by M/s Satya, stated to be an NGO, Opposite Party No. 3 in this petition.

...

4. There is no dispute about Baby Manji Yamada having been given birth to by a surrogate mother. It is stated that the biological parents Dr. Yuki Yamada and Dr. Ikufumi Yamada came to India in 2007 and had chosen a surrogate mother in Anand, Gujarat and a surrogacy agreement was entered into between the biological father and biological mother on one side and the surrogate mother on the other side. It appears from some of the statements made that there were matrimonial discords between the biological parents. The child was born on 25-7-2008. On 3-8-2008 the child was moved to Arya Hospital in Jaipur following a law and order situation in Gujarat and she was being provided with much needed care including being breastfed by a woman. It is stated by the petitioner that the genetic father Dr. Ikufumi Yamada had to return to Japan due to expiration of his visa. It is also stated that the municipality at Anand has issued a birth certificate indicating the name of the genetic father.

5. Stand of Respondent 3 was that there is no law governing surrogation (sic) in India and in the name of surrogation (sic) a lot of irregularities are being committed. According to it, in the name of surrogacy a money-making racket is being perpetuated. It is also the stand of the said respondent that the Union of India should enforce stringent laws relating to surrogacy.

...

8. Surrogacy is a well-known method of reproduction whereby a woman agrees to become pregnant for the purpose of gestating and giving birth to a child she will not raise but hand over to a contracted party. She may be the child's genetic mother (the more traditional form for surrogacy) or she may be, as a gestational carrier, carry the pregnancy to delivery after having been implanted with an embryo. In some cases surrogacy is the only available option for parents who wish to have a child that is biologically related to them.

9. The word “surrogate”, from Latin “subrogare”, means “appointed to act in the place of”. The intended parent(s) is the individual or couple who intends to rear the child after its birth.

**10.** In *traditional surrogacy* (also known as the *Straight* method) the surrogate is pregnant with her own biological child, but this child was conceived with the intention of relinquishing the child to be raised by others; by the biological father and possibly his spouse or partner, either male or female. The child may be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), or ICI (intracervical insemination) which is performed at a fertility clinic.

**11.** In *gestational surrogacy* (also known as the *Host* method) the surrogate becomes pregnant via embryo transfer with a child of which she is not the biological mother. She may have made an arrangement to relinquish it to the biological mother or father to raise, or to a parent who is themselves unrelated to the child (e.g. because the child was conceived using egg donation, germ donation or is the result of a donated embryo). The surrogate mother may be called the gestational carrier.

**12.** *Altruistic surrogacy* is a situation where the surrogate receives no financial reward for her pregnancy or the relinquishment of the child (although usually all expenses related to the pregnancy and birth are paid by the intended parents such as medical expenses, maternity clothing, and other related expenses).

**13.** *Commercial surrogacy* is a form of surrogacy in which a gestational carrier is paid to carry a child to maturity in her womb and is usually resorted to by well-off infertile couples who can afford the cost involved or people who save and borrow in order to complete their dream of being parents. This medical procedure is legal in several countries including in India where due to excellent medical infrastructure, high international demand and ready availability of poor surrogates it is reaching industry proportions. Commercial surrogacy is sometimes referred to by the emotionally charged and potentially offensive terms “wombs for rent”, “outsourced pregnancies” or “baby farms”.

**14.** Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a health condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy.

**15.** Alternatively, the intended parent may be a single male or a male homosexual couple.

**16.** Surrogates may be relatives, friends, or previous strangers. Many surrogate arrangements are made through agencies that help match up intended parents with women who want to be surrogates for a fee. The agencies often help manage the complex medical and legal aspects involved. Surrogacy arrangements can also be made independently. In compensated surrogacies the amount a surrogate receives varies widely from almost nothing above expenses to over \$30,000. Careful screening is needed to assure their health as the gestational carrier incurs potential obstetrical risks.

**17.** In the present case, if any action is to be taken that has to be taken by the Commission. It has a right to inquire into complaints and even to take suo motu notice of matters relating to: (i) deprivation and violation of child rights, (ii) non-implementation of laws providing for protection and development of children, and (iii) non-compliance with policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and to provide relief to such children, or take up the issues arising out of such matters with the appropriate authorities.

**18.** It appears that till now no complaint has been made by anybody relating to the child, the petitioner in this Court. We, therefore, dispose of this writ petition with a direction that if any person has any grievance, the same can be ventilated before the Commission constituted under the Act. It needs no emphasis that the Commission has to take into account various aspects necessary to be taken note of.

**19.** Another grievance of the petitioner is that the permission to travel so far as the child is concerned including issuance of a passport is under consideration of the Central Government; but no orders have been passed in that regard...

**20.** The learned Solicitor General, on instructions, stated that if a comprehensive application, as required under law, is filed within a week, the same shall be disposed of expeditiously and not later than four weeks from the date of receipt of such application. If the petitioner has any grievance in relation to the order to be passed by the Central Government, such remedy, as is available in law may be availed.

...”

## IN THE HIGH COURT OF DELHI

**Rama Pandey v. Union of India & Ors.****(2015) 221 DLT 756****Rajiv Shakdher, J.**

***A commissioning mother, whose application for maternity leave had been rejected by the central government on the ground that she was not a biological mother, invoked the Delhi High Court's writ jurisdiction for relief. The Court was to adjudicate on the issue of whether a commissioning mother is eligible for maternity leave under the Central Civil Services (Leave) Rules, 1972. In its decision, the Court also examined the impact of the principle of "best interests of the child" in determining the entitlement to maternity leave for a commissioning mother.***

Shakdher, J.:

## FACTS

1. A synthesis of science and divinity (at least for those who believe in it), led to the culmination of the petitioner's desire for a child. Married, on 18.01.1998, to one Sh. Atul Pandey, the petitioner's wish to have a child was fulfilled on 09.02.2013, albeit via the surrogacy route. Her bundle of joy comprised of twins, who were born on the aforementioned date, at a city hospital.

...

2. ...This far, the petitioner was happy; her unhappiness, however, commenced with rejection of her application dated 06.06.2013, for grant of maternity and Child Care Leave (CCL). By this application, the petitioner sought 180 days maternity leave and 3 months CCL. This application was addressed to respondent no. 3, with a copy to respondent no. 2.

2.1 Respondent no. 3 vide a covering letter of even date, i.e., 06.06.2013, forwarded the petitioner's application to respondent no. 2, along with the requisite documents i.e. the surrogacy agreement and the birth certificate of the children. Respondent no. 3, sought clarification with regard to the request made by the petitioner for sanctioning the maternity leave. A perusal of the covering letter would show that the leave sought for the purposes of child care was not being objected to. A doubt, was raised only qua maternity leave.

2.2 Evidently, vide communication dated 10.10.2013, petitioner's request was rejected by respondent no. 3, based on, inputs received from respondent no. 2 vide two communications dated 04.09.2013 and 19.09.2013. The first communication appears to have been sent by Kendriya Vidyalaya Sangathan (KVS), [Headquarters], while the second was, evidently, sent by KVS (D.R.). These communications, though, are not on record.

2.3 In sum, it was conveyed to the petitioner that there was no provision for grant of maternity leave in cases where the surrogacy route is adopted. The petitioner was, however, informed that the CCL could be sanctioned, in her favour, under Rule 43-A, which was applicable to "female government servants". It now transpires that reference ought to have been made to Rule 43 and not Rule 43-A; a fact which was confirmed by the counsel for respondent no. 2 and 3.

2.4 In the background of the aforesaid stand, the petitioner was requested to submit an application for CCL, in case she was desirous of availing leave on that account.

3. The petitioner being aggrieved, approached this court by way of the instant petition, filed, under Article 226 of the Constitution...[F]acts in the matter are not in dispute. The issue raised in the writ petition is, a pure question of law.

4. I may only note that on 10.02.2015, respondents placed before this court an office memorandum dated 09.02.2015, issued by the Ministry of Personnel, Public Grievances, Pensions, Department of Personnel and Training (DoPT), Govt. of India which, in turn, relied upon the office memorandum dated 09.01.2015, issued by the Ministry of Human Resources and Development.

4.1 The stand taken, based on the said office memorandums, was that, there was no provision for grant of maternity leave to female employees, who took recourse to the surrogacy route for procreating a child. Furthermore, it was indicated that for grant of "adoption leave", a valid adoption had to be in place.

4.2 Having said so, the DoPT recommended grant of maternity/adoption leave to the petitioner keeping in mind the welfare of the child and, on consideration of the fact that the child was in her custody. The recommendation made was, that, not only should the petitioner be allowed 180 days of leave as was permissible in situations dealing with maternity

leave/adoption leave but that she, should also be allowed, CCL, in case, an application was made for the said purpose. It was further indicated that the said two sets of leave would not be adjusted from the petitioner's leave account. The said recommendation was, however, made without prejudice to the policy, rules and/or instructions that the government may frame in that behalf in due course.

**4.3** In the light of the aforesaid development, the counsel for both parties indicated that since the answer to the issue of law remains unarticulated (though the grievance of the petitioner may have been redressed), this court ought to deliberate upon the same and pronounce its judgment in the matter.

**4.4** It is based on the stand taken by the counsels for the parties, I proceed to decide the issues raised, in the matter.

...

## REASONS

**7.** I have heard the learned counsels for the parties. According to me, what needs to be borne in mind, is this: there are two stages to pregnancy, the pre-natal and post-natal stage. Biologically pregnancy takes place upon union of an ovum with spermatozoon. This union results in development of an embryo or a foetus in the body of the female. A typical pregnancy has a duration of 266 days from conception to delivery. The pregnancy brings about physiological changes in the female body which, inter alia, includes, nausea (morning sickness), enlargement of the abdomen etc. [Dorland's Illustrated Medical Dictionary, 30<sup>th</sup> Edition, Saunders Publication]

**7.1** Pregnancy brings about restriction in the movement of the female carrying the child as it progresses through the term. In case complications arise, during the term, movement of the pregnant female may get restricted even prior to the pregnancy reaching full term. It is for these reasons, that maternity leave of 180 days is accorded to pregnant female employees.

**7.2** Those amongst pregnant female employees, who are constitutionally strong and do not face medical complications, more often than not, avail of a substantial part of their maternity leave in the period commencing after delivery. Rules and regulations framed in this regard by most organizations, including those applicable to respondent no. 3, do not provide for bifurcation of maternity leave, that is, division of leave between pre-natal and post-natal stages.

**7.3** The reason, perhaps, why substantial part of the leave is availed of by the female employees (depending on their well-being), post delivery, is that, the challenging part, of bringing a new life into the world, begins thereafter, that is, in the post-natal period. There are other factors as well, which play a part in a pregnant women postponing a substantial part of her maternity leave till after delivery, such as, family circumstances (including the fact she is part of a nuclear family) or, the health of the child or, even the fact that she already has had successful deliveries; albeit without sufficient time lag between them.

**8.** Thus, it is evident that except for the physiological changes and difficulties, all other challenges of child rearing are common to all female employees, irrespective of the manner, she chooses, to bring a child into this world.

**9.** But the law, as it stands today, and therefore, the rules and regulations as framed by most organisations do not envisage attainment of parenthood via the surrogacy route.

...

**11.** With the advent of New Reproductive Technologies (NRT) or what are also known as Assisted Reproductive Technologies (ART), (after the birth of the first test-tube baby Louise Joy Brown, in 1978), there has been a veritable explosion of possibilities for achieving and bringing to term a pregnancy. It appears that in future one would have three kinds of mothers:

- (i) a genetic mother, who donates or sells her eggs;
- (ii) a surrogate or natal mother, who carries the baby; and
- (iii) a social mother, who raises the child.

[See: Feminist Perspectives on Law, Chapter 4: Facilitating Motherhood, pages 121-123]

**11.1** India's first test-tube baby Kanupriya alias Durga, brought to fore the use of similar technology in India. The reproduction of children by NRTs or ARTs, raises several moral, legal and ethical issues. One such legal issue arises in the instant case.

**11.2** Though the science proceeded in this direction in the late 1970, the practice of having children via surrogacy is a more recent phenomena. The relevant leave rules were first framed in 1972; to which amendments have been made from time to time. While notions have changed vis-a-vis parenthood (which is why provisions have been incorporated for paternity leave; an aspect which I will shortly advert to), there appears to be an inertia in recognising that motherhood can be attained even via surrogacy.

**11.3** Rule 43 implicitly recognises that there are two principal reasons why maternity leave is accorded. First, that with pregnancy, biological changes occur. Second, post childbirth “multiple burdens” follow. (See: C-366/99 *Griesmar*, [2001] ECR I-9383)

**11.4** Therefore, if one were to recognise even the latter reason the commissioning mother, to my mind, ought to be entitled to maternity leave.

**11.5** It is clearly foreseeable that a commissioning mother needs to bond with the child and at times take over the role of a breast-feeding mother, immediately after the delivery of the child.

**11.6** In sum, the commissioning mother would become the principal care giver upon the birth of child; notwithstanding the fact that child in a given situation is bottle-fed.

**11.7** It follows thus, to my mind, that the commissioning mother's entitlement to maternity leave cannot be denied only on the ground that she did not bear the child. This is de hors the fact that a commissioning mother may require to be at the bed side of the surrogate mother, in a given situation, even at the pre-natal stage; an aspect I have elaborated upon in the latter part of my judgment.

**11.8** The circumstances obtaining in the present case, however, indicate that the genetic father made use of a donor egg, which then, was implanted in the surrogate mother.

**11.9** The surrogate mother in this case had no genetic connection with the children she gave birth to. The surrogate mother however, carried the pregnancy to term.

**12.** Undoubtedly, the fact that the surrogate mother carried the pregnancy to full term, involved physiological changes to her body, which were not experienced by the commissioning mother but, from this, could one possibly conclude that her emotional involvement was any less if, not more, than the surrogate mother?

**12.1** Therefore, while the submission advanced by Mr. Rajappa that maternity leave is given to a female employee who is pregnant, to deal with biological changes, which come about with pregnancy, and to ensure the health and safety, both of the mother and the child, while it is in her womb, is correct; it is, I am afraid, an uni-dimensional argument, offered to explain the meaning of the term “maternity”, as found incorporated in the extant rules.

**12.2** The rules as framed do not restrict the grant of leave to only those female employees, who are themselves pregnant as would be evident from the discussion and reasons set forth hereafter. For this purpose, in the first instance, I intend to examine the scope and effect of the Rules to the extent relevant for the purposes of issues raised in the writ petition.

**12.3** The word ‘maternity’ has not been defined in the Central Civil Services (Leave) Rules, 1972 (in short the Leave Rules), which respondents say are applicable to the petitioner.

**12.4** Rule 43, which makes provision for maternity, for the sake of convenience, is extracted hereinbelow:

“...43. Maternity Leave:

(1) A female Government servant (including an apprentice) with less than two surviving children may be granted maternity leave by an authority competent to grant leave for a period of (180 days) from the date of its commencement.

(2) During such period, she shall be paid leave salary equal to the pay drawn immediately before proceeding on leave. NOTE:- In the case of a person to whom Employees' State Insurance Act, 1948 (34 of 1948), applies, the amount of leave salary payable under this rule shall be reduced by the amount of benefit payable under the said Act for the corresponding period.

(3) Maternity leave not exceeding 45 days may also be granted to a female Government servant (irrespective of the number of surviving children) during the entire service of that female Government in case of miscarriage including abortion on production of medical certificate as laid down in Rule

19: 'Provided that the maternity leave granted and availed of before the commencement of the CCS (Leave) Amendment Rules, 1995, shall not be taken into account for the purpose of this sub-rule'.

(4) (a) Maternity leave may be combined with leave of any other kind. (b) Notwithstanding the requirement of production of medical certificate contained in sub-rule (1) of Rule 30 or sub-rule (1) of Rule 31, leave of the kind due and admissible (including commuted leave for a period not exceeding 60 days and leave not due) up to a maximum of one year may, if applied for, be granted in continuation of maternity leave granted under sub-rule (1).

(5) Maternity leave shall not be debited against the leave account..."

**12.5** A perusal of Rule 43 would show that a female employee including an apprentice with less than two surviving children, can avail of maternity leave for 180 days from the date of its commencement. Sub-rule (3) of Rule 43 is indicative of the fact that where the female employee has suffered a miscarriage, including abortion, she can avail of maternity leave not exceeding 45 days. Importantly, clause (a) of sub-rule (4) of Rule 43, states that maternity leave can be combined with leave of any other kind. Furthermore, under clause (b) of sub-rule (4) such a female employee is entitled to leave of the kind referred to in Rule 31(1) notwithstanding the requirement to produce a medical certificate, subject to a maximum of two years, if applied for, in continuation of maternity leave granted to her. Sub-rule (5) of Rule 43 states that, maternity leave shall not be debited against leave account.

**13.** There are three other Rules to which I would like to refer to. These are Rules 43-A, 43-AA and 43-B.

**13.1** Rule 43-A deals with paternity leave available to a male employee for the defined period, where "**his wife**" is confined on account of child birth. The said Rule allows a male employee, including an apprentice, with less than two surviving children, to avail of 15 days leave during the confinement of his wife for child birth, that is, up to 15 days "**before**" or "**up to 6 months**" from the date of delivery of the child.

#### **[43-A. Paternity leave:**

(1) A male Government servant (including an apprentice) with less than two surviving children, may be granted Paternity Leave by an authority competent to grant leave for a period of 15 days, during the confinement of his wife for childbirth, i.e., up to 15 days before, or up to six months from the date of delivery of the child.

(2) During such period of 15 days, he shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

(3) The paternity Leave may be combined with leave of any other kind.

(4) The paternity leave shall not be debited against the leave account.

(5) If Paternity Leave is not availed of within the period specified in sub-rule (1), such leave shall be treated as lapsed.

NOTE:- The Paternity Leave shall not normally be refused under any circumstances.]

**13.2** Sub-rule (4) of Rule 43-A makes it clear that if paternity leave is not availed of within the period specified above, such leave shall be treated as lapsed.

**13.3** Like in the case of a female employee, paternity leave can be combined with leave of any other kind, and the said leave is not debited against the male employee's leave account. This position emanates upon reading of sub-rule (3) and sub-rule (4) of Rule 43-A above.

**13.4** Rule 43-AA deals with paternity leave made available, to a male employee, for the defined period, albeit from the date of "**valid adoption**".

#### **[43-AA. Paternity Leave for Child Adoption. –**

(1) A male Government servant (including an apprentice) with less than two surviving children, on valid adoption of a child below the age of one year, may be granted Paternity Leave for a period of 15 days within a period of six months from the date of valid adoption.

(2) During such period of 15 days, he shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

(3) The paternity leave may be combined with leave of any other kind.

(4) The Paternity Leave shall not be debited against the leave account.

(5) If Paternity leave is not availed of within the period specified in sub-rule (1) such leave shall be treated as lapsed.

[Note 1]: - The Paternity Leave shall not normally be refused under any circumstances.]

[Note 2]: - “Child” for the purpose of this rule will include a child taken as ward by the Government servant, under the Guardians and Wards Act, 1890 or the personal law applicable to that Government servant, provided such a ward lives with the Government servant and is treated as a member of the family and provided such Government servant has, through a special will, conferred upon that ward the same status as that of a natural born child.]

**13.5** The aforementioned rule is *pari materia* with Rule 43-A, in all other aspects; the only difference being that the paternity leave of 15 days available to the male employee should be availed of within 6 months from the date of a valid adoption.

**13.6** Under the Leave Rules, a female employee is also entitled to leave if she were to adopt a child as against taking recourse to the surrogacy route. In other words, there is a provision in the Leave Rules for **Child Adoption Leave**. The relevant provision in this behalf is made in Rule 43-B.

**[43-B. Leave to a female Government servant on adoption of a child:**

(1) A female Government servant, with fewer than two surviving children, on valid adoption of a child below the age of one year may be granted child adoption leave, by an authority competent to grant leave, for a period of [180 days] immediately after the date of valid adoption.

(2) During the period of child adoption leave, she shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

(3)(a) Child adoption leave may be combined with leave of any other kind.

(b) In continuation of the child adoption leave granted under sub-rule (1), a female Government servant on valid adoption of a child may also be granted, if applied for, leave of the kind due and admissible (including leave not due and commuted leave not exceeding 60 days without production of medical certificate) for a period upto one year reduced by the age of the adopted child on the date of valid adoption, without taking into account child adoption leave.

Provided that this facility shall not be admissible in case she is already having two surviving children at the time of adoption.

(4) Child adoption leave shall not be debited against the leave account.]

[Note: - “Child” for the purpose of this rule will include a child taken as ward by the Government servant, under the Guardians and Wards Act, 1890 or the personal Law applicable to that Government servant, provided such a ward lives with the Government servant and is treated as a member of the family and provided such Government servant has, through a special will, conferred upon that ward the same status as that of a natural born child.]

The said Rule was substituted by notification dated 31.03.2006 and was published in the gazette of India on 27.04.2006; to take effect from 31.03.2006.

It appears that prior to the insertion of Rule 43-B, the said rule was numbered as 43-A and was inserted vide notification dated 22.10.1990, which was published in the gazette of India, on 26.01.1991. The said notification was, however, substituted by another notification dated 04.03.1992, which in turn was published in the gazette of India on 14.03.1992.]

**13.7** Rule 43-B, which enables the female employee with fewer than two surviving children, to avail of child adoption leave for a period of 180 days affixes, inter alia, a condition that there should be in place a “**valid adoption**” of a child below the age of one year. The period of 180 days commences immediately after the date of valid adoption. [See sub-rule (1) of Rule 43-B]

**13.8** Clause (a) of sub-rule (3) of Rule 43-B enables a female employee to combine child adoption leave with leave of any other kind. Clause (b) of sub-rule (3) of Rule 43-B, entitles a female employee in continuation of child adoption leave granted under sub-rule (1), on valid adoption of a child to apply for leave of the kind due and admissible (including leave not due and commuted leave not exceeding 60 days without production of medical certificates) for a period up to one year, albeit reduced by the age of adopted child on the date of “valid adoption”. In other words, this sub-rule allows a female employee to apply for any other leave which is due and admissible in addition to child adoption leave. There is, however, a proviso added to the said sub-rule which prevents a female employee to avail of such leave if she already has two surviving children at the time of adoption.



**13.9** As in the other rules, child adoption leave is not to be debited against the leave account.

**14.** Thus, a reading of Rule 43 would show that while it is indicated in sub-rule (1) as to when the period of leave is to commence, that is, from the date of maternity; the expression 'maternity' by itself has not been defined. As a matter of fact, sub-rule (3) of Rule 43 shows that if the pregnancy is not carried to full term on account of miscarriage, which may include abortion, a female employee is entitled to leave not exceeding 45 days.

**15.** There are two ways of looking at Rule 43. One, that the word, 'maternity' should be given the same meaning, which one may argue inheres in it, on a reading of sub-rule (3) of Rule 43; which is the notion of child bearing. The other, that the word "**maternity**", as appearing in sub-rule (1) of Rule 43, with advancement of science and technology, should be given a meaning, which includes within it, the concept of motherhood attained via the surrogacy route. The latter appears to be more logical if, the language of Rule 43-A, which deals with paternity leave, is contrasted with sub-rule (1) of Rule 43. Rule 43-A makes it clear that a male employee would get 15 days of leave "**during the confinement of his wife for child birth**", either 15 days prior to the event, or thereafter, i.e. after child birth, subject to the said leave being availed of within 6 months of the delivery of the child.

**15.1** There is no express stipulation in sub-rule (1) of Rule 43 to the effect that the female employee (applying for leave) should also be one who is carrying the child. The said aspect while being implicit in sub-rule (1) of Rule 43, does not exclude attainment of motherhood via surrogacy. The attributes such as "**confinement**" of the female employee during child birth or the conditionality of division of leave into periods before and after child birth do not find mention in Rule 43(1).

**15.2** Having regard to the aforesaid position emanating upon reading of the Rules, one is required to examine the tenability of the objections raised by the respondents.

**16.** The argument of the respondents, in sum, boils down to this: that the word 'maternity' can be attributed to only those female employees, who conceive and carry the child during pregnancy. In my view, the argument is partially correct, for the reason that the word 'maternity' pertains to the 'character, condition, relation or state of a mother' [Black's Law Dictionary, 6th Edition at page 977]. In my opinion, where a surrogacy arrangement is in place, the commissioning mother continues to remain the legal mother of the child, both during and after the pregnancy...

**16.1** Therefore, according to me, maternity is established vis-a-vis the commissioning mother, once the child is conceived, albeit in a womb, other than that of the commissioning mother.

**16.2** It is to be appreciated that Maternity, in law and/or on facts can be established in any one of the three situations: First, where a female employee herself conceives and carries the child. Second, where a female employee engages the services of another female to conceive a child with or without the genetic material being supplied by her and/or her male partner. Third, where female employee adopts a child.

**16.3** In so far as the third circumstance is concerned, a specific rule is available for availing leave, which as indicated above, is provided for in Rule 43-B. In so far as the first situation is concerned, it is covered under sub-rule (1) of Rule 43. However, as regards the second situation, it would necessarily have to be read into sub-rule (1) of Rule 43.

**16.4** To confine sub-rule (1) of Rule 43 to only to that situation, where the female employee herself carries a child, would be turning a blind eye to the advancement that science has made in the meanwhile. On the other hand, if a truncated meaning is given to the word 'maternity', it would result in depriving a large number of women of their right to avail of a vital service benefit, only on account of the choice that they would have exercised in respect of child birth.

**17.** The argument of the respondents that the underlying rationale, for according maternity leave (which is to secure the health and safety of pregnant female employee), would be rendered nugatory - to my mind, loses sight of the following:

- (i) First, that entitlement to leave is an aspect different from the right to avail leave.
- (ii) Second, the argument centres, substantially, around, the interest of the carrier, and in a sense, gives, in relative terms, lesser weight to the best interest of the child.

**17.1** In a surrogacy arrangement, the concern of the commissioning parents, in particular, the commissioning mother is to a large extent, focused on the child carried by the gestational mother. There may be myriad situations in which the interest of the child, while still in the womb of the gestational mother, may require to be safeguarded by the commissioning mother. To cite an example, a situation may arise where a commissioning mother may need to attend to the surrogate/ gestational mother during the term of pregnancy; because the latter may be bereft of the necessary wherewithal. The lack of wherewithal could be of: financial nature (the arrangement in place may not suffice for whatever reasons), physical

condition or emotional support or even a combination of one or more factors stated above. In such like circumstances, the commissioning mother can function effectively, as a care-giver, only if, she is in a position to exercise the right to take maternity leave. To my mind, to curtail the commissioning mother's entitlement to leave, on the ground that she has not conceived the child, would work, both to her detriment, as well as, that of the child.

**18.** The likelihood of such right, if accorded to the commissioning mother, being misused can always be curtailed by the competent leave sanctioning authority.

**18.1** At the time of sanctioning leave the competent authority can always seek information with regard to circumstances which obtain in a given case, where application for grant of maternity leave is made. The competent authority's scrutiny, to my mind, would be keener and perhaps more detailed, where leave is sought by the commissioning mother at the pre-natal stage, as against post-natal stage. If conditions do not commend that leave be given at the pre-natal stage, then the same can be declined.

**18.2** In so far as post-natal stage is concerned, ordinarily, leave cannot be declined as, under most surrogacy arrangements, once the child is born, its custody is immediately handed over to the commissioning parents. The commissioning mother, post the birth of the child, would, in all probability, have to play a very crucial role in rearing the child.

**18.3** However, these are aspects which are relatable to the time and the period for which maternity leave ought to be granted. The entitlement to leave cannot be denied, to my mind, on this ground.

...

**20.** In our Constitution, under Article 39(f), which falls in part IV, under the heading Directive Principles of the States policy, the state is obliged to, inter alia, ensure that the children are given opportunities and facilities to develop in a healthy manner. Similarly, under Article 45, State has an obligation to provide early childhood care.

**20.1** Non-provision of leave to a commissioning mother, who is a employee, would, to my mind, be in derogation of the stated Directive Principles of State Policy as contained in the Constitution.

**21.** In this context, regard may also be had to Article 6 of the United Nations Convention on Rights of Child (UNCRC).

**21.1** Article 6 of the UNCRC provides that the States, which are party to the Convention, shall recognize that every child has the inherent right to life. A State-party is thus obliged to ensure, to the maximum extent possible, the survival and development of the child. Undoubtedly, India is a signatory to the UNCRC.

**21.2** There is no municipal law, which is in conflict with the provisions of Article 6 of the UNCRC. The State, therefore, is obliged to act in a manner which ensures that it discharges its obligations under the said Article of the UNCRC. [See *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360; *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 and *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 at para 484 to 487/para 51 to 60].

**22.** The Madras High Court in *K. Kalaiselvi's* case equated the position of an adoptive parent to that of a parent who obtains a child via a surrogacy arrangement. The observations of the court, to that effect, are found in the following paragraphs of the judgement.

"13. Alternatively, he contended that if law can provide child care leave in case of adoptive parents as in the case of Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987, then they should also apply to parents like the petitioner who obtained child through surrogate agreement since the object of such leave is to take care of the child and developing good bond between the child and the parents.

[Rule 3-A - Leave to female employees on adoption of a child:

A female employee on her adoption a child may be granted leave of the kind and admissible (including commuted leave without production of medical certificate for a period not exceeding 60 days and leave not due) upto one year subject to the following conditions:

(i) the facility will not be available to an adoptive mother already having two living children at the time of adoption;

(ii) the maximum admissible period of leave of the kind due and admissible will be regulated as under:

(a) If the age of the adopted child is less than one month, leave upto one year may be allowed.

(b) If the age of the child is six months or more, leave upto six months may be allowed.

(c) If the age of the child is nine months or more leave upto three months may be allowed.]

14. However, the learned counsel for the Port Trust contended that in the absence of any specific legal provision, the question of this court granting leave will not arise.

15. In the light of these rival contentions, it has to be seen whether the petitioner is entitled for a leave similar to that of the leave provided under Rule 3-A and whether her child's name is to be included in the FMI Card for availing future benefits?

16. This court do not find anything immoral and unethical about the petitioner having obtained a child through surrogate arrangement. For all practical purpose, the petitioner is the mother of the girl child G.K. Sharanya and her husband is the father of the said child. When once it is admitted that the said minor child is the daughter of the petitioner and at the time of the application, she was only one day old, she is entitled for leave akin to persons who are granted leave in terms of Rule 3-A of the Leave Regulations. The purpose of the said rule is for proper bonding between the child and parents. Even in the case of adoption, the adoptive mother does not give birth to the child, but yet the necessity of bonding of the mother with the adoptive child has been recognised by the Central Government. Therefore, the petitioner is entitled for leave in terms of Rule 3-A. Any other interpretation will do violence to various international obligations referred to by the learned counsel for the petitioner. Further, it is unnecessary to rely upon the provisions of the Maternity Benefit Act for the purpose of grant of leave, since that act deals with actual child birth and it is mother centric. The Act do not deal with leave for taking care of the child beyond 6 weeks, i.e., the post natal period. The right for child care leave has to be found elsewhere. However, this court is inclined to interpret Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987 also to include a person who obtain child through surrogate arrangement..."

**22.1** The ratio of the judgement, to my mind, is that, an adoptive parent is no different from a commissioning parent, which seeks to obtain a child via a surrogacy arrangement. The Madras High Court thus interpreted Rule 3-A of the Madras Port Trust Regulation to include a female employee who seeks to obtain a child via a surrogacy arrangement.

**23.** In the instant case, in so far as Rule 43-B obtains, the situation is somewhat similar to that which prevailed in *K. Kalaiselvi's* case.

**23.1** Having said so, in my opinion, the impediment perhaps in applying the ratio set forth in *K. Kalaiselvi's* case would be, if at all, on account of the presence of the expression, 'valid adoption', in Rule 43-B; which is also one of the objections taken by the respondents to the entitlement to leave by a commissioning mother under the said Rule.

**23.2** For the sake of completeness I must refer to the judgement of the Kerala High Court on somewhat similar issue in the matter of *P. Geetha v. The Kerala Livestock Development Board Ltd.* 2015 (1) KLJ 494. However, the gamut of rules that this court is called upon to examine are not, in their entirety, similar to the ones that were before the Kerala High Court. To cite an example in *P. Geetha's* case the rules framed by the Kerala Livestock Development Board did not provide for paternity leave.

**23.3** Therefore, in my view, in such like situations, the appropriate course would be to allow commissioning mothers to apply for leave under Rule 43(1).

**24.** In view of the discussion above, the conclusion that I have reached is as follows:-

(i). A female employee, who is the commissioning mother, would be entitled to apply for maternity leave under sub-rule (1) of Rule 43.

(ii). The competent authority based on material placed before it would decide on the timing and the period for which maternity leave ought to be granted to a commissioning mother who adopts the surrogacy route.

(iii). The scrutiny would be keener and detailed, when leave is sought by a female employee, who is the commissioning mother, at the pre-natal stage. In case maternity leave is declined at the pre-natal stage, the competent authority would pass a reasoned order having regard to the material, if any, placed before it, by the female employee, who seeks to avail maternity leave. In a situation where both the commissioning mother and the surrogate mother are employees, who are otherwise eligible for leave (one on the ground that she is a commissioning mother and the other on the ground that she is the pregnant women), a suitable adjustment would be made by the competent authority.

(iv). In so far as grant of leave qua post-natal period is concerned, the competent authority would ordinarily grant such leave except where there are substantial reasons for declining a request made in that behalf. In this case as well, the competent authority will pass a reasoned order.

25. The writ petition is disposed of, in the aforementioned terms.

26. Parties shall, however, bear their own costs.”

## IN THE HIGH COURT OF DELHI

**Major Anamdeep Singh Dhingra v. Union of India & Ors.**

**2016 SCC OnLine Del 4060**

**Pradeep Nandrajog and Pratibha Rani, JJ.**

***The petitioner was employed with the Army Dental Corps as a Short Service Commission Officer. His wife suffered from a medical condition because of which she was unable to conceive without fertility treatment. The treatment was only available at Delhi, where the petitioner was posted. Further, the petitioner's presence with his wife in Delhi was necessary for at least seven months as ART procedures could require three to four attempts with interval periods between each attempt. The petitioner was directed to move to a field hospital where ART procedures were not available. Being aggrieved of his posting order, he invoked the writ jurisdiction of the Delhi High Court, seeking quashing of such posting order as he wanted to remain in Delhi with his wife where they could undertake the required medical treatment.***

**Nandrajog, J.:** “The petitioner joined the Army Dental Corp. as a Short Service Commission Officer on January 17, 2008. He was married in November, 2009. Unfortunately petitioner's wife suffered from Polycystic Ovarian disease. Under strict medical supervision petitioner's wife could conceive and good luck blessed the couple with a baby boy born on August 30, 2013. But ill luck followed. The infant was suffering from a severe disability having Hypoplastic Left Heart (sic) Syndrome. Adding a number to the population of this country on August 30, 2013, after fourteen days the unfortunate infant reduced the number by one to the population. He passed away.

2. Desirous of having a progeny of their own, the petitioner and his wife sought for a transfer to a family station so that they could avail the benefit of specialised IVF facilities. The petitioner was posted at a family station and is aggrieved by his posting to the 2136 Field Hospital at Pooh in Himachal Pradesh. The reason why the petitioner questions the posting order is the need to be with his wife who needs expert medical supervision in trying to conceive. Polycystic Ovarian Disease with which petitioner's wife is afflicted means that the ovum inside the ovary either does not form or forms immature and hence unfit for fertilization by the sperm; the result is no conception. A drug called Metformin is administered to females suffering from Polycystic Ovarian disease. It cuts down the blood sugar level, which are generally high due to insulin resistance in such patients. This helps the ovum to mature for fertilization by the sperm. It also has to be ensured that Luteinizing hormone is below a particular level to sustain the embryo after fertilization takes place. All this requires constant monitoring.

3. Medical documents evince that petitioner's wife consulted the expert on December 20, 2015 who started administering Metformin to petitioner's wife under strict vigil, constantly monitoring her parameters. Medical documents shows that the regular follicular monitoring over three months suggest hormonal profile stabilising suggesting that petitioner's wife could continue further treatment for conception. But the requisite hormonal profile not being achieved oral medication continued. The wife of the petitioner can, as per the medical expert, have intrauterine insemination and for which the likely date is July 29, 2016. If first attempt of intrauterine insemination fails two or three more attempts would be made in the next menstrual cycles and if this fails the expert would go in for a test tube baby in medical parlance ‘In Vitro Fertilization’. Three-four attempts would be made with an interval of month each if the first, second or third IVF fails. If petitioner's wife conceives she would be under constant supervision because she carries a very high risk of Gestational Diabetes Mellitus (Deranged sugar), preeclampsia (Deranged high blood pressure) throughout her pregnancy. Age is a major concern because post 35, petitioner's wife would hardly had (sic) any chance of conception.

4. The position, therefore, would be that if God willing, the intrauterine insemination sustains by the end of the month the petitioner's wife would be blessed with the baby after nine months. Meaning thereby petitioner's presence with his wife would be a must for at least ten months reckoning from now. If the first intrauterine insemination fails and the second succeeds this period would be extended to eleven months. If even the second fails, and number third succeeds, this period of stay would be extended to a year. If intrauterine insemination fails and petitioner's wife is to go for a test-tube baby, the first IVF attempt would be made after four months from today. If it fails, the next after five months. If that fails the next after six months.
  5. The future is uncertain. But one thing is clear. In the next seven months at least the petitioner's presence at Delhi is necessary. Whether further presence is necessary would depend upon whether petitioner's wife conceives.
  6. Conscious of the fact that the Indian Army is short of doctors, but the Indian Army can surely spare one officer.
  7. It is a competing claim of hardships. The petitioner claims hardships so do the respondents.
  8. But in the competition we find petitioner's hardship to be more pressing and of the kind that if the petitioner is not with his wife for at least seven months, the cause for which the petitioner and his wife are struggling for shall be lost forever.
  9. The policy dated October 20, 2009 regarding treatment at Assisted Reproductive Technology for officers of the Indian Army on which the respondents rely may strictly not vest a power with the competent authority to permit the petitioner to stay on in Delhi, but we find that there is no negative stipulation in the policy.
  10. Under the circumstances in view of the exceptional facts of the instant case we dispose of the petition quashing the posting and the movement orders dated May 9, 2016 and June 16, 2016 respectively. We direct that the petitioner should be posted at a duty station in the NCR where he can stay with his wife and be properly monitored by the Gynaecologist under whom petitioner's wife is being treated.
- ...

## Endnotes

- 1 The Indian Council for Medical Research (ICMR) in its guidelines relating to Artificial Reproductive Technologies (ART) clinics, defines ART to include “all techniques that attempt to obtain a pregnancy by manipulating the sperm or/and oocyte outside the body, and transferring the gamete or embryo into the uterus.” Ministry of Health and Family Welfare, Government of India, NATIONAL GUIDELINES FOR ACCREDITATION, SUPERVISION AND REGULATION OF ART CLINICS IN INDIA (2005), *available at* <https://www.icmr.nic.in/sites/default/files/guidelines/Chapter.pdf> (ART include Artificial Insemination, Assisted Hatching, Intracytoplasmic Sperm Injection, Intrauterine Insemination, In *vitro* Fertilisation-Embryo Transfer).
- 2 See Ministry of Health and Family Welfare, Government of India, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005), *available at* <https://www.icmr.nic.in/sites/default/files/guidelines/b.pdf>.
- 3 See Ministry of Health and Family Welfare, Government of India, Commission of Surrogacy-Instructions Regarding (2015), *available at* <https://dhr.gov.in/sites/default/files/latest Govt. instructions on ART Surrogacy Bill.pdf>.
- 4 (2008) 13 SCC 518.
- 5 The parents of the baby had separated during the pregnancy. The intending mother was no longer interested in taking custody of the child. Hence, the intending father of the child, and his mother came to India to take custody of the child. Due to law and order issues, the child had to be moved from Gujarat (where it was born) to Rajasthan. The visa of the intending father expired during the process. Hence, the paternal grandmother was the one seeking custody of the child.
- 6 For a discussion of cases on the issue of maternity benefits in the context of employment, see Chapter 12, “Pregnancy, Maternity and Child Care Leave, and Employment.”
- 7 (2015) 221 DLT 756. See also Hema Vijay Menon v. State of Maharashtra, (2015) SCC OnLine Bom 6127; Kalaiselvi v. Chennai Port Trust, (2013) 3 Mad LJ 493; P. Geetha v. The Kerala Livestock Development Board, 2015 (1) KLJ 494.
- 8 2016 SCC OnLine Del 4060.
- 9 U.N. Office of the High Commissioner for Human Rights, “Status of Ratification Interactive Dashboard—India,” <http://indicators.ohchr.org/>.
- 10 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained in U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001), Arts. 3-4.*
- 11 Vishaka v. State of Rajasthan, AIR 1997 SC 3011.



# CHAPTER FIVE



# MEDICAL TERMINATION OF PREGNANCY

Prior to 1971, abortions were governed solely by Sections 312-314 of the Indian Penal Code 1860 (IPC) and could not be performed except for saving a pregnant woman's life. In 1971, the Medical Termination of Pregnancy Act (MTP Act) was enacted to eliminate abortions by untrained persons and in unhygienic conditions and to reduce maternal morbidity and mortality.<sup>1</sup> In **Jacob George v. State of Kerala**,<sup>2</sup> the Supreme Court clarified that the provisions of the IPC relating to miscarriage are subservient to the MTP Act.

A challenge to the constitutional validity of the MTP Act on the premise that it violates the fundamental right to life of an unborn child was rejected by the Rajasthan High Court in **Nand Kishore Sharma v. Union of India**.<sup>3</sup> It held that the MTP Act was in consonance with Article 21 of the Indian Constitution as its dominant object was to save the life of pregnant women, to prevent any injury to their physical or mental health, and to prevent possible impairments in the child to be born. With the Supreme Court's decision in **Suchita Srivastava v. Chandigarh Administration**,<sup>4</sup> a woman's right to make reproductive choice, including the choice to procreate or abstain from procreating has been recognized as part of her personal liberty under Article 21 of the Indian Constitution.<sup>5</sup> The Bombay High Court, in **High Court on its Own Motion v. State of Maharashtra**,<sup>6</sup> reiterated the position stated in **Suchita Srivastava** and further opined that:

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. ... These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.

... According to international human rights law, a person is vested with human rights only at birth; an unborn foetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control their own body and fertility and motherhood choices should be left to the women alone. Let us not lose sight of the basic right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant.

Although the MTP Act liberalized the law on abortion when compared to the provisions of the IPC, it does not provide women an unrestricted right of abortion. The permissibility of abortion under the Act has frequently come up for adjudication before the Courts. This chapter contains cases pertaining to:

- Seeking Judicial Authorization for Medical Termination of Pregnancy
- Termination Beyond the 20-Week Period
- Consent of a Minor for Medical Termination of her Pregnancy
- Consent of a Mentally Disabled Woman for Medical Termination of her Pregnancy
- Spousal Consent for Medical Termination of Pregnancy
- Prosecutions for Contravention of the MTP Act

## Seeking Judicial Authorization for Medical Termination of Pregnancy

While the MTP Act does not require judicial authorization for the termination of a pregnancy, courts are repeatedly approached for this purpose. In cases where women (or their guardians, in the case of minors) have sought permission for termination of pregnancies resulting from rape *within* the 20 week gestational limit under the MTP Act, courts generally tend to affirm Section 3 of the MTP Act and either permit such termination or direct a medical board to explore with the woman or girl the possibility of termination in consonance with Section 3 of the MTP Act.<sup>7</sup> For example, in **X v. Govt of NCT of Delhi**,<sup>8</sup> an HIV positive woman was 18 weeks pregnant as a result of forced prostitution. The woman was lodged in a government protection home and her initial request for abortion was denied by the concerned authorities.

She petitioned the Delhi High Court against this denial. The High Court allowed the termination of her pregnancy, relying on Section 3 of the MTP Act, and in particular her willingness to terminate a pregnancy that resulted from rape as well as the mental, physical, social and economic problems that the woman was likely to face from continuation of the pregnancy.

At the same time, in *Bashir Khan v. State of Punjab*,<sup>9</sup> and *Kamla Devi v. State of Haryana*,<sup>10</sup> the Punjab and Haryana High Court clarified that for a pregnancy under the 20 week gestational limit, there is no requirement to obtain permission of any authority for termination of pregnancy under the MTP framework aside from the medical opinion of the requisite number of medical practitioners and consent of the woman or guardian in case of a minor.

In *Hallo Bi v. State of Madhya Pradesh*,<sup>11</sup> a woman under-trial prisoner approached the High Court of Madhya Pradesh seeking permission for termination of her pregnancy of about 12 weeks, which was a result of forced prostitution. Her initial request made to the jail authorities was forwarded to a chief judicial magistrate, who rejected it. The High Court allowed her to terminate her pregnancy relying on the ruling in *Suchita Srivastava* that a women's right to make reproductive choices is a dimension of her personal liberty and in view of the medical opinion on feasibility of abortion. It held that "forced prostitution" amounts to rape and was covered within the conditions stipulated under Section 3(2) of the MTP Act for termination of pregnancy.

## Termination Beyond the 20-Week Period

Under Section 5 of the MTP Act, termination of pregnancies *beyond* 20 weeks is permitted if one registered medical practitioner is of the opinion, formed in good faith, that such termination is "immediately necessary" for saving the life of the pregnant woman. The Section does not require any judicial authorization for post-20 weeks terminations. However, when doctors deny abortion post-20 weeks, pregnant women approach the Supreme Court and High Courts seeking permission to terminate the pregnancy.<sup>12</sup> In such cases, Courts generally direct the setting up of a medical board comprising of a multi-specialty team of doctors to examine the pregnant woman and provide a medical report to the Court.<sup>13</sup> In adjudicating such cases, courts have looked at the following different factors while determining the permissibility of terminating a pregnancy beyond 20 weeks:

### RISK TO THE PREGNANT WOMAN FROM CONTINUING WITH THE PREGNANCY

In most post-20 weeks cases courts require a medical opinion on the risks of continuing with the pregnancy in order to determine whether the pregnancy would endanger the life of the pregnant woman. In *Meera Santosh Pal v. Union of India*,<sup>14</sup> the Supreme Court emphasized a woman's right to reproductive autonomy and bodily integrity, and stated that this includes the right to take all steps necessary to preserve her own life. Therefore, the Court permitted termination of a pregnancy that posed a danger to the pregnant woman.

In *High Court on its Own Motion v. State of Maharashtra*,<sup>15</sup> the Bombay High Court opined that continuing *any* unwanted pregnancy to term "represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health."

### RISK TO THE PREGNANT WOMAN FROM TERMINATION

Courts also routinely seek medical opinion on the risks associated with terminating the pregnancy. Though termination of pregnancy in accordance with medical standards at any stage of the pregnancy is by itself not associated with high risk of morbidity or mortality,<sup>16</sup> where a medical opinion by the court-appointed medical board raises concerns about the risks of termination associated with the particular health condition of the pregnant woman, courts have been reluctant to authorize termination of the pregnancy. For example, the Rajasthan High Court in *Jamana Suthar v. State of Rajasthan*,<sup>17</sup> and Punjab and Haryana High Court in *Kavita v. State of Haryana*,<sup>18</sup> disallowed termination of pregnancy because the medical opinion stated that it was likely to endanger the life of the minor rape survivors.

Likewise, the Supreme Court in *Alakh Alok Srivastava v. Union of India*,<sup>19</sup> *Murugan Nayakkar v. Union of India*,<sup>20</sup> and *Chanchala Kumari v. Union of India*,<sup>21</sup> heavily relied on the medical board's opinion concerning the risks involved in termination of pregnancy without making an explicit reference to Section 3 or 5 of the MTP Act. All three cases dealt with pregnancies of very young children. In *Alakh Alok Srivastava*, the medical board opined that the risk of terminating the pregnancy was higher than the risk of carrying the pregnancy to term. Based on this opinion, the Court declined permission to terminate a pregnancy over the 20-week limit. In the other two cases, however, the respective medical boards were of the opinion that the risk from terminating the pregnancy was less than the risk of carrying the pregnancy to term. The Supreme Court accordingly permitted the termination of pregnancy in both cases.

## RISK TO THE PREGNANT WOMAN AS A RESULT OF FOETAL IMPAIRMENT

Pregnant women have approached the Supreme Court and High Courts across the country seeking permission to terminate pregnancies after 20 weeks following foetal impairment diagnoses. Where women receive diagnoses of foetal impairments that are incompatible with extra-uterine life, courts have tended to permit such abortions, stating that carrying such a pregnancy to term poses risks to the mental and physical health of the pregnant woman. In **Meera Santosh Pal v. Union of India**,<sup>22</sup> and **X v. Union of India**,<sup>23</sup> the Supreme Court emphasized that a pregnant woman has the right to preserve her own life and cannot be forced to continue a pregnancy that may cause her physical or mental injury. In both these cases there were fatal foetal impairments and the medical opinion noted that carrying the pregnancy to term would pose risks to the pregnant woman's mental and physical health.<sup>24</sup> Similarly, in **Mamta Verma v. Union of India**,<sup>25</sup> and **X v. Union of India**,<sup>26</sup> the Supreme Court permitted post-20 week abortions on the ground of foetal impairments that were incompatible with life outside the uterus. In both cases, the Court also took into account the risk of mental injury to the pregnant woman from carrying the pregnancy to term.<sup>27</sup> In **Shaikh Ayesha Khatoon v. Union of India**,<sup>28</sup> the Bombay High Court allowed termination of a 27 weeks' pregnancy, where there were several foetal impairments and low chances of independent survival post-birth. The Court also held that in order to meet the object of the MTP Act and advance the cause of justice, the conditions for medical termination of pregnancy provided under Section 3(2)(b)(i) & (ii) of the MTP Act should be read into Section 5(1), which considers termination of pregnancies over 20 weeks. It thus ruled that in cases of foetal impairments, mental injury caused to the woman would be sufficient to meet the requirement of Section 5 and denial of her choice to terminate the pregnancy would violate her personal liberty under Article 21.<sup>29</sup>

Courts have taken a similar approach in cases where there are foetal impairments that are compatible with extra-uterine life, but would require extensive surgical interventions carrying a very high risk of mortality or morbidity. The Supreme Court in **Sarmishtha Chakraborty v. Union of India**,<sup>30</sup> and **Sonali Sandeep Jadhav v. Union of India**,<sup>31</sup> the Bombay High Court in **Priti Mahendra Singh Rawal v. Union of India**,<sup>32</sup> and the Himachal Pradesh High Court in **Geeta Devi v. State of Himachal Pradesh**,<sup>33</sup> all allowed medical termination of pregnancies in such circumstances since continuation of the pregnancy would pose a risk to the mental health of the pregnant woman. In **Tapasya Umesh Pisal v. Union of India**,<sup>34</sup> however, the Supreme Court permitted termination of a 25-week pregnancy solely on the ground that the foetal impairment was linked to high mortality and morbidity after birth, required multiple corrective surgeries after birth, and was associated with a limited life span. Referring to Section 3 (2) (b) (ii) of the MTP Act which allows for termination of pregnancies until 20 weeks if there is a substantial risk that the child if born would "suffer from such physical or mental abnormalities as to be seriously handicapped," the Court held that since this case falls within the purview of this section, except for the gestational limit, it would be in the interests of justice to permit the abortion.

In contrast to the cases mentioned above, when the foetal impairment does not impact the likelihood of extra-uterine survival, and the medical opinion does not disclose any risks to the mental or physical health of the pregnant woman, courts have been reluctant to permit abortion post-20 weeks. This was the case in **Sheetal Shankar Salvi v. Union of India**,<sup>35</sup> and **Savita Sachin Patil v. Union of India**.<sup>36</sup>

Likewise, the Bombay High Court disallowed termination of pregnancy only on the ground of foetal impairment in **Nikhil D. Datar v. Union of India**.<sup>37</sup> Petitioners in this case challenged the constitutionality of Section 5 (1) of the MTP Act since it does not cover cases of foetal impairments involving substantial risk of serious disability in the child. This challenge was dismissed by the Bombay High Court on the reasoning that the legislature had, in its wisdom, placed gestational limits upon abortion of impaired fetuses. An appeal against this decision is pending in the Supreme Court.<sup>38</sup> The appeal challenges the constitutionality of the 20-week limit prescribed under Section 3(2)(b) for foetal impairment on grounds that this limit violates the right to life, health and dignified existence of women guaranteed under Article 21 of the Indian Constitution.

## PREGNANCY RESULTING FROM RAPE

In **Ashaben v. State of Gujarat**,<sup>39</sup> the Gujarat High Court adopted a strict interpretation of Section 5 of the MTP Act stating that it allowed termination of pregnancies exceeding 20 weeks only if continuation of pregnancy would endanger the life of the pregnant woman and not on the ground that the pregnancy resulted from rape. A similar approach was followed by the Gujarat High Court in **Chandrakant Jayantilal Suthar v. State of Gujarat**.<sup>40</sup> In this case, the Court was also guided by the fact that no medical opinion had been produced which suggested that continuing with the pregnancy would pose a danger to the life of the pregnant woman. On appeal, the Supreme Court directed the constitution of a medical board to examine whether the continuation of the pregnancy would pose a serious threat to the life of the pregnant woman, and if so determined, then to proceed with the abortion without seeking any additional permission from the Court.<sup>41</sup>

However, the Kerala High Court in **Ms. X v. State of Kerala**<sup>42</sup> allowed termination of pregnancy of a rape survivor by extending the ambit of Section 5 of the MTP Act to cover situations where such pregnancy results in grave mental stress and change of attitude in her normal life for which she is not prepared.

In **Bashir Khan v. State of Punjab**,<sup>43</sup> and **Kamla Devi v. State of Haryana**,<sup>44</sup> the Punjab and Haryana High Court recognized the physical and mental harm caused to rape survivors due to delay in termination of pregnancy; the Court directed the State to provide all assistance to rape survivors seeking abortion in obtaining requisite medical opinion and services.

In a pending case titled **Anusha Ravindra v. Union of India**,<sup>45</sup> the Supreme Court has admitted a matter regarding the need for framing appropriate medico-legal guidelines for setting up a permanent mechanism for expedient termination of pregnancies beyond 20 weeks in cases involving rape survivors and foetal impairment, and for urgent and safe termination of pregnancy. The Court, however, rejected the prayer for a direction to the legislature to accordingly amend Section 3 (2) of the MTP Act.

## RAPE OF A MINOR

In **Suchita Srivastava v. Chandigarh Administration**,<sup>46</sup> a case pertaining to abortion for a 19-year-old woman with intellectual disabilities, the Supreme Court stated that in cases where the Court is deciding the permissibility of abortion in the exercise of its *parens patriae* jurisdiction, it should consider the “best interest” of the woman concerned, through careful evaluation of the medical opinion on feasibility of abortion and consideration of her social circumstances. Such determination should be guided solely by the interest of the woman and not of her guardian or society in general. It should be independent of considerations such as the woman’s understanding of the sexual act or any apprehensions about her capacity to carry the pregnancy to its full term or discharge her maternal responsibilities.

Though **Suchita Srivastava** did not deal directly with abortion for minors, High Courts have relied on this judgment and have adopted a “best interests” approach in determining the permissibility of abortion for minors. In **Bhavikaben v. State of Gujarat**,<sup>47</sup> the Gujarat High Court allowed medical termination of pregnancy taking into account the young age and health of the rape survivor, the grave mental injury caused due to the unwanted pregnancy, and the medical opinion indicating no risk to her life from termination of pregnancy. Similarly, in **Madhuben Arvindbhai Nimavat v. State of Gujarat**,<sup>48</sup> and **Pujaben Subedar Yadav v. State of Gujarat**,<sup>49</sup> the High Court left the discretion with the medical practitioners to terminate the pregnancy if in their opinion the termination requested was in the best interest of the minor rape survivor.

The Punjab and Haryana High Court in **R v. State of Haryana**,<sup>50</sup> also applied the best interest test and considered the grave injury caused to physical and mental health of the minor rape survivor due to the social and emotional consequences of continuation of pregnancy, which was corroborated by the medical opinion. However, since the medical board constituted in this case gave an opinion against termination of pregnancy on the ground that the pregnancy was beyond the 20-week limit in the MTP Act, the Court felt unable to permit such termination. In its order, the Court also emphasized the necessity of revising the time limit under the MTP Act to permit abortions beyond 20 weeks. It advised the State to amend the MTP Act to clarify that doctors acting in good faith and in accordance with the rules to save the life of rape survivor or prevent grave injury to her physical or mental health will not be unnecessarily prosecuted.

In **X (since minor through her mother) v. Union of India**,<sup>51</sup> the Bombay High Court allowed termination of pregnancy of a deaf and mute minor rape survivor, diagnosed with Down syndrome, under Section 5 of the MTP Act. Aside from the danger to her life from continuation of pregnancy, the Court also considered the psychological trauma caused due to the unwanted pregnancy and opined that the pregnancy was violative of her personal liberty and against her best interest.

In **Bhatou Boro v. State of Assam**,<sup>52</sup> the medical board refused to give an opinion for termination of pregnancy of a minor rape survivor as it had exceeded 20 weeks. Noting the decisions of the Supreme Court where it allowed termination of pregnancies of over 20 weeks, the Gauhati High Court directed the medical board to re-examine the minor in light of the impact of the unwanted pregnancy on her mental health, and terminate her pregnancy if medically feasible, without being constrained by the legal limits under the MTP Act.

## Consent of a Minor for Medical Termination of her Pregnancy

Section 3(4)(a) of the MTP Act mandates the written consent of the guardian of a minor girl or a “mentally ill” woman or girl before termination of her pregnancy. In **V. Krishnan v. G. Rajan**,<sup>53</sup> the Madras High Court held that if a minor wished to continue her pregnancy, an abortion could not be performed only on the basis of her guardian’s consent, especially when the medical report did not indicate any foetal impairment and the minor was found to be fully aware of the consequences of pregnancy.

Similarly, in **Marimuthu v. Inspector of Police**,<sup>54</sup> the Court relied on the Convention on Rights of Child, the object of MTP Act and women's right to autonomy and bodily integrity to state that Section 3(4) cannot be read as to dispense with the consent of the minor where she wishes to continue her pregnancy. The Court also discussed issues relating to teenage pregnancy, child marriage and the age of consent under Protection of Children from Sexual Offences Act, 2012.

On the other hand, the Madhya Pradesh High Court in **Sundarlal v. State of MP**,<sup>55</sup> stated that it is not necessary to obtain a rape survivor's willingness to terminate her pregnancy, where she is a minor and her guardian consents to such termination.

## Consent of a Mentally Disabled Woman for Medical Termination of her Pregnancy

In **Suchita Srivastava v. Chandigarh Administration**,<sup>56</sup> the Supreme Court was approached on behalf of a woman diagnosed with "mental retardation" challenging the High Court's order for termination of her pregnancy without her consent. The Court affirmed that the consent of a woman, who has attained the age of majority and does not suffer from any "mental illness" (as distinct from "mental retardation" and as defined under Section 2 (b) of the MTP Act), constitutes an essential condition for termination of pregnancy. It pointed out that the legislative provisions treat "mental retardation" differently from mental illness. In its decision, the Supreme Court recognized and emphasized that a woman's right to make reproductive choices is a dimension of her personal liberty under Article 21 of the Indian Constitution.<sup>57</sup>

## Spousal Consent for Medical Termination of Pregnancy

While consent of the woman is an essential requirement for termination of her pregnancy as stated under Section 3(4)(2) (b),<sup>58</sup> the MTP Act does not require the husband's consent for terminating the pregnancy of a major woman.

In **Anil Kumar Malhotra v. Ajay Pasricha**,<sup>59</sup> the Supreme Court dismissed the appeal against the Punjab and Haryana High Court's decision in **Dr. Mangla Dogra v. Anil Kumar Malhotra**,<sup>60</sup> rejecting a suit for damages filed by the husband against his wife and doctors for terminating his wife's pregnancy without his consent on the reasoning that the MTP Act does not require the husband's consent for an abortion. The Gujarat High Court in **Nirav Anupambhai Tarkas v. State of Gujarat**,<sup>61</sup> upheld dismissal of a criminal complaint filed by a husband against his wife and her family for terminating her pregnancy despite his opposition, on the ground that his consent was not required for the termination.<sup>62</sup>

## Prosecution for Contravention of the MTP Act

Termination of pregnancy without a woman's consent is a non-bailable offence under Section 313 of IPC. A strict approach has been adopted by the Court while considering bail applications or petitions for quashing criminal prosecution filed in such cases. The Orissa High Court in **Binod Bihari Naik v. State of Orissa**,<sup>63</sup> dismissed a doctor's petition for quashing of criminal prosecution for allegedly terminating a pregnancy without the woman's consent as a *prima facie* case had been established against him.

The Delhi High Court in **Sushil Kumar v. Govt of NCT of Delhi**,<sup>64</sup> rejected anticipatory bail applications filed by a husband and his family accused under Section 313 of the IPC for forcing his wife to consume abortion pills, on the ground that these allegations were of a very serious nature. In **Dr. Saraswati v. State of Maharashtra**,<sup>65</sup> where an abortion that was carried out contrary to provisions of the MTP Act resulted in the death of the pregnant woman, the Bombay High Court rejected the bail application, since a strong *prima facie* case existed that the doctors' actions had led to the death of a woman.

The Supreme Court in **Surendra Chauhan v. State of M.P.**,<sup>66</sup> upheld the Madhya Pradesh High Court's decision to convict the accused for causing a woman's death by miscarriage. The accused had had "illicit relations" with the woman, which resulted in pregnancy, and had then brought her to a clinic where neither the doctor nor the clinic fulfilled the MTP Act's and Rules' requirements. Both the doctor and the present accused were convicted under Section 314 of the IPC.

In **Raj Bokaria v. Medical Council of India**,<sup>67</sup> the Court stressed that it is mandatory to record the formation of medical opinion on termination of pregnancy under Section 5(1), in the form prescribed under the Medical Termination of Pregnancy Regulations, 2003. Due to the absence of such record, the Court upheld action by the Ethics Committee of the Medical Council of India against the petitioner-doctor, who had terminated a woman's pregnancy of over 20 weeks in order to protect her life.

## Related Human Rights Standards and Jurisprudence

Below is a selection of international and regional human rights standards and jurisprudence relating to state obligations to ensure access to abortion. Human rights mechanisms have recognized that denial of abortion information and services profoundly affects women's lives and health and hinders the fulfillment of a range of civil, political, economic, and social rights. As such, human rights standards and jurisprudence recognize state obligations to decriminalize abortion; to permit abortion at a minimum to ensure women's lives, health, in cases of rape, incest, or severe or fatal foetal impairment; and ensure access to abortion in practice where legal including by providing information and addressing socio-economic needs of women seeking abortion.

The Government of India has committed itself to comply with obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR).<sup>68</sup> Under international law all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.<sup>69</sup> The Supreme Court has held that in light of the obligation to “foster respect for international law” in Article 51 (c) of the Indian Constitution, “[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”<sup>70</sup>

### INTERNATIONAL TREATY STANDARDS

#### TREATIES

- **CEDAW, Articles 1-3, 5(a), 10(h), 12, 16(e)** (outlining women's rights to equality in law and practice, to health including access to family planning information and services, and to determine the number and spacing of children; and defining states' duty to eliminate cultural prejudices based on stereotyped roles for men and women).
- **ICESCR, Articles 2(2), 3, 12(1)** (guaranteeing the rights to health, equality, and non-discrimination).
- **ICCPR, Articles 2(1), 6, 7, 17** (protecting the rights to life, non-discrimination and equality, freedom from torture and ill-treatment, and privacy).
- **Convention on Rights of the Child, Articles 2(2), 3, 5-6, 12, 16, 24** (protecting the rights to life, health, non-discrimination, development, privacy, and to express their views and having them given due weight; and outlining that all rights are to be interpreted through the lens of the best interest of the child, with respect for their evolving capacities).
- **Convention on the Rights of Persons with Disability (CRPD), Articles 3, 5-7, 8(1)(b), 10, 12, 17, 22, 23(1)(b), 25** (calling for respect for the inherent dignity, individual autonomy including freedom to make one's own choices and guaranteeing rights to life, privacy, personal integrity, non-discrimination, legal capacity on an equal basis with others and support in exercising this capacity; outlining state duties to “combat stereotypes, prejudices and harmful practices relating to persons with disability, including those based on sex and age;” and safeguarding the rights to sexual and reproductive health founded on a basis of free and informed consent, including the rights to decide on the number and spacing of children, to access age-appropriate reproductive and family planning information, and to access the necessary means to exercise these rights).

#### SELECTED GENERAL COMMENTS

- **Human Rights Committee, General Comment No. 36 (2018) on article 6 of the ICCPR, on the right to life**, U.N. Doc. CCPR/C/GC/36 (2018), para. 8 (outlining that states may not adopt measures on voluntary termination of pregnancy that violate women's rights to life and other rights under the treaty, including rights to non-discrimination, freedom from inhuman and degrading treatment, and privacy; calling on states to remove existing barriers and not introduce new barriers to women's access to safe and legal abortion, including by refraining from criminalizing women who receive abortion or abortion providers; affirming that states parties must prevent the stigmatization of women seeking abortion and provide safe, legal and effective access to

abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, including in cases of rape or fatal foetal impairment ).

- **Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)***, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), paras. 10-11 (indicating that in order to ensure women's equal rights to life, states must ensure that women do not have to undergo life-threatening clandestine abortion and calling for states to report on whether women who have become pregnant from rape have access to safe abortion as part of the obligation to ensure women's equal rights to freedom from inhuman and degrading treatment).
- **Committee for Economic Social and Cultural Rights, *General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the ICESCR)***, U.N. Doc. E/C.12/GC/22 (2016), paras. 13-14, 18-19, 21, 28, 34, 40-49 (calling on states to liberalize abortion laws, and guarantee abortion access complying with the AAAQ framework, meaning that it is accessible, available, acceptable, and of good quality; noting specifically that states must ensure access to safe, confidential and respectful abortion services and quality post-abortion care and the availability of trained medical personnel and essential medicines including abortion medicine and post-abortion care; recognizing that states must ensure that women's access to such goods and services is not hindered due to ideologically based policies, practices, or refusals of care; and outlining that criminalizing abortion is discriminatory against women).
- **Committee for Economic Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)***, U.N. Doc. E/C.12/2000/4 (2000), paras. 8, 11, 14, fn 12, 21, 23, 34 (defining the right to health as the right to "control one's health and body, including sexual and reproductive freedom," which means that states must guarantee women and girls access to "safe, effective, affordable and acceptable methods of family planning of their choice" and remove "all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health").
- **CEDAW Committee, *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19***, U.N. Doc. CEDAW/C/GC/35 (2017), paras. 18, 31(a) (affirming that criminalization of abortion, denial or delay of safe abortion and post-abortion care, forced continuation of pregnancy, and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, constitute violations of women's sexual and reproductive health rights as well as forms of gender-based violence that may amount to torture or cruel, inhuman or degrading treatment; and calling on states to repeal laws that criminalize abortion).
- **CEDAW Committee, *General Recommendation No. 24 on Article 12 of the Convention (women and health)***, U.N. Doc. A/54/38/Rev.1 (1999), paras. 14, 31 (outlining that states should remove all barriers and restrictions to women's access to health services, including sexual and reproductive health, and in particular should not require women to get authorization from third parties, such as husbands, parents, or health authorities; and calling on states to remove punitive criminal measures imposed on women who undergo abortion).
- **CEDAW Committee, *General Recommendation No. 34 on the rights of rural women***, U.N. Doc. CEDAW/C/GC/34 (2016), paras. 38-39 (instructing states to guarantee rural women's and girls' access to safe abortion and quality post-abortion care, regardless of whether or not abortion is legal, supported by adequate financing; and further requiring states to remove obstacles on rural women's access to sexual and reproductive health services, particularly by repealing laws that criminalize abortion or require waiting periods or third party consent for abortion).
- **Committee on the Rights of the Child, *General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence***, U.N. Doc. CRC/C/GC/20 (2016), paras. 38-39, 46, 59-61 (encouraging the decriminalization of abortion in order to "ensure that girls have access to safe abortion and post-abortion services, [...] with a view to guaranteeing the best interests of pregnant adolescents and ensur[ing] that their views are always heard and respected in abortion-related decisions;" and outlining that "[a]ll adolescents should have access to free, confidential, adolescent-responsive and non-discriminatory sexual and reproductive health services, information and education" free of barriers such as third-party consent requirements or stigma).

- **Committee on the Rights of the Child, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (Article 24)**, U.N. Doc. CRC/C/GC/15 (2013), paras. 24, 31, 54, 56, 70 (outlining state obligations to ensure health systems and services can meet the sexual and reproductive health needs of adolescents, including safe abortion services; recognizing rights of children to consent to abortion without permission of a parent, guardian, or caregiver; and recommending states ensure access to safe abortion and post-abortion care, irrespective of whether abortion itself is legal).
- **Joint statement by the CRPD and CEDAW Committees, Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities**, 19 Aug. 2018 (“States parties should decriminalize abortion in all circumstances and legalize it in a manner that fully respects the autonomy of women, including women with disabilities;” outlining that states must address the root causes of discrimination against women and persons with disability).
- **CRPD Committee, General Comment No. 3 (2016) on women and girls with disabilities**, U.N. Doc. CRPD/C/GC/3 (2016), paras. 32, 40, 44, 63(a) (reaffirming that states must ensure that women and girls with disabilities can access understandable and appropriate information, services, and supported decision-making in order to ensure their right to medical care, including sexual and reproductive health care, on the basis of autonomous and informed consent).

## INQUIRIES AND INDIVIDUAL COMPLAINTS

- **CEDAW Committee, L.C. v. Peru, Communication No. 22/2009**, UN Doc. CEDAW/C/50/D/22/2009 (2011), paras. 8.7-8.18, 9(b)(ii) (where a 13-year-old girl tried to commit suicide after becoming pregnant following rape and was denied critical medical care due to her pregnancy, including an abortion: finding violations of, *inter alia*, the rights to non-discrimination, to health, life and dignity, to access health services, and to be free from sex-based stereotypes that put women’s and girls’ reproductive function before their personal rights; and requiring the state to establish a legal framework that provides effective, timely access to legal abortion for women and legal clarity for providers, and to train health providers to support reproductive rights, including and particularly for adolescents and sexual violence survivors).
- **Human Rights Committee, K.L. v. Peru, Communication No. 1153/2003**, U.N. Doc. CCPR/C/85/D/1153/2003 (2005), paras. 6.1-8 (where an adolescent girl was denied a legal abortion on the basis of fatal foetal impairment, to the foreseeable detriment of her mental and physical health, holding that where abortion is legal it must be accessible in practice, and finding violations of the rights to effective remedy, to privacy, to special protection as a minor, and to be free of inhuman and degrading treatment; and requiring the state to pay compensation and guarantee non-repetition).
- **Human Rights Committee, L.M.R. v. Argentina, Communication No. 1608/2007**, U.N. Doc. CCPR/C/101/D/1608/2007 (2011), paras. 9.2-11 (where a rape survivor with an intellectual disability sought an abortion as permitted under the law and the hospital received an injunction from a judge prohibiting her from receiving a legal abortion that delayed the abortion past a gestational period where the hospital would perform it even after the Supreme Court overturned the injunction: finding violations of her rights to privacy, to be free from cruel and inhuman treatment, with a particular view to her vulnerability due to her disability, and to access an effective remedy that could guarantee timely access to legal abortion in practice; and requiring the state to provide compensation and guarantees of non-repetition).
- **Human Rights Committee, Mellet v. Ireland, Communication No. 2324/2013**, U.N. Doc. CCPR/C/116/D/2324/2013 (2016), paras. 7.1-9 and **Whelan v. Ireland, Communication No. 2425/2014**, U.N. Doc. CCPR/C/119/D/2425/2014 (2017), paras. 7.1-9 (two cases where pregnant women received a diagnosis of a fatal foetal impairment and were forced to travel abroad for an abortion because the law in Ireland did not allow an abortion in such cases: finding that the legal restrictions on access to abortion caused her foreseeable pain and suffering amounting to cruel and inhumane treatment and violated her right to privacy and equality; and instructing the state to amend its laws and Constitution so as to ensure “effective, timely and accessible procedures for pregnancy termination in Ireland” as well as access to relevant information).



## UNITED NATIONS HUMAN RIGHTS EXPERTS

- **Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR Health), *Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. A/64/272 (2009), paras. 54-55, 57-60 (outlining that women are entitled to reproductive health information and services that are respectful of autonomy, privacy and confidentiality, provided by properly trained personnel; and that women may not be denied the right to consent-based health care justified by the best interests of the unborn child or due to spousal or other third-party consent requirements).
- **SR Health, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. E/CN.4/2004/49 (2004), paras. 25-27, 30, 39 (establishing women's right to autonomous decision-making regarding their sexual and reproductive health and the number and spacing of children; recommending the removal of punitive provisions against women who undergo abortions; emphasizing that women should be offered information and counselling regarding where and when a pregnancy may be terminated legally; and underlining states' duty to ensure that health information and services are available to marginalized groups).
- **Working Group on the issue of discrimination against women in law and in practice, *Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends***, Position paper (2017), pp. 4-7 (outlining, *inter alia*, that women's rights to non-discrimination require that abortion should never be criminalized, that regulations governing abortion after the first trimester "must not result in creating a barrier" that would lead a woman to pursue an unsafe termination, and that access to abortion services should be autonomous, affordable and effective; highlighting that where access to abortion after the first trimester is limited to certain grounds, those grounds should be expansive; and reiterating that human rights are accorded only upon birth).
- **Working Group on the issue of discrimination against women in law and in practice, *Report of the Working Group on the issue of discrimination against women in law and in practice***, U.N. Doc. A/HRC/32/44 (2016), paras. 79-83, 107(b)-(c) (instructing states to decriminalize abortion; instructing states to repeal restrictive laws and policies, such as those prohibiting access to information on legal abortion, requiring third-party authorization from medical professional(s), a hospital committee, a parent, guardian or spouse, or permitting conscientious objection by health practitioners without ensuring access to an alternative provider; highlighting that such restrictions are discriminatory on the basis of socioeconomic status; and outlining that women should be able to terminate a pregnancy on request during the first trimester, or later on broad grounds).
- **Office of the High Commissioner on Human Rights et al., *Preventing Gender-Biased Sex Selection: An Interagency Statement OHCHR, UNFPA, UNICEF, UN Women and WHO*** (2011), p. V (emphasizing that states must address prenatal sex selection "without exposing women to the risk of death or serious injury by denying them access to needed services such as safe abortion to the full extent of the law," which would constitute further violations of their rights to life and health).

## REGIONAL CASE LAW

### EUROPEAN COURT OF HUMAN RIGHTS

- ***Tysiack v. Poland*, Application no. 5410/03 (2007)**, paras. 105-130 (where a woman suffered the loss of her eyesight due to pregnancy but was denied an abortion on the grounds of risk to her health, even though her right to access abortion was guaranteed in Polish law: finding violations of her right to private life, encompassing the rights to personal autonomy, physical integrity, and to access information; reiterating that where legal, abortion must be practically accessible; and articulating the state's obligation to regulate abortion so as to alleviate any chilling effect on access to legal abortion in practice).
- ***P. and S. v. Poland*, Application No. 15966/04 (2009)**, paras. 108-109, 111, 128-137, 157-169 (where a 14-year-old rape survivor was denied abortion care and where medical professionals shared her personal information without her permission: affirming state duty to ensure adolescents' autonomous reproductive choices and privacy; establishing that authorities should have taken into account her young age and vulnerability as a rape survivor; and finding violations, *inter alia*, of the rights to be free from ill-treatment, to private life, and to liberty and security of the person).

- ***R.R. v. Poland, Application no. 27617/04 (2011)***, paras. 148-162, 179-214 (where a woman was denied access to prenatal testing that would have enabled her to decide whether to access a legal abortion on the basis of foetal impairment: ruling that the state had failed to ensure her right to private life and to freedom from inhuman and degrading treatment; and concluding that the state must guarantee the availability of relevant, full and reliable information, including on foetal health, to pregnant women).

#### INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

- ***Paulina Ramírez v. Mexico, Report N° 21/07, Petition 161-02, Friendly Settlement (2007)*** (outlining the terms of a friendly settlement by a State providing reparations, public apology, and preventing reoccurrence in a case involving a 13-year-old rape survivor who was given false information about the safety of abortion procedures and therefore decided to carry her pregnancy to term under incorrect, coercive pretenses).
- ***Asunto niña Mainumby respect de Paraguay, Precautionary Measures N° 178/15 (2015)***, paras. 11-20, 23, [available only in Spanish] (where a 10-year-old rape survivor's health was determined to be at risk from her pregnancy and interruption of pregnancy was indicated by her physicians, instructing the state to make all medical options available to her in order to protect her rights to life and personal integrity, to access adequate medical treatment, to participate in all health decisions affecting her health in accordance with her age and maturity, and to protection from future abuse).

#### INTER-AMERICAN COURT OF HUMAN RIGHTS

- ***B. c. El Salvador, Precautionary Measures No PM 114/13 (2013)***, paras. 11-17 et seq., [available only in Spanish] (where a woman's rights to life, health and integrity were at risk due to health complications during her pregnancy with a foetus with fatal impairments, and abortion was prohibited regardless of circumstances: calling on the state to ensure that the medical professionals were free to initiate appropriate treatment urgently, in view of the woman's request for an abortion).

# RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

## IN THE HIGH COURT OF MADRAS

V. Krishnan v. G. Rajan

(1994) 2 MWL (Cri) 333

Srinivasan and Abdul Hadi, JJ.

***A father filed a petition in the Madras High Court seeking termination of his minor daughter's pregnancy after she left home and married against his will. Though the daughter wanted to continue with the pregnancy, the father argued that as per the MTP Act a minor's consent for MTP was irrelevant. The Court adjudicated upon the issue in light of Article 21 of the Indian Constitution that guarantees the right to life and personal liberty to all, including minors.***

Srinivasan, J.: "...

2. ...[T]he petitioner has prayed for issue of a direction to the Superintendent, Government Kasthuri Bhai Gandhi Hospital, Triplicane, Madras, to terminate the pregnancy of his daughter Sasikala. Thus, he prays for a direction to put an end to a life in the womb of Sasikala on the ground that she is still in her teens and teenage pregnancy will lead to many complications physically, physiologically, mentally and socially...

...

7. When this petition came up before us on 8.11.1993, we directed the Public Prosecutor to utilise the services of a Medical Practitioner to ascertain whether the girl is pregnant and report to this Court. We adjourned the matter by a week. Pursuant thereto the girl was taken to Anbu Clinic, Thiruvannamiyur, situated near Avvai Home. Dr. K.R. Radha, M.B.B.S., D.D. has examined the girl and given her findings as follows:—...

The certificate does not disclose any abnormality. One can say that the girl will deliver a child in the normal course.

8. Thereafter, the girl was also produced in Court and the matter was heard. We thought fit to put some questions to the girl in our Chamber. We spoke to the girl and found that she was not willing to have the pregnancy terminated. We recorded the same and posted the matter in Court for arguments. Counsel on both sides argued at length. We thought it better to record the evidence of the girl in so far as it relates to the prayer in this petition and also give an opportunity to the petitioner's counsel to cross-examine her. Her deposition was recorded *in camera*. We have found that the girl is quite capable of understanding things. She had no hesitation whatever in answering all questions put to her by counsel for the petitioner as well as by Public Prosecutor. The Court put some questions. Her answers are quite clear and specific. She knows her mind and she appears to be having definite ideas about her future. Her answers disclose enormous self-confidence on her part. In particular, the petitioner's counsel asked her as to what she would do if the first respondent deserts her, after some time. Her answer is "I am not worried". Counsel put another question as to what she would do if the first respondent disowns the child. Pat came the answer that she will bring up the child herself. At the end of the examination, the Court asked her as to what she meant when she said that she is not worried if Rajan deserts her. She clarified by saying that she will live alone even if he deserts her. According to the girl, her mother left the house with her younger brother when she was aged about 5. According to her, the first respondent married her and after the marriage they had sexual relationship resulting in the pregnancy. A perusal of her deposition shows that she is fully aware of the consequences of the pregnancy and the child-birth. She is quite categorical that the pregnancy should not be disturbed. It is quite obvious that she has already started loving the child that is growing in her womb ...

...

**MILLION DOLLAR QUESTION.**

**12.** This question is not reported to have arisen before any Court in India. It is of great importance and relevance in the present day society as the number of teenage pregnancies is said to be on the increase. The question is whether the guardian of a minor girl is entitled to an order from the Court directing the termination of the pregnancy of his ward when the pregnant girl is not agreeable for such termination.

...

**40.** In India causing abortion has been an offence for ever. The Indian Penal Code uses the expression miscarriage and deals with it in S. 312 to 318. S. 312 reads:

“Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage is not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine

*Explanation* A woman who causes herself to miscarry, is within the meaning of this section.”

Thus, the only exception is that caused in good faith for the purpose of saving the life of the woman. Under the section, the consent of the pregnant woman is immaterial as she is also liable to be punished. In August 1971, Parliament passed the Act with a design to create more exceptions to the strict provisions of the Penal Code. ... Whatever might have been the motive for the legislation, we are concerned only with the provisions thereof. According to the preamble, the Act is to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto. S. 2(a) defines guardian as a person having the care of the person of a minor or lunatic. S. 2(c) defines a ‘minor’ as a person who under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority. The expression ‘registered medical practitioner’ is defined in S. 2(d) of the Act. S. 3 is the pivotal section. It reads thus:—...

...

**42.** The provisions of the Act do not confer or recognise any right on any person to cause an abortion or termination of pregnancy. Even the pregnant woman cannot terminate the pregnancy except under the circumstance set out in the Act. Even during the first trimester, the woman cannot abort at her will and pleasure. There is no question of abortion ‘on demand’. S. 3 is only an enabling 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 and it is only an exception. The normal rule that the pregnancy should continue to its term shall prevail unless a registered medical practitioner in the case of a pregnancy not exceeding twelve weeks or two registered medical practitioners in the case of a pregnancy exceeding 12 weeks but less than twenty weeks, opine in good faith that the continuance of the pregnancy would involve (i) a risk to the life of the pregnant woman, or (ii) grave injury to her physical or mental health, or (iii) 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. ... Under explanation I to S. 3(2), if the pregnancy is alleged to have been caused by rape, the mental anguish resulting therefrom shall be presumed to constitute a grave injury to the mental health of the pregnant woman. The Explanation only provides for a presumption which can be rebutted in the facts and circumstances of the case. It is not necessary for us to refer to Explanation II in the present case. Sub-S. (4)(a) of S. 3 provides that if the pregnant woman has not attained the age of 18, or if she is a lunatic, the pregnancy shall not be terminated except with the consent of her guardian in writing. Sub-S. (4)(b) provides that no pregnancy shall be terminated except with the consent of the pregnant woman save as otherwise provided in clause (a).

**43.** Learned counsel for the petitioner places considerable reliance on the provisions of Sub-S. (4)(a) and (4)(b) of S. 3. It is contended by him that Sub-S. (4)(b) is subject to the provisions of Sub-S. (4)(a) and in the case of a minor, it is only the guardian who can decide whether the pregnancy should be terminated or not. According to him, the application of Sub-S. 4(b) is excluded by its own language if the pregnant woman has not attained the age of eighteen. We are unable to accept this contention. The entire scheme of the Act shows that the provisions thereof can be invoked only by the pregnant woman. If she happens to be a minor, the registered medical practitioner, who is approached for terminating the pregnancy, must take care to get the consent of the guardian of the minor in writing. Sub-S. (4)(a) can never be understood as dispensing with the consent of the pregnant woman if she is below 18 years of age. The provision is only intended to help the registered medical practitioner to take into account all the relevant facts and circumstances as set out

in S. 3 so as to decide whether the continuance of the pregnancy will involve any of the risks mentioned in the Section. For example, Sub-S. (3) requires the medical practitioner to take into account the pregnant woman's actual or reasonably foreseeable environment while determining the question whether the continuance of the pregnancy would involve such risk as is mentioned in Sub-S. (2). In the case of a minor, it is, therefore, necessary for the medical practitioner in order to ascertain the relevant facts under Sub-S. (3) to notify the guardian of the minor and get his written consent.

**44.** Learned counsel for the petitioner submits that the pregnancy of the petitioner's daughter has been caused by rape as defined by the Indian Penal Code and the requirements of Sub-S. (2) of S. 3 of the Act are fulfilled. According to him, the continuance of the pregnancy would involve grave injury to the physical or mental health of his daughter. There is no substance in this contention. As pointed out already, Explanation I provides only for a presumption. No doubt the Court is bound to presume, as the expression used is "shall be presumed". But, such presumption can be rebutted on the facts. In the present case, the question whether the pregnancy is caused by rape cannot be decided here, as it may arise before the Metropolitan Magistrate. But, even if it is assumed that the pregnancy is caused by rape, there is no question of anguish caused by such pregnancy in the pregnant woman. We have already pointed out that Sasikala is very keen on continuing the pregnancy and bearing the child. Hence, the continuance of the pregnancy will not cause any injury to her mental health.

**45.** Learned counsel for the petitioner invites our attention to the judgment of a Division Bench of this Court in *Komalavalli v. C.R. Nair and others* (1983 L.W. (Crl.)190). The petitioner therein was a woman having two children. She was gang-raped by three or four persons and became pregnant. She was detained in a Women's Welfare Institution. She applied under Article 226 of the Constitution of India for a direction to the Government Maternity Hospital to terminate her pregnancy. The Court was satisfied that she was impregnated against her will and unless the pregnancy was terminated, she will suffer traumatic and psychological shock. Hence, the Court granted the petition subject to the condition that qualified gynaecologists examine her and find that pregnancy can be terminated without detriment to her life and safety. The petitioner's husband was also a party to the proceeding. He was present in Court. The Bench has recorded that he stated that he will make the necessary arrangements for the future custody of the petitioner. That ruling will have no bearing in this case. Counsel on both sides have not been able to place before us a ruling of any Court in India which has a relevance to this case.

...

**47.** ... Even if the petitioner is entitled to pray for termination of pregnancy, the same can be ordered only if the continuance of the pregnancy would involve the risks mentioned in sub-S. (2) of the S. 3 of the Act. In the present case, the petitioner has not made out any ground for granting the prayer. We are also of the opinion that if termination of pregnancy is ordered against the will of Sasikala, it will undoubtedly affect her mental health and there is likelihood of her physical health also being affected thereby.

**48.** The learned Additional Public Prosecutor rightly points out that the Constitution of India does not make any distinction between a major and a minor in the matter of fundamental rights. According to him, Article 21 of the Constitution of India is wide enough to include the right of the girl Sasikala to continue her pregnancy and have a child. In Durga Das Basu's "Shorter Constitution of India", 10th Edition, the following passage is found at page 108:—

"Are there any unenumerated Fundamental Rights under the Constitution of India? A view is recently gaining ground that even though a right is not specifically mentioned in Art. 19(1), it may still be regarded as a fundamental right if it can be regarded as 'an integral part' of any of the fundamental rights specifically mentioned in Art. 19(1) as distinguished from the ordinary incidents of a named right.

Consonant with this view, it has been held that the following unenumerated rights can be enforced under Art. 19 even though not mentioned therein:

- (a) Right to travel, which is necessary for exercising one's fundamental rights of trade or business under Art. 19(1)(d).
- (b) Right to privacy, as an integral part of the freedom of movement under Art. 19(1)(d).
- (c) Right to receive such higher or professional education as is necessary for carrying on a particular trade or profession, under Art. 19(1)(g).
- (d) Right to human dignity.
- (e) Right of an accused to a speedy trial."

Again, at page 157 it is said:

“Right of privacy. 1. In *Kharak Singh's case* (AIR 1963 S.C. 1295), domiciliary visit by the Police without the authority of a law, was held to be violative of Art. 21, assuming that a right of privacy was a fundamental right derived from the freedom of movement guaranteed by Art. 19(1)(d), as well as personal liberty guaranteed by Art. 21.

2. But such right would not be absolute but must be subject to reasonable restrictions so that a provision for domiciliary visits would not be unreasonable if confined to habitual criminals or persons having criminal antecedents. Nor would it be violated by posting Policemen immediately outside the jail.

3. Similarly, wire-tapping of voluntary conversation, for the purpose of investigation of crime, has been upheld, assuming that privacy of conversation would be derived from personal liberty’ under Art. 21.”

49. The learned Additional Public Prosecutor referred to the judgment of the Supreme Court in *Govind v. State of Madhya Pradesh and another* (AIR 1975 SC 1378). Dealing with the right of privacy, the Court said that it will necessarily have to go through a process of case-by-case development. The Court referred to the judgment of the Supreme Court of the United States in *Roe v. Henry Wade* (1973) 410 U.S. 113).

50. Our attention is drawn to the judgment of the Supreme Court in *State of Maharashtra v. Madhukar Narayan Gardikar* (AIR 1991 SC 207). It is held that even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when one likes. So also it is not open to any and every person to violate her person as and when he wishes.

51. We are also of the view that the life of the child in the embryo cannot be taken away for the reasons urged by the petitioner.

...

## CONCLUSION

55. Taking the facts and circumstances of the case into account, we hold that the prayer of the petitioner cannot be granted...”

## IN THE SUPREME COURT OF INDIA

**Jacob George v. State of Kerala**

**(1994) 3 SCC 430**

**R.M. Sahai and B.L. Hansaria, JJ.**

***A homeopath was charged for committing an offence under Section 314 of the IPC for causing the death of a woman in the process of carrying out an abortion. He was acquitted by the Sessions Court. On appeal, the High Court of Kerala reversed the decision and convicted him under Section 314 of the IPC. While deciding the appeal, the Supreme Court made observations on the relationship between the IPC and the MTP Act.***

Hansaria, J.: “ ...

5. This distinction is, however, not material for our purpose because Section 312 of the Penal Code speaks about causing of miscarriage and Section 314 punishes the person who has intent to cause miscarriage of a woman and while doing so causes the death of such woman. It is under this section that the appellant has been found guilty by the High Court of Kerala after setting aside the acquittal order of the learned Assistant Sessions Judge. For the offence under Section 314, the appellant has been sentenced RI for 4 years and a fine of Rs 5000. The High Court had also taken suo motu cognizance against the order of acquittal and it is because of this that along with the criminal appeal filed by the State which was registered as Criminal Appeal No. 415 of 1989 the High Court disposed of CrRC No. 44 of 1989, which is relatable to its own action. So, two aforesaid appeals have been preferred by the appellant. It may be stated that out of fine of Rs 5000 as awarded, a sum of Rs 4000 was directed to be paid to the children of the deceased towards compensation for loss of their mother, in case of realisation of fine.

6. Our law-makers had faced some difficulty when our Penal Code was being enacted. The authors of the Code observed as below while enacting Section 312:

“With respect to the law on the subject of abortion, we think it necessary to say that we entertain strong apprehension that this or any other law on that subject may, in this country, be abused to the vilest purposes. The charge of abortion is one which, even where it is not substantiated often leaves a stain on the honour of families. The power of bringing a false accusation of this description is therefore a formidable engine in the hands of unprincipled men. This part of the law will, unless great care be taken, produce few convictions but much misery and terror to respectable families, and a large harvest of profit to the vilest pests of society. We trust that it may be in our power in the Code of Criminal Procedure to lay down rules which may prevent such an abuse. Should we not be able to do so, we are inclined to think that it would be our duty to advise his Lordship in Council rather to suffer abortion, where the mother is a party to the offence, to remain wholly unpunished, than to repress it by provisions which would occasion more suffering to the innocent than to the guilty.”

So what finds place in the aforesaid section is the result of very mature and hard thinking and we have to give full effect to it.

7. After the enactment of the Medical Termination of Pregnancy Act, 1971, the provisions of the Penal Code relating to miscarriage have become subservient to this Act because of the non obstante clause in Section 3, which *permits* abortion/miscarriage by a registered practitioner under certain circumstances. This permission can be granted on three grounds:

- (i) Health — when there is danger to the life or risk to the physical or mental health of the woman;
- (ii) humanitarian — such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman;
- (iii) eugenic — where there is substantial risk that the child, if born, would suffer from deformities and diseases.

(See Statement of Objects and Reasons).

...

10. ...The learned trial court...held that charges had not been established beyond reasonable doubt and therefore acquitted the appellant.

11. On appeal being preferred by the State and suo motu cognizance being taken by the High Court, the acquittal order has been set aside and the appellant has been convicted and sentenced as aforesaid, after refusing to give the benefit of Probation of Offenders Act as prayed for. Hence these appeals under Article 136 of the Constitution.

...

13. ...What was found in autopsy would clearly show that the uterus got perforated because of employing scientific gadgets by the appellant a homeopath, which shows that he had absolutely no training to handle the gadgets. The High Court has rightly described the exercise of the appellant in this regard as “daring, crude and criminal”. We therefore, agree with the High Court that an innocent life was sacrificed at the altar of a quack.

14. We would, therefore, uphold the conviction as awarded by the High Court, as the case is apparently not covered by any exception mentioned in the aforesaid Pregnancy Termination Act. It may be pointed out that the High Court did not accept the case of the prosecution insofar as the offence under Section 201 of the Indian Penal Code, or for that matter, under Section 342, is concerned.

...”

## IN THE SUPREME COURT OF INDIA

**Surendra Chauhan v. State of M.P.****AIR 2000 SC 1436****D.P. Wadhwa and Ruma Pal, JJ.**

***In this appeal from a Madhya Pradesh High Court decision, the accused had “illicit relations” with a woman, as a result of which the woman got pregnant. When she was three months pregnant, the accused took her to a clinic to terminate her pregnancy. However, she did not survive the procedure. The doctor’s qualifications and the clinic did not comply with the MTP Act and Rules requirements. The question before the court was whether the accused had been rightly convicted by the High Court under Section 314 of the IPC (for causing death by miscarriage) and Section 34 of the IPC (common intention with the doctor).***

**Wadhwa, J.:** “Appellant Surendra Chauhan (Chauhan) has been convicted for an offence under Sections 314/34 of the Indian Penal Code (IPC) and sentenced to undergo rigorous imprisonment for seven years and a fine of Rs 10,000 and in default of payment of fine to undergo further rigorous imprisonment for a period of two years. Chauhan and Dr Ravindra Kumar Sharma (Sharma) were tried together. While Sharma was tried under Section 314 IPC Chauhan was tried under Sections 314/34 IPC. Sharma had also been convicted under Section 314 IPC and similarly sentenced as Chauhan by the trial court. Both filed appeal in the Madhya Pradesh High Court. Their conviction and sentence were upheld and their appeal dismissed by judgment dated 7-1-1998. Both sought leave to appeal from this Court under Article 136 of the Constitution against the judgment of the High Court. Sharma was refused leave. Chauhan was granted leave and that is how the matter is now before us.

**2.** Alpana, a young girl of 24 years of age, was living with her mother Lalita Soni, a teacher, along with her younger sister, 18 years of age. Alpana was not married. On 23-3-1993 Alpana told her mother that she was feeling unwell and would herself go to the hospital. Next day in the morning when her mother was sitting in “pooja”, Alpana told her that she was going to the hospital. She also told her mother that she along with Chauhan would be going to Sharma for her treatment. As noted above, Sharma stands convicted and sentenced. The same day, at about 2 or 3 p.m. while Lalita was resting in her home, both Sharma and Chauhan came to her and told her that Alpana was in a serious condition. Sharma said that Alpana was under treatment in his hospital. Chauhan said that the condition of Alpana was serious. Lalita told them that her husband was not in the house and when he would come they would both go to the hospital. Both the accused, i.e., Sharma and Chauhan said that the condition of Alpana was very serious and insisted Lalita to accompany them. On this Lalita immediately went along with them. In the hospital of Sharma she saw her daughter Alpana lying on the table inside the clinic. Lalita found that her daughter was dead. She asked what was the reason of the treatment and death of her daughter. On that Chauhan told her that he was having illicit relations with Alpana as a result of which she was carrying pregnancy of two to three months. He also told Lalita that he got Alpana admitted in the hospital for her abortion and during the treatment the condition of Alpana became serious causing her death. Lalita then went to inform her husband Mohan Lal and again went to the hospital of Sharma by which time the police had also arrived and there was a crowd standing outside the hospital.

**3.** Dr D.C. Jain is the Professor of Forensic Medicines in Medical College, Raipur. In his deposition he said that in his opinion Alpana was carrying pregnancy of three months. He did not find any injury in the uterus or vagina. He said it was possible that the abortion was caused without applying anaesthesia to the deceased causing her death or her death could be due to fear. He found that the uterus was enlarged containing blood clots. He gave his opinion as under:

“Deceased was pregnant, foetus should be in uterus. Foetus age is 3 months. No injury to uterus or vagina detected. It is possible that the deceased died of vagal inhibition due to the effect of abortion without anaesthesia or due to fear.”

In his cross-examination he said that shock also takes place during the state of fear. Dr H.K. Josh performed post-mortem on the dead body of Alpana. According to him the cause of death was shock.

**4.** There have been concurrent findings that Chauhan was having illicit relations with Alpana with the result that she became pregnant. He accompanied her to the clinic of Sharma for her abortion. It has also come on record that Sharma was having a degree of Bachelor of Medicine in Electrohomoeopathy from the Board of Electrohomoeopathic Systems of Medicines, Jabalpur (M.P.). This entitled him to practise in Electrohomoeopathic systems of medicines. He also possessed a Diploma of Bachelor of Medicine and Surgery in Ayurved. Alpana met her death in the clinic of Sharma either due to shock or without applying anaesthesia while she was undergoing abortion. Sharma is not a medical



practitioner, who possesses any recognised medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956, whose name has been entered in a State Medical Register and who has any experience or training in gynaecology and obstetrics.

**5.** Section 314 IPC is as under:

*“314. Death caused by act done with intent to cause miscarriage.—Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;*

*[if act done without woman's consent]* and if the act is done without the consent of the woman, shall be punished either with imprisonment for life, or with the punishment above mentioned.

*Explanation.—*It is not essential to this offence that the offender should know that the act is likely to cause death.”

From the record it is apparent that Sharma and Chauhan had the intent to cause miscarriage of Alpana, who was pregnant, and death was caused to Alpana by Sharma while conducting abortion...

...

**7.** During the course of investigation the police also recovered some instruments from the dicky of the scooter of Sharma allegedly used for causing abortion. One Hindi book containing the literature on abortion, contraceptives and one Hindi book containing an illustrative abortion guide were seized from the clinic of Sharma...

...

**13.** There is another aspect of the matter. After the coming into force of the Medical Termination of Pregnancy Act, 1971 provisions of IPC relating to miscarriage became subservient to that Act because of the non obstante clause in Section 3 which section is as under:

*“3.(1) Notwithstanding anything contained in the Indian Penal Code, 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.*

...

**14.** Under Section 4 of the Act termination of pregnancy shall be made in accordance with the Act and at a hospital established or maintained by the Government or a place approved by the Government for the purposes of the Act. Rule 4 of the Medical Termination of Pregnancy Rules, 1975, framed under the Act, provides as to how a place under Section 4 could be approved and how inspection etc. of such place is to be carried out. A place shall not be approved under Section 4:

*“(i) unless the Government is satisfied that termination of pregnancies may be done therein under safe and hygienic conditions; and*

*(ii) unless the following facilities are provided therein, namely:*

*(a) an operation table and instruments for performing abdominal or gynaecological surgery;*

*(b) anaesthetic equipment, resuscitation equipment and sterilisation equipment;*

*(c) drugs and parenteral fluids for emergency use”.*

**15.** In the present case Sharma was certainly not competent to terminate the pregnancy of Alpana nor his clinic had the approval of the Government. Even the basic facilities for abortion were not available in his clinic. Chauhan took Alpana to the clinic of Sharma with the intent to cause her miscarriage and then her death was caused by Sharma while causing abortion, which act was done by Sharma in furtherance of the common intention of both Sharma and Chauhan. There is no escape from the conclusion that Chauhan had been rightly convicted under Sections 314/34 IPC.

**16.** The question then arises of the sentence awarded to Chauhan. We are of the opinion that the sentence awarded is rather on the higher side. We would, therefore, reduce the sentence of imprisonment to one-and-a-half years (18 months) rigorous imprisonment but would enhance the fine to Rs 25,000 and in default of payment of fine Chauhan to undergo further rigorous imprisonment for a period of one year. In case fine is realised the same shall be payable to Lalita Soni, the mother of Alpana.

**17.** The appeal is thus partly allowed.”

## IN THE HIGH COURT OF RAJASTHAN

**Nand Kishore Sharma v. Union of India****AIR 2006 Raj 166****S.N. Jha, C.J. and Rajesh Balia, J.**

***In this public interest litigation, the petitioner challenged the constitutional validity of Section 3(2)(a) & (b) and Explanations I and II to Section 3 of the MTP Act, arguing that the provisions legalized abortion and permitted the killing of an unborn child. The High Court considered the dominant object behind the MTP Act to decide whether its provisions violate Article 21 of the Indian Constitution.***

**Jha, C.J.:** “The petitioner who claims to be a social activist has filed this writ petition as a Public Interest Litigation questioning the vires of the Medical Termination of Pregnancy Act, 1971 (in short, the Act) particularly Section 3(2)(a) and (b) and Explanations I and II to Section 3 of the Act as being unethical and violative of Article 21 of the Constitution of India.

...

4. The issues relating to medical termination of pregnancy in common parlance known as ‘abortion’ are indeed of public importance. Counsel for the parties attempted to go into the length and breadth of the issue. In our opinion, however, the point for consideration lies in a narrow compass. This Court is not supposed to enter upon a debate as to when foetus comes to life or the larger question touching upon the ethics of abortion. We are merely concerned with the validity of the relevant provisions of the Act. At the outset, it may be mentioned that the petition was sought to be argued as if the Act has been enacted to legalise abortions but from a bare reading of the relevant provision it would appear that Act aims at termination of pregnancy in the interest of the woman or the to-be-born child. Section 3 may be quoted in extenso as under:...

...

5. On a plain reading, it is manifest that Section 3 permits termination of pregnancy by registered medical practitioner(s) on being satisfied, in good faith, that the continuance of pregnancy would involve a risk to the life of the pregnant woman or cause grave injury to her physical and mental health; or that if the child were born, it would suffer from such physical or mental abnormalities as would render it seriously handicapped. As per the Explanation, where pregnancy is caused by rape, the anguish of pregnancy is regarded as ‘grave injury to the mental health’ of the pregnant woman. If the pregnancy occurs as a result of failure of any device or method used by the woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy is also treated as constituting ‘grave injury to the mental health’ of the pregnant woman.

6. It would appear that dominant object to achieve which the law has been enacted is to save the life of the pregnant woman or to relieve her of any injury toward physical and mental health or prevent the possible deformities in the child — to be born. We find support from the Statement of Objects and Reasons of the Act, the relevant portion of which reads as under:

“There is thus avoidable wastage of the mother's health, strength and, sometimes, life. The proposed measure which seeks to liberalize certain existing provisions relating to termination of pregnancy has been conceived (1) as a health measure — When there is danger to the life or risk to physical or mental health of the woman; (2) on humanitarian grounds — Such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc.; (3) eugenic grounds — Where there is substantial risk that the child, if born, would suffer from deformities and diseases.

7. The object of the Act being to save the life of the pregnant woman or relieve her of any injury to her physical and mental health, and no other thing, it would appear the Act is rather in consonance with Article 21 of the Constitution of India than in conflict with it. While it may be debatable as to when the foetus comes to life so as to attract Article 21 of the Constitution of India, there cannot be two opinion that where continuance of pregnancy is likely to involve risk to the life of the pregnant woman or cause grave injury to her physical and mental health, it would be in her interest to terminate the pregnancy.

8. The perusal of Section 3 also makes it clear that the Act does not give a carte blanche to any person, even a medical practitioner, to cause termination of pregnancy. The Act provides in express terms that the pregnancy can be terminated upto twenty weeks and only by registered medical practitioner. If the length of pregnancy exceeds twelve weeks upto twenty weeks, it can be terminated only if a Board of at least two registered medical practitioners is of the opinion, in good faith, that the continuance of pregnancy involves risk to the life of the pregnant woman or cause grave injury to her physical and mental health.

9. An important aspect of the case is that the termination of pregnancy is not something which is provided for the first time by the Medical Termination of Pregnancy Act. Section 312 of the Indian Penal Code too protects termination of pregnancy described as miscarriage; if it is done “in good faith for the purpose of saving the life of the woman”. Similarly Section 315 of the Indian Penal Code protects any act done with intent to prevent child from being born alive or causing it to die after its birth “if such act has been done in good faith for the purpose of saving the life of the mother”. To bring home the point, it would be useful to quote Sections 312 and 315 as under:—...

10. It would not be out of place to mention that the deficiency in the Indian Penal Code as regards termination of pregnancy or abortion was noticed in the Statement of Objects and Reasons in the following words:

“The provisions regarding the termination of pregnancy in the Indian Penal Code which were enacted about a century ago were drawn up in keeping with the then British Law on the subject. Abortion was made a crime for which the mother as well as the abortionist could be punished except where it had to be induced in order to save the life of the mother. It has been stated that this very strict law has been observed in the breach in a very large number of cases all over the country. Furthermore, most of these mothers are married women, and are under no particular necessity to conceal their pregnancy.

11. Read in the context of Sections 312 and 315, IPC, it would appear that the object of the Act was to make the provisions relating to termination of pregnancy stringent and effective rather than to permit blatant termination of pregnancy. Section 312 of the IPC made causing miscarriage an offence except in good faith for the purpose of saving the life of the woman without laying down the manner in which pregnancy could be medically terminated. Section 3 of the Act provides the guidelines or limitation within which the pregnancy could be terminated.

12. In the above premises, we are satisfied that the Act or the provisions particularly complained of, cannot be said to be invalid, and no case thus is made out for interference by the Court.

...”

## IN THE HIGH COURT OF BOMBAY

**Nikhil D. Datar & Ors. v. Union of India**

**(2008) 110 Bom LR 3293**

**R.M.S. Khandeparkar and A.A. Sayed, JJ.**

***A woman received a diagnosis of substantial foetal cardiac abnormalities only in the 24<sup>th</sup> week of her pregnancy and sought permission from the Bombay High Court for termination of her 26 week pregnancy. Together with her husband and doctor, she challenged the constitutionality of Section 5 of the MTP Act in so far as it does not include the contingencies specified in Section 3(2)(b)(ii) to permit medical termination of pregnancy post the 20 week-limit in cases where there is a “substantial risk” that the child upon birth would suffer from “such physical or mental abnormalities as to be seriously handicapped.”***

**Khandeparkar, J.:** “1. ...

2. By the present petition, the petitioners are seeking declaration that Section 5 of The Medical Termination of Pregnancy Act, 1971, for short “the said Act”, to the extent it does not include the eventualities specified under Section 3(2)(b)(ii) of the said Act is ultra vires and that, therefore, the Section 5(1) of the said Act should be read down to include the said eventualities, and consequently should be read to include the following words “and when 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” and hence direction should be issued to the respondents to allow the petitioner No.3 to terminate the pregnancy.

3. The facts which are not in dispute are that the petitioner No.3 is currently in 26th week of pregnancy. During 24th week of pregnancy, the petitioner No.3 having undergone the necessary medical tests learnt that the foetus in her womb was diagnosed to have congenital complete heart block. The petitioner Nos.2 and 3 consulted the petitioner No.1 and sought his opinion about the possibility for termination of pregnancy after learning about the alleged anomalies in the foetus.

4. It is the case of the petitioners that though the termination of pregnancy has been advised, on account of statutory provisions comprised under the said Act, the doctors are reluctant to perform the necessary surgical operation in that regard.

...

**9.** The provision of law, as comprised under Section 3(1) of the said Act, provides that notwithstanding anything contained in the Indian Penal Code, 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 the said Act. Sub-section (2) of Section 3 of the said Act provides that subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner, - 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, of opinion, formed in good faith, that - 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; 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. Explanation I provides that 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 II provides that 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. Sub-section (3) thereof provides 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. Sub-section (4) provides that 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 mentally ill person, shall be terminated except with the consent in writing of her guardian, and save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

**10.** Section 5 of the said Act, which is yet another section dealing with the pregnancy, in its sub-section (1) provides that the provisions of section 4, and so much of the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman. Sub-section (2) provides that notwithstanding anything contained in the Indian Penal Code, the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

**11.** The above provisions of law comprised under the said Act clearly disclose the circumstances under which pregnancy can be terminated. Undoubtedly, Section 5 of the said Act relates to the right of a pregnant woman to terminate pregnancy in case it is found necessary to save her life. Section 5 nowhere speaks of any right of a pregnant woman to terminate the pregnancy on the ground that delivery of a child may result in some abnormalities in or to the child to be born. It strictly restricts to the cases where life of the pregnant woman would be in danger in case the pregnancy is not terminated and does not refer to any other circumstances. Undoubtedly, the opinion in that regard has to be formed by a registered medical practitioner and such opinion should be in good faith. The expression "good faith" discloses that the opinion has to be based on the necessary examination required to form such an opinion.

**12.** As far as Section 3(2)(b)(ii) is concerned, it clearly speaks of right to terminate the pregnancy where there is a substantial risk in allowing the child to take birth as it would suffer from such physical or mental abnormalities as to be seriously handicapped. However, such right is restricted to the maximum period of twenty weeks of pregnancy and not beyond it. Section 3(2)(b)(ii) is very clear in that regard. It also provides that before opting for such pregnancy within the said period, it is necessary for two registered medical practitioners to form an opinion in good faith for termination of the pregnancy. In case, the pregnancy has not exceeded twelve weeks, then such an opinion can be formed in good faith by any one medical practitioner.

**13.** In the case in hand, the opinion expressed by the Committee which was constituted pursuant to the direction of this Court has clearly opined that "there are very least chances that child will be born incapacitated and handicapped to survive. On medical reasons, the committee feels that the findings observed do not have substantive significance to resort the termination of pregnancy."

**14.** The findings which have been arrived at on examination of the petitioner no.3 and various reports of her medical examination and which have been reproduced in the earlier part of the order, undoubtedly refer to "complete heart block with a ventricular rate of 50-55 per minute,"; however, it also discloses the finding to the effect that "heart is structurally and functionally normal. Great arteries are in mal position (L-malposition) without any other structural defects and

it is viable to normal life provided there are no other structural anomalies in the heart. In the echocardiogram done outside, no other structural anomalies are identified. Only small percentage of kids will be symptomatic and will require implantation of the pace maker costing less than, one lakh of rupees which will be replaced by adult pace make at a later date, leading to normal life."

...

**17.** Undoubtedly, the opinion given by Dr. Shakuntala Prabhu and Dr. Snehal Kulkarni refers to the possibility of "a substantial risk if the child were born it would suffer from physical or mental abnormalities as to be seriously handicapped." However, the opinion itself discloses the necessary treatment which is required to be given to overcome the problem which the child on its birth may face, apart from the fact that considering the defects as they are noticed today, both the doctors are not sure that cardiac surgery would be required at or after the birth to the child and according to them, it would all depend upon post delivery sonography to be conducted. The question No.3 and answer thereto is very clear in this regards and reads thus:-

"Q.3 Since there are only two defects noticed, can you surely say that the cardiac surgery will not be required at/after birth?

Ans: No.

- On post delivery sonography, 50% of babies show additional defects.

- In such cases cardiac surgery is required."

Being so, taking into consideration the opinion expressed by the doctors' committee from J.J.Group of Hospital as well as the Two Expert Committee of two doctors which was constituted by the petitioners themselves, there is no categorical opinion before us from the medical experts to the effect that "if the child were born, it would suffer from physical or mental abnormalities as to be seriously handicapped."

Apart from the fact that already the period of 26 weeks of pregnancy has passed, even the requirements of the provisions of law under Section 3(2)(ii) read with Section 3(2)(b) are not satisfied. In other words, even if the petitioners were to approach this Court before the expiry of 20 weeks of pregnancy, based on the medical opinion placed before us, it would not have been possible for this Court to issue direction for exercise of right in terms of Section 3 of the said Act.

**18.** It was sought to be argued on behalf of the petitioners that the preamble of the said Act clearly provides that there is avoidable wastage of the mother's health, strength and, sometimes, life, and therefore, the legislation in the form of the said Act seeks to liberalise certain existing provisions relating to termination of pregnancy which is nothing but a health measure in cases where there is danger to the life or risk to physical or mental health of the woman as also on humanitarian grounds such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, etc., and where there is substantial risk that the child, if born, would suffer from deformities and diseases, and considering the eventualities under which the pregnancy can be terminated in terms of Section 3, the same should be read in Section 5 also. According to the learned Advocate, there was lapse on the part of the legislators in not including such eventualities under Section 5 of the said Act and relying upon the decision of the Apex Court in the matter of *Union of India v. Association for Democratic Reforms & Anr.*, reported in (2002)5 SCC 294, the learned advocate for the petitioners submitted that the said lacuna is required to be filled in by reading down Section 5 to include such eventualities.

**19.** We are afraid the contention on behalf of the petitioners if accepted would virtually amount to legislating upon Section 5 of the said Act. Under the guise of reading down a provision of law, the Courts are not empowered to legislate upon a statute. That is essentially the function of the legislature.

**20.** The Statement of Objects and Reasons of the said Act undoubtedly discloses that the legislation in the nature of the said Act was enacted to regulate the matters in relation to the termination of certain pregnancies. Sections 3 and 5 clearly speak of right to terminate pregnancy under the specified circumstances and after taking necessary precautions and after obtaining medical opinion of the medical experts who are required to give their opinion in good faith in that regard. Section 5 can be resorted to for termination of pregnancy when the non-termination of pregnancy would be dangerous to the life of pregnant woman. It is not a mere desire to terminate the pregnancy that will entitle either pregnant woman to go for termination of pregnancy or for the doctors to assist the pregnant woman to terminate the pregnancy by taking resort to Section 5 of the said Act. There has to be an opinion formed in good faith by a medical experts in that regard before going for termination of pregnancy. Undoubtedly, the experts have to ascertain whether there is danger to the life of a pregnant woman on account of pregnancy.

21. As regards the physical or mental abnormalities of serious nature to the child to be born which could be the cause for termination of pregnancy, the legislature in its wisdom has imposed certain period within which the pregnancy can be terminated. Nothing is placed on record on behalf of the petitioners even to remotely suggest that the period so prescribed by the statute has been arbitrarily prescribed or that there is no logic behind the period prescribed by the legislature in that regard.

22. In the circumstances, the petitioners have not placed on record even any material which could perhaps justify the exercise of our discretion in writ jurisdiction to allow the petitioner No.3 to terminate the pregnancy. No exceptional case in that regard has been made out so as to exercise discretionary jurisdiction under Article 226 of the Constitution of India to issue any writ in the matter...

...

## IN THE HIGH COURT OF RAJASTHAN

**Jamana Suthar v. State of Rajasthan**

**2009 SCC OnLine Raj 3468**

**Dinesh Maheshwari, J.**

***A minor girl, who had conceived as a result of rape, filed an application through her parents before the concerned authorities to facilitate the medical termination of her pregnancy. Given the inaction of the authorities, the minor approached the High Court seeking a writ of mandamus directing the concerned authorities to terminate her pregnancy. The High Court examined whether the minor's pregnancy of around 25 weeks could be terminated under Section 5 of the MTP Act.***

**Maheshwari, J.:** "...

The petitioner is said to be a minor married girl residing with her father but who was allegedly kidnapped on 02.01.2009 and a report in that regard was lodged by her father at Police Station, Sri Dungargarh where FIR No. 22/2009 was registered for the offences under Sections 363, 366 and 120B IPC. The petitioner's father also filed a Habeas Corpus Petition bearing No. 1311/2009 to this Court alleging inaction on the part of the police authorities in recovering the petitioner from the illegal detention of the accused Shanker Lal. It is borne out from the record that the petitioner was allegedly recovered by the police in the last week of May 2009 from the State of Karnataka and was produced before the Judicial Magistrate and her statements were recorded on 02.06.2009 wherein she alleged kidnapping by three named accused persons and also stated herself having been subjected to rape by the accused continuously leading to pregnancy.

It is the case of the petitioner that she submitted an application before the concerned authorities through her father to get rid of the unwanted and illegal pregnancy caused by rape... The petitioner has also filed with the additional affidavit the applications said to have been made on 13.06.2009 to the Superintendent of Police, Bikaner in this regard as Annexure-6 and that to the Collector, Bikaner on 08.07.2009 as Annexure-7.

This petition was filed only on 13.07.2009 stating that there had been inaction on the part of the respondents in not providing the petitioner the facility of medical termination of pregnancy that amounted to violation of her fundamental right; and it was prayed that by way of mandamus, the respondents be directed to terminate the pregnancy of the petitioner according to the provisions of the Medical Termination of Pregnancy Act, 1971 ('the Act of 1971') without delay and to pay her compensation for inaction of not terminating the pregnancy with immediate effect.

...The petitioner did visit the medical college on 21.07.2009 and a Board was constituted to examine her...

The Board stated its opinion regarding the proposition of termination of pregnancy thus:

"As per MTP Act termination of pregnancy can be done upto 20 weeks of pregnancy. The present case is having pregnancy of  $25 \pm 1$  week duration. So the medical termination of pregnancy is not indicated. Above 20 weeks of pregnancy it can be terminated only on therapeutic consideration for the mother, when continuation of pregnancy will involve a risk to mother's life. In present case there is no condition which could involve risk to mother's life."

...

...Looking to the submissions made on 30.07.2009, this Court, in the first session, passed the following order:-

“ ...

Having regard to the facts and circumstances of this case, it is considered appropriate and hence directed that if the petitioner Jamana Suthar appears today before the Chief Judicial Magistrate, Bikaner, her statements be got recorded particularly in regard to the propositions as stated in the writ petition that she wants termination of her pregnancy. After such statements, if she attends the hospital concerned wherein she was examined earlier by the Medical Board under the orders of this Court, her case may specifically be examined by a responsible Medical Officer particularly on her wishes and intentions and so also about the medical opinion if there would be likelihood of any danger to her life in case of carrying out termination of pregnancy at this stage.

It shall be ensured that copies of the report from the Medical Officer as well as the statements reach the Government Counsel and/or the Registry of this Court per fax today itself.

...”

...

In her statement on 30.07.2009, the petitioner stated that she was carrying pregnancy of about six months but was desirous of terminating the same. ...

On 30.07.2009, however, the Medical Board stated its opinion in the following terms:-

“(1) There would be likelihood of danger to her life in case of carrying out termination of pregnancy at this stage.

(2) If labour is induced for carrying out termination of pregnancy there are chances of live birth of new born as the maturity of foetus is 26 weeks and estimated foetal weight is 755 gms.”

...

Though the learned counsel for the petitioner has made a fervent appeal for issuing directions for permitting the pregnancy of the petitioner to be terminated for the same having been caused against her wishes and because of rape, this Court finds itself unable to grant relief for several reasons and factors. Looking to the background facts and circumstances and pendency of investigation, this Court is not in a position to directly come to the conclusion that it had been a matter of rape. Leaving this aspect aside, and assuming that the pregnancy for whatever reason had been against the wish and desire of the petitioner, the intriguing aspect in the present matter is that by the time the petitioner chose to file this writ petition i.e., on 13.07.2009, the pregnancy had been of about 24 weeks, as is borne out from the medical reports. It does not appear that the petitioner or her parents at the time when she was recovered and made the statement before the Court and investigating agency in the first week of June 2009 made any suggestion about her desire to have the pregnancy terminated so that her matter could have been considered in terms of Section 3 of the Act of 1971. Then, it is very difficult to find if the petitioner specifically made the representations as alleged on 12/13.06.2009. In any case, it remains entirely inexplicable that this petition was chosen to be filed only on 13.07.2009.

The facts repeatedly found from the medical reports are to the effect that at the time of filing of the petition, the petitioner had the pregnancy of about 24 weeks and then, the report dated 30.07.2009 even states the opinion about likelihood of danger to her life in case of carrying out termination at this stage and so also of the possibility of live birth.

The learned counsel for the petitioner strenuously made the submissions that when read in the context of Explanation 1 to Section 3, where pregnancy caused by rape is said to be of grave injury to the mental health of a pregnant woman, the same aspect must *ipso facto* ought to have been made applicable to the provisions of Section 5 of the Act of 1971 too whereby the pregnancy could be terminated if required immediately in order to save the life of the pregnant woman. The submissions as made by the learned counsel attempted at finding incorrectness or invalidity in any of the provisions as contained in the Act of 1971 cannot be countenanced in this writ petition for no such basis having been laid in the petition; and if the vires of the enactment were to be challenged at all, it was required that the petition was framed accordingly to be laid before the appropriate Division Bench.

Noteworthy it is that the provisions of the Act of 1971, particularly its Section 3 have been held valid by the Division Bench of this Court in the case of *Nand Kishore Sharma v. Union of India*: AIR 2006 Rajasthan 166.

Though the learned counsel for the petitioner has attempted to refer to certain decisions in *V. Krishnan v. G. Rajan alias Madipu Rajan the Inspector of Police (Law and Order)*: 1994 (1) Madras Law Weekly (Criminal) 16, *Komalavalli v. C.R. Nair*: 1984 Cri.L.J. 446; *D. Rajeshwari v. State of Tamil Nadu*: 1996 Cri. L.J. 3795; and the orders passed by the Hon'ble Punjab and Haryana High Court in *Chandigarh Administration v. Unknown*: CWP No. 8760/2009 on 09.06.2009 and 17.07.2009; and but none of them could be applied to the petitioner's case in view of the length of the pregnancy and the present medical reports not supporting her case.

In the given set of facts and circumstances, this Court is unable to find any legal ground within the frame work of law, particularly in view of the Act of 1971, to grant the relief to the petitioner as prayed for.

However, if, on and for the reasons and circumstances as contemplated by Section 5, any opinion is formed in good faith by a registered medical practitioner about necessity of immediate termination of pregnancy, this order shall not be treated to be of any comment in that regard.

This order shall also not be of any impediment for any other relief, if claimed and prayed for by the petitioner in accordance with law. It is made clear that in the given circumstances, even the aspect of claim of compensation by the petitioner has not been heard and finally decided by this Court in this petition.

...

## IN THE SUPREME COURT OF INDIA

**Suchita Srivastava & Anr. v. Chandigarh Administration**  
(2009) 9 SCC 1

**K.G. Balakrishnan, C.J., and P. Sathasivam and B.S. Chauhan, JJ.**

***A woman diagnosed with “mental retardation” became pregnant as a result of rape while she was living as an inmate in a government run welfare home in Chandigarh. The Chandigarh Administration had received approval from the Punjab and Haryana High Court to terminate her pregnancy (of 19 weeks), as it was considered by the court to be in her best interest. In this appeal, the Supreme Court examined the validity of the High Court's order which did not take into account the woman's consent. It also considered what should be the appropriate approach for a court while ascertaining the “best interests” of an intellectually disabled woman in exercise of its “parens patriae” jurisdiction.***

**Balakrishnan, C.J.:** “Leave granted. A Division Bench of the High Court of Punjab and Haryana in *Chandigarh Admn. v. Nemo*, by orders dated 9-6-2009 [ CWP No. 8760 of 2009, order dated 9-6-2009] and 17-7-2009 [ CWP No. 8760 of 2009, order dated 17-7-2009], ruled that it was in the best interests of a mentally retarded woman to undergo an abortion.

**2.** The said woman (name withheld, hereinafter “the victim”) had become pregnant as a result of an alleged rape that took place while she was an inmate at a government-run welfare institution located in Chandigarh. After the discovery of her pregnancy, the Chandigarh Administration, which is the respondent in this case, had approached the High Court seeking approval for the termination of her pregnancy, keeping in mind that in addition to being mentally retarded she was also an orphan who did not have any parent or guardian to look after her or her prospective child.

**3.** The High Court had the opportunity to peruse a preliminary medical opinion and chose to constitute an expert body consisting of medical experts and a judicial officer for the purpose of a more thorough inquiry into the facts. In its order dated 9-6-2009 [ CWP No. 8760 of 2009, order dated 9-6-2009], the High Court framed a comprehensive set of questions that were to be answered by the expert body. In such cases, the presumption is that the findings of the expert body would be given due weightage in arriving at a decision. However, in its order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009] the High Court directed the termination of the pregnancy in spite of the expert body's findings which show that the victim had expressed her willingness to bear a child.

**4.** Aggrieved by these orders, the appellants moved this Court and the second appellant, Ms Tanu Bedi, Advocate appeared in person on 20-7-2009 and sought a hearing on an urgent basis because the woman in question had been pregnant for more than 19 weeks at that point of time. We agreed to the same since the statutory limit for permitting the termination of a pregnancy i.e. 20 weeks was fast approaching.

...



**6.** After hearing the counsel at length we had also considered the opinions of some of the medical experts who had previously examined the woman in question. Subsequent to the oral submissions made by the counsel and the medical experts, we had granted a stay on the High Court's orders thereby ruling against the termination of the pregnancy.

**7.** The rationale behind our decision hinges on two broad considerations. The first consideration is whether it was correct on the part of the High Court to direct the termination of pregnancy without the consent of the woman in question. This was the foremost issue since a plain reading of the relevant provision in the Medical Termination of Pregnancy Act, 1971 clearly indicates that consent is an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer from any “mental illness”. As will be explained below, there is a clear distinction between “mental illness” and “mental retardation” for the purpose of this statute.

**8.** The second consideration before us is that even if the said woman was assumed to be mentally incapable of making an informed decision, what are the appropriate standards for a court to exercise “parens patriae” jurisdiction? If the intent was to ascertain the “best interests” of the woman in question, it is our considered opinion that the direction for termination of pregnancy did not serve that objective. Of special importance is the fact that at the time of hearing, the woman had already been pregnant for more than 19 weeks and there is a medico-legal consensus that a late-term abortion can endanger the health of the woman who undergoes the same.

...

**13.** [Upon discovery of the pregnancy of the woman], [t]he Director-Principal of GMCH thereafter constituted a three-member Medical Board on 25-5-2009 which was headed by the Chairperson of the Department of Psychiatry in the said hospital. Their task was to evaluate the mental status of the victim and they opined that the victim's condition was that of “mild mental retardation”.

...

## TERMINATION OF PREGNANCY CANNOT BE PERMITTED WITHOUT THE CONSENT OF THE VICTIM IN THIS CASE

**18.** Even though the expert body's findings were in favour of continuation of the pregnancy, the High Court decided to direct the termination of the same in its order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009]. We disagree with this conclusion since the victim had clearly expressed her willingness to bear a child.

**19.** The victim's reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter. We have adopted this position since the applicable statute clearly contemplates that even a woman who is found to be “mentally retarded” should give her consent for the termination of a pregnancy.

**20.** In this regard we must stress upon the language of Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter also referred to as “the MTP Act”) ...

**21.** When the MTP Act was first enacted in 1971 it was largely modelled on the Abortion Act of 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified “right to abortion” and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers.

**22.** There is no doubt that a woman's right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a “compelling State interest” in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

- 23.** A perusal of [Sections 3 and 4 of the MTP Act] makes it clear that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a “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 per Section 3(2)(i)] or when “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” [as per Section 3(2)(ii)]...
- 24.** The Explanations to Section 3 have also contemplated the termination of pregnancy when the same is the result of a rape or a failure of birth control methods since both of these eventualities have been equated with a “grave injury to the mental health” of a woman.
- 25.** In all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in Section 3(4)(b) of the MTP Act, 1971.
- 26.** The exceptions to this rule of consent have been laid down in Section 3(4)(a) of the Act. Section 3(4)(a) lays down that when the pregnant woman is below eighteen years of age or is a “mentally ill” person, the pregnancy can be terminated if the guardian of the pregnant woman gives consent for the same. The only other exception is found in Section 5(1) of the MTP Act which permits a registered medical practitioner to proceed with a termination of pregnancy when he/she is of an opinion formed in good faith that the same is “immediately necessary to save the life of the pregnant woman”. Clearly, none of these exceptions are applicable to the present case.
- 27.** In the facts before us, the State could claim that it is the guardian of the pregnant victim since she is an orphan and has been placed in government-run welfare institutions. However, the State’s claim to guardianship cannot be mechanically extended in order to make decisions about the termination of her pregnancy. An ossification test has revealed that the physical age of the victim is around 19-20 years. This conclusively shows that she is not a minor. Furthermore, her condition has been described as that of “mild mental retardation” which is clearly different from the condition of a “mentally ill person” as contemplated by Section 3(4)(a) of the MTP Act.
- 28.** It is pertinent to note that the MTP Act had been amended in 2002, by way of which the word “lunatic” was replaced by the expression “mentally ill person” in Section 3(4)(a) of the said statute. The said amendment also amended Section 2(b) of the MTP Act, where the erstwhile definition of the word “lunatic” was replaced by the definition of the expression “mentally ill person” which reads as follows:

“2. (b) ‘mentally ill person’ means a person who is in need of treatment by reason of any mental disorder other than mental retardation;”

The 2002 amendment to the MTP Act indicates that the legislative intent was to narrow down the class of persons on behalf of whom their guardians could make decisions about the termination of pregnancy. It is apparent from the definition of the expression “mentally ill person” that the same is different from that of “mental retardation”. A similar distinction can also be found in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. This legislation treats “mental illness” and “mental retardation” as two different forms of “disability”. This distinction is apparent if one refers to Sections 2(i), (q) and (r) [of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.] which define “disability”, “mental illness” and “mental retardation” in the following manner:

“2. (i) ‘disability’ means—

...

(vi) mental retardation;

(vii) mental illness;

\*\*\*

(q) ‘mental illness’ means any mental disorder other than mental retardation;

(r) ‘mental retardation’ means a condition of arrested or incomplete development of mind of a person which is specially characterised by subnormality of intelligence.”

The same definition of “mental retardation” has also been incorporated in Section 2(g) of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

**29.** These legislative provisions clearly show that persons who are in a condition of “mental retardation” should ordinarily be treated differently from those who are found to be “mentally ill”. While a guardian can make decisions on behalf of a “mentally ill person” as per Section 3(4)(a) of the MTP Act, the same cannot be done on behalf of a person who is in a condition of “mental retardation”.

**30.** The only reasonable conclusion that can be arrived at in this regard is that the State must respect the personal autonomy of a mentally retarded woman with regard to decisions about terminating a pregnancy. It can also be reasoned that while the explicit consent of the woman in question is not a necessary condition for continuing the pregnancy, the MTP Act clearly lays down that obtaining the consent of the pregnant woman is indeed an essential condition for proceeding with the termination of a pregnancy.

**31.** As mentioned earlier, in the facts before us the victim has not given consent for the termination of pregnancy. We cannot permit a dilution of this requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim. We must also be mindful of the fact that any dilution of the requirement of consent contemplated by Section 3(4)(b) of the MTP Act is liable to be misused in a society where sex-selective abortion is a pervasive social evil.

**32.** Besides placing substantial reliance on the preliminary medical opinions presented before it, the High Court has noted some statutory provisions in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 as well as the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 where the distinction between “mental illness” and “mental retardation” has been collapsed. The same has been done for the purpose of providing affirmative action in public employment and education as well as for the purpose of implementing anti-discrimination measures. The High Court has also taken note of the provisions in IPC which lay down strong criminal law remedies that can be sought in cases involving the sexual assault of “mentally ill” and “mentally retarded” persons. The High Court points to the blurring of these distinctions and uses this to support its conclusion that “mentally ill” persons and those suffering from “mental retardation” ought to be treated similarly under the MTP Act, 1971. We do not agree with this proposition.

**33.** We must emphasise that while the distinction between these statutory categories can be collapsed for the purpose of empowering the respective classes of persons, the same distinction cannot be disregarded so as to interfere with the personal autonomy that has been accorded to mentally retarded persons for exercising their reproductive rights.

#### **Termination of pregnancy is not in the “best interests” of the victim**

**34.** In the impugned orders, the High Court has in fact agreed with the proposition that a literal reading of Section 3 of the MTP Act would lead to the conclusion that a mentally retarded woman should give her consent in order to proceed with the termination of a pregnancy. However, the High Court has invoked the doctrine of “parens patriae” while exercising its writ jurisdiction to go beyond the literal interpretation of the statute and adopt a purposive approach. The same doctrine has been used to arrive at the conclusion that the termination of pregnancy would serve the “best interests” of the victim in the present case even though she has not given her consent for the same. We are unable to accept that line of reasoning.

**35.** The doctrine of “parens patriae” has been evolved in common law and is applied in situations where the State must make decisions in order to protect the interests of those persons who are unable to take care of themselves. Traditionally this doctrine has been applied in cases involving the rights of minors and those persons who have been found to be mentally incapable of making informed decisions for themselves.

**36.** Courts in other common law jurisdictions have developed two distinct standards while exercising “parens patriae” jurisdiction for the purpose of making reproductive decisions on behalf of mentally retarded persons. These two standards are the “best interests” test and the “substituted judgment” test.

**37.** As evident from its literal description, the “best interests” test requires the Court to ascertain the course of action which would serve the best interests of the person in question. In the present setting this means that the Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim. It is important to note that the Court’s decision should be guided by the interests of the victim alone and not those of the other stakeholders such as guardians or the society in general. It is evident that the woman in question will need care and assistance which will in turn entail some costs. However, that cannot be a ground for denying the exercise of reproductive rights.

**38.** The application of the “substituted judgment” test requires the Court to step into the shoes of a person who is considered to be mentally incapable and attempt to make the decision which the said person would have made, if she was competent to do so. This is a more complex inquiry but this test can only be applied to make decisions on behalf of persons who are conclusively shown to be mentally incompetent.

**39.** In the present case the victim has been described as a person suffering from “mild mental retardation”. This does not mean that she is entirely incapable of making decisions for herself. The findings recorded by the expert body indicate that her mental age is close to that of a nine-year-old child and that she is capable of learning through rote memorisation and imitation. Even the preliminary medical opinion indicated that she had learnt to perform basic bodily functions and was capable of simple communications. In light of these findings, it is the “best interests” test alone which should govern the inquiry in the present case and not the “substituted judgment” test.

**40.** We must also be mindful of the varying degrees of mental retardation, namely, those described as borderline, mild, moderate, severe and profound instances of the same. Persons suffering from severe and profound mental retardation usually require intensive care and supervision and a perusal of academic materials suggests that there is a strong preference for placing such persons in an institutionalised environment. However, persons with borderline, mild or moderate mental retardation are capable of living in normal social conditions even though they may need some supervision and assistance from time to time.

**41.** A developmental delay in mental intelligence should not be equated with mental incapacity and as far as possible the law should respect the decisions made by persons who are found to be in a state of mild to moderate “mental retardation”.

**42.** In the present case, the victim has expressed her willingness to carry the pregnancy till its full term and bear a child. The expert body has found that she has a limited understanding of the idea of pregnancy and may not be fully prepared for assuming the responsibilities of a mother. As per the findings, the victim is physically capable of continuing with the pregnancy and the possible risks to her physical health are similar to those of any other expecting mother. There is also no indication that the prospective child may be born with any congenital defects. However, it was repeatedly stressed before us that the victim has a limited understanding of the sexual act and perhaps does not anticipate the social stigma that may be attached to a child which will be born on account of an act of rape.

**43.** Furthermore, the medical experts who appeared before us also voiced the concern that the victim will need constant care and supervision throughout the pregnancy as well as for the purposes of delivery and childcare after birth. Maternal responsibilities do entail a certain degree of physical, emotional and social burdens and it was proper for the medical experts to gauge whether the victim is capable of handling them.

**44.** The counsel for the respondent also alerted us to the possibility that even though the victim had told the members of the expert body that she was willing to bear the child, her opinion may change in the future since she was also found to be highly suggestible.

**45.** Even if it were to be assumed that the victim's willingness to bear a child was questionable since it may have been the product of suggestive questioning or because the victim may change her mind in the future, there is another important concern that should have been weighed by the High Court. At the time of the order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009], the victim had already been pregnant for almost 19 weeks. By the time the matter was heard by this Court on an urgent basis on 21-7-2009, the statutory limit for terminating a pregnancy i.e. 20 weeks, was fast approaching. There is of course a cogent rationale for the provision of this upper limit of 20 weeks (of the gestation period) within which the termination of a pregnancy is allowed. This is so because there is a clear medical consensus that an abortion performed during the later stages of a pregnancy is very likely to cause harm to the physical health of the woman who undergoes the same.

...

**48.** ...[I]t is our considered opinion that the direction given by the High Court (in its order dated 17-7-2009 [ CWP No. 8760 of 2009, order dated 17-7-2009] ) to terminate the victim's pregnancy was not in pursuance of her “best interests”. Performing an abortion at such a late stage could have endangered the victim's physical health and the same could have also caused further mental anguish to the victim since she had not consented to such a procedure.

**49.** We must also mention that the High Court in its earlier order had already expressed its preference for the termination of the victim's pregnancy (see para 38 in order dated 9-6-2009 [ CWP No. 8760 of 2009, order dated 9-6-2009] ) even as it proceeded to frame a set of questions that were to be answered by an expert body which was appointed at the instance of the High Court itself. In such a scenario, it would have been more appropriate for the High Court to express its inclination only after it had considered the findings of the expert body.

**50.** Our conclusions in the present case are strengthened by some norms developed in the realm of international law. For instance one can refer to the principles contained in the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971 [GA Res 2856 (XXVI) of 20-12-1971] which have been reproduced below:

- “1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.
2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.
3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.
4. Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.
5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interests.
6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.
7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.”

Special emphasis should be placed on Principle 7 (cited above) which prescribes that a fair procedure should be used for the “restriction or denial” of the rights guaranteed to mentally retarded persons, which should ordinarily be the same as those given to other human beings.

**51.** In respecting the personal autonomy of mentally retarded persons with regard to the reproductive choice of continuing or terminating a pregnancy, the MTP Act lays down such a procedure. We must also bear in mind that India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) on 1-10-2007 and the contents of the same are binding on our legal system.

**52.** The facts of the present case indeed posed some complex questions before us. While we must commend the counsel for their rigorous argumentation, this case also presents an opportunity to confront some social stereotypes and prejudices that operate to the detriment of mentally retarded persons. Without reference to the present proceedings, we must admit to the fact that even medical experts and judges are unconsciously susceptible to these prejudices. [See generally: Susan Stefan, “Whose Egg is it anyway? Reproductive Rights of Incarcerated, Institutionalised and Incompetent Women”, 13 Nova Law Review 405-56 (November 1989).]

**53.** We have already stressed that persons who are found to be in borderline, mild and moderate forms of mental retardation are capable of living in normal social conditions and do not need the intensive supervision of an institutionalised environment. As in the case before us, institutional upbringing tends to be associated with even more social stigma and the mentally retarded person is denied the opportunity to be exposed to the elements of routine living.

For instance, if the victim in the present case had received the care of a family environment, her guardians would have probably made the efforts to train her to avoid unwelcome sexual acts. However, the victim in the present case is an orphan who has lived in an institutional setting all her life and she was in no position to understand or avoid the sexual activity that resulted in her pregnancy. The responsibility of course lies with the State and fact situations such as those in the present case should alert all of us to the alarming need for improving the administration of the government-run welfare institutions.

...

**54.** It would also be proper to emphasise that persons who are found to be in a condition of borderline, mild or moderate mental retardation are capable of being good parents. Empirical studies have conclusively disproved the eugenics theory that mental defects are likely to be passed on to the next generation. The said “eugenics theory” has been used in the past to perform forcible sterilisations and abortions on mentally retarded persons. [See generally: Elizabeth C. Scott, “Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy”, *Duke Law Journal* 806-65 (November 1986).] We firmly believe that such measures are anti-democratic and violative of the guarantee of “equal protection before the law” as laid down in Article 14 of our Constitution.

**55.** It is also pertinent to note that a condition of “mental retardation” or developmental delay is gauged on the basis of parameters such as intelligence quotient (IQ) and mental age (MA) which mostly relate to academic abilities. It is quite possible that a person with a low IQ or MA may possess the social and emotional capacities that will enable him or her to be a good parent. Hence, it is important to evaluate each case in a thorough manner with due weightage being given to medical opinion for deciding whether a mentally retarded person is capable of performing parental responsibilities.

## CONCLUSION AND DIRECTIONS

...

**57.** The substantive questions posed before us were whether the victim's pregnancy could be terminated even though she had expressed her willingness to bear a child and whether her “best interests” would be served by such termination. As explained in the forementioned discussion, our conclusion is that the victim's pregnancy cannot be terminated without her consent and proceeding with the same would not have served her “best interests”.

**58.** In our considered opinion, the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority. Since none of the other statutory conditions have been met in this case, it is amply clear that we cannot permit a dilution of the requirement of consent for proceeding with a termination of pregnancy. We have also reasoned that proceeding with an abortion at such a late stage (19-20 weeks of gestation period) poses significant risks to the physical health of the victim.

**59.** Lastly, we have urged the need to look beyond social prejudices in order to objectively decide whether a person who is in a condition of mild mental retardation can perform parental responsibilities.

**60.** The findings recorded by the expert body which had examined the victim indicate that the continuation of the pregnancy does not pose any grave risk to the physical or mental health of the victim and that there is no indication that the prospective child is likely to suffer from a congenital disorder. However, concerns have been expressed about the victim's mental capacity to cope with the demands of carrying the pregnancy to its full term, the act of delivering a child and subsequent childcare. In this regard, we direct that the best medical facilities be made available so as to ensure proper care and supervision during the period of pregnancy as well as for post-natal care.

**61.** Since there is an apprehension that the woman in question may find it difficult to cope with maternal responsibilities, the Chairperson of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities (constituted under the similarly named 1999 Act) has stated in an affidavit that the said Trust is prepared to look after the interests of the woman in question which will include assistance with childcare. In the said affidavit, it has been stated that this Trust will consult the Chandigarh Administration as well as experts from the Post Graduate Institute of Medical Education and Research (PGIMER) in order to ensure proper care and supervision.

**62.** If any grievances arise with respect to the same subject-matter in the future, the respondent can seek directions from the High Court of Punjab and Haryana under its writ jurisdiction. The present appeal is disposed of accordingly.”

## IN THE HIGH COURT OF DELHI

Dr. Raj Bokaria v. Medical Council of India

2010 SCC OnLine Del 4125

S. Muralidhar, J.

***The petitioner, a doctor, terminated a woman's pregnancy of over 20 weeks in order to protect her life following a diagnosis of foetal impairments. This diagnosis was causing extreme mental stress and deteriorating the pregnant woman's health. However, the woman died during the course of the termination procedure. The Ethics Committee of the Medical Council of India penalized the petitioner for terminating a pregnancy beyond 20 weeks in contravention of Section 3 of the MTP Act. The petitioner challenged this order before the Delhi High Court arguing that the Ethics Committee overlooked Section 5 of the MTP Act, which permits termination of pregnancy to save a woman's life. While adjudicating on the petitioner's claim, the High Court examined the requirements for complying with Section 5 of the MTP Act.***

Muralidhar, J.: “ ...

2. The wife of Respondent No. 2, late Dr. Roopa Dutta, a gynaecologist and obstetrician herself, was being treated at the Moolchand Kheratiram Hospital, Respondent No. 3 herein, by a team of four doctors headed by the Petitioner during her second pregnancy in 2003. An ultrasound carried out after 20 weeks of pregnancy revealed that the foetus had a single umbilical artery. Amniocentesis done in Ganga Ram Hospital revealed that the chromosome count in the foetus was abnormal being 22. It is stated by the Petitioner that late Dr. Roopa Dutta was also a known patient of asthma and could not accept the thought of delivery of an abnormal child. It is stated that she suffered from extreme mental stress and aggravated asthma and her condition became precarious. The Petitioner states that in light of the above complication, the issue was discussed with Respondent No. 2 and his late wife. She and her husband therefore took a conscious decision to discontinue the pregnancy in order to protect the life of late Dr. (Mrs.) Roopa Dutta. It is claimed in the petition that this decision to discontinue pregnancy was a normal and accepted medical practice and a certificate dated 26th June 2004 issued by the East Delhi Gynecologist Forum is enclosed in support of such submissions. However, the records showing that a consultation was held by the Petitioner with the deceased and her husband, and that an opinion was formed by the Petitioner to terminate the pregnancy is not placed on record. It is the admitted position that there is no such record maintained in the present case.

3. It is stated that late Dr. Roopa Dutta was admitted to the RAV unit of Respondent No. 3, headed by the Petitioner, at 11 am on 6th October 2003 for discontinuation of pregnancy by inducing pre-term labour. A consent form signed by the patient and her husband has been produced. The asthma evaluation was done by one Dr. S.K. Jain. It is claimed that on 8th October 2003 the deceased got good contractions and delivered a gasping foetus spontaneously at 9.25 am at a time when the Petitioner was not present. The delivery apparently happened in the room itself. After delivery, the deceased was shifted to the labour room for further observation and management. However, since the placenta was not expelled for more than an hour, a bona fide decision was taken to remove the placenta manually under anaesthesia to prevent any further complication. It is claimed that at that time the patient was conscious and was aware of the decision. It is claimed that neither she nor her husband objected to it. On the operation-table before induction, the deceased had an episode of severe bronchospasm for which I.V. steroids and broncho dilators were given but she became hypoxic and had falling oxygen saturation. Ultimately, the interventions by the attending doctors did not help and the deceased expired in the evening of 9th October 2003.

...

6. The above submissions have been considered by this Court. It has been correctly submitted that the impugned order of the Ethics Committee essentially turned on the legal opinion given by its retainer on an interpretation of Section 3 of the MTP Act. It was opined, and in the view of this Court, correctly, that in terms of Section 3(2) the satisfaction of one medical practitioner was required for terminating a pregnancy which does not exceed 12 weeks. That satisfaction had to be either that the continuation of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health or that there was a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. For termination of a pregnancy between 12 and 20 weeks, such opinion must be of two medical practitioners. Therefore, there was no question of terminating a pregnancy by inducing pre-term labour beyond the 20<sup>th</sup> week of pregnancy. A reference was made to the decision in *Suchita Srivastava v. Chandigarh Administration* (2009) 9 SCC 1.

**7.** What is significant as far as the present case is concerned is that it was not denied that the pre-term labour inducement of labour was resorted to beyond 20 weeks of pregnancy. Clearly, therefore, the prohibition under Section 3 of the MTP Act was attracted. The only defence, however, is that Section 5 of the MTP Act was overlooked and action of the Petitioner was justified thereunder.

...

**9.** The reply of learned counsel for the Petitioner to the question whether any record to show the forming of opinion by the Petitioner in terms of Section 5(1) was produced either before the DMC or before the MCI, was in the negative. It is submitted in fact that there was no such document, although it was asserted that such opinion was in fact formed by the Petitioner. It was submitted that there was no such practice of maintaining any such record of the decision taken to go in for inducement of pre-term labour even when the pregnancy was more than 20 weeks. However, the importance of maintenance of such record was not denied by counsel for the Petitioner.

...

**11.** On a reading of Section 5 of the MTP Act, it appears to this Court that the opinion formed by the medical practitioner to go for either MTP or pre-term inducement of labour when the pregnancy is beyond 20 weeks, has necessarily to be in writing and in the prescribed format. There was no question of there not being any record whatsoever of the forming of such opinion of the medical practitioner. The argument advanced by Ms. Acharya that in a case of emergency there may be no time for recording such opinion cannot explain the failure to record an opinion in the present case. The facts narrated by the Petitioner herself show that a very conscious decision was taken of going for a pre-term inducement of labour sometime around 6th October 2003 when the deceased was admitted to Respondent No. 3 hospital. Even at that time the opinion of the Petitioner should have been recorded. The pre-term induced delivery took place on 8th October 2003. There was sufficient time, therefore, for the Petitioner to record her opinion, mandatorily required by Section 5(1). In terms of Rule 3(1) of the Medical Termination of Pregnancy Regulations, 2003 the medical practitioner has to record her opinion in Form I. The non-maintenance of records to show the basis on which an opinion was formed to going in for a pre-term inducement in a case where the pregnancy is beyond the 20th week is indeed a very serious lapse. There can be no excuse whatsoever for a medical practitioner seeking to defend herself with reference to Section 5 of the MTP Act not maintaining any record of the formation of the opinion in terms of Section 5(1) read with the Regulations of 2003. In the considered view of this Court, the above factor alone is enough to demonstrate the gross negligence on the part of the Petitioner.

**12.** It was repeatedly urged that the question whether there was negligence on the part of the Petitioner can be judged only with reference to expert opinion which is still awaited. This submission does not impress this Court in the facts and circumstances of the present case. There had to be in the first place an opinion formed by the Petitioner as required mandatorily by Section 5(1) MTP Act. It is only thereafter that one can proceed to test such opinion and examine whether any ordinarily skilled gynaecologist and obstetrician would have formed a similar opinion in the facts and circumstances. The opinion, if recorded by the Petitioner, would have reflected the application of mind of the Petitioner with reference to the medical records of the patient. Absent such recording of opinion, the question of evaluation of the Petitioner's opinion with reference to the opinion that may have been formed by an ordinarily skilled medical practitioner does not arise. In that view of the matter, there is no need to examine the other question whether the Petitioner ought to have been given copies of the statement of the other doctors or permitted to cross-examine them.

**13.** This Court finds that no ground is made out for interfering with the impugned order of the Ethics Committee of the MCI. The writ petition along with pending applications is dismissed, but in the circumstances, with no order as to costs."



## IN THE HIGH COURT OF GUJARAT

Nirav Anupambhai Tarkas v. State of Gujarat

2011 SCC OnLine Guj 5577

M.D. Shah, J.

***A husband filed a complaint against his wife and her family alleging commission of an offence under Section 312, IPC for terminating her pregnancy despite the opposition of the husband. The lower courts rejected his complaint. The issue that arose before the High Court was whether a husband's consent is required under the MTP Act in addition to the pregnant woman's consent for termination of her pregnancy.***

Shah, J.: "...

2. The facts of the case in brief are that a complaint was filed by the petitioner-original complainant against the respondent Nos. 2-6-original accused before the Court of learned Chief Judicial Magistrate, Vadodara for the offences punishable under Sections 312 read with Secs.202 and 114 of IPC...It is further stated that as his wife became pregnant, he took her to Dr. Miraben Pankajbhai Desai on 19-12-2002, who informed that growth of the child was normal. However, when his wife wanted to terminate the pregnancy, he opposed to the same. The respondent No. 2 then approached Dr. Meeraben, however, as there was no consent of the husband, she did not agree for abortion...However, on 20-12-2005 the respondent No. 3 came to Vadodara and on the next day took away respondent No. 2 and went to Surat and approached Dr. Chetanaben. As there was no consent of husband, said doctor also did not agree for abortion. Thereafter, the respondent Nos. 2 to 5 went to Dr. Bhardwaj Joshi, who terminated the pregnancy of respondent No. 2 ... On inquiry, the police submitted a report stating that no offence was committed and hence, an order dated 8-2-2006 was passed by the learned Magistrate dismissing the complaint by holding that consent of the husband is not required as per Medical Termination of Pregnancy Act, 1971 ('the Act' for short). Revision being Criminal Revision Application NO. 65 of 2006 preferred before the Sessions Court was also rejected by the learned Sessions Judge vide order dated 27-7-2007. Hence, the present petition.

...

5. This Court has gone through the complaint together with the impugned orders of both the courts below. This Court has also gone through the provisions of the Act. It appears that the learned Chief Judicial Magistrate by detailed reasons dismissed the complaint filed by the complainant. Said order has been confirmed by the learned Sessions Judge, Vadodara, by elaborate reasons. It was held by the learned Sessions Judge that provisions of Sub-Section (4) of Sec.3 of the Act makes it mandatory to obtain consent of the pregnant woman in terminating the pregnancy but the court did not find it mandatory to accept the consent of husband. It was also held by the learned Sessions Judge that when there are two children out of the wedlock and wife and husband are not in goods terms since long, wife would not be compelled by the doctor to obtain consent of the husband. The findings appear to be just, legal and proper and no illegality or irregularity has been committed by both the courts below in arriving at the said findings. In view of the above, this petition does not have any merit and is hereby dismissed..."

## IN THE HIGH COURT OF PUNJAB AND HARYANA

Dr. Mangla Dogra v. Anil Kumar Malhotra

ILR (2012) 2 P&amp;H 446

Jitender Chauhan, J.

*A civil suit was filed by a husband against his wife, her family and her doctors for recovery of damages on account of mental pain and agony suffered by him due to termination of his wife's pregnancy in the absence of any medical requirement and without obtaining his consent. The Civil Court rejected the claim of the doctors and family members that the suit was not maintainable. In these revision petitions before the High Court, the issue was whether the express consent of the husband is required for terminating a pregnancy once consent of the wife has been obtained and provisions of the MTP Act are complied with. Further, if such consent of the husband is required, whether the husband is entitled to damages in case such termination is carried out without his consent.*

Chauhan, J.: “...

2. The facts giving rise to these Civil Revisions originated from a matrimonial dispute between respondent No. 1 Anil Kumar Malhotra and respondent No. 2, Seema Malhotra. The marriage between the parties was solemnized on 17.4.1994. Out of the wedlock, a male child was born on 14.2.1995. The parties resided at Panipat. Due to the hostilities and strained relations between the parties, Seema Malhotra along with her minor son had been staying with her parents at Chandigarh since 1999. Respondents No. 5 is the brother of respondent No. 2, whereas respondent Nos. 3 & 4 are her parents. Respondent No. 1, Seema Malhotra filed an application under section 125 Cr.P.C claiming maintenance from the husband, Anil Kumar Malhotra. On 9.11.2002, during the pendency of the application under section 125 Cr. P. C, with the efforts of the Lok Adalat, Chandigarh, she agreed to accompany the husband. As a consequence, the couple went to Panipat. On 2.1.2003, Anil Kumar Malhotra came to know that Seema Malhotra had conceived. The wife-Seema Malhotra did not want to continue with the pregnancy and she wanted to get the foetus aborted, as despite their living together, the differences between them persisted. It was the case of the husband-respondent No. 1 that on the pretext of getting herself medically examined, the wife went to Dr. (Mrs.) Riru Prabhakar, Prabhakar Hospital, Panipat. However, she was adamant to get the foetus aborted but the husband refused. On 3.1.2003, she contacted her mother at Chandigarh. On the advice of her mother, she along with her husband and son came to Chandigarh. On 4.1.2003, they went to General Hospital, Sector 16, Chandigarh. The husband refused to sign the papers giving his consent to terminate the pregnancy. The husband filed a suit for mandatory injunction restraining the wife from getting the foetus aborted. That suit was withdrawn in September, 2003, as the respondent No. 2 underwent MTP (Medical Termination of Pregnancy) at Nagpal Hospital, Sector 19, Chandigarh. The MTP was done by Dr. Mangla Dogra assisted by Dr. Sukhbir Grewal as Anesthetist. The husband-respondent No. 1 filed a civil suit for the recovery of Rs. 30 lacs towards damages on account of mental pain, agony and harassment against the wife, Seema Malhotra, her parents, brother, Dr. Mangla Dogra and Dr. Sukhbir Grewal for getting the pregnancy terminated illegally. The ground taken in the suit is that the specific consent of respondent No. 1, being father of the yet to be born child, was not obtained and the MTP was done in connivance with respondents No. 2 to 6. All the respondents are jointly and severally responsible for conducting the illegal act of termination of pregnancy without any medical requirement...

...

6. Defendant No. 1 informed the doctor that she did not want to continue with the pregnancy as this was an unwanted pregnancy and on examination by defendant No. 5, it was found that pregnancy was less than 12 weeks old, the defendant No. 5 after getting due consent from defendant No. 1, terminated the pregnancy. **Under Section 3(4)(b) of the Act, only the consent of the pregnant woman undergoing the termination of pregnancy is required. An unwanted pregnancy as per Explanation II to Section 3(2) of the Act is a grave injury to the physical or mental health of the woman.** The defendant No. 5 and 6 have conducted the abortion strictly in accordance with the provisions of the Act and they have no connivance with defendant Nos. 2 to 4 in any manner, whatsoever, as alleged by the plaintiff-respondent No. 1.

...

16. The question arising for consideration in these revisions is “whether the express consent of the husband is required for unwanted pregnancy to be terminated by a wife?”

**17.** This is the most unfortunate case where a husband has brought privileged acts and conducts of husband and wife in the court. The relation between the husband and wife became sour in the year 1999, when the wife started residing with her parents at Chandigarh. It is an admitted fact that on 09.11.2002, during proceedings under section 125 of the Code of Criminal Procedure, with the efforts of the Lok Adalat, Chandigarh, the wife agreed to accompany the husband and started residing with her, under one roof. Naturally, they have cohabited as husband and wife while residing together. Besides love and affection, physical intimacy is one of the key elements of a happy matrimonial life. In the present case, the wife knew her conjugal duties towards her husband. Consequently, if the wife has consented to matrimonial sex and created sexual relations with her own husband, it does not mean that she has consented to conceive a child. It is the free will of the wife to give birth to a child or not. The husband cannot compel her to conceive and give birth to his child. Mere consent to conjugal rights does not mean consent to give birth to a child for her husband. The wife did so in order to strengthen the matrimonial ties. On 02.01.2003, admittedly the husband and wife came to know that the wife was pregnant from her husband. She did not want to give birth to a child and showing unwillingness, got her pregnancy terminated in January, 2003, from the petitioners in Civil Revision No. 6337 of 2011 who are authorized to do so under the Act.

**18.** The argument of the Ld. counsel for the husband/respondent has to be rejected in view of the medical termination of pregnancy Rules, 1975. Rule 8 provides as under:—

**“ 8. Form of Consent-The consent referred to in sub section (4) of Section 3 shall be given in Form C.”**

**Form C is prescribed as under:—**

FORM C

(see rule 8)

I .....daughter/wife of ..... Aged..... about  
years of ..... (here state the permanent address)..... at present  
residing .....at do hereby give my consent of the termination of my pregnancy at  
.....  
.....

(State of name of place where the pregnancy is terminated)

.....

Signature

Place .....

Date .....

**19.** This form is to be signed by the wife only, showing her willingness to have the pregnancy terminated or aborted. The Medical Termination of Pregnancy Act, 1971 (34 of 1971), nowhere provides for the express or implied consent of the husband. The wife is the best judge and is to see whether she wants to continue the pregnancy or to get it aborted. The husband has unsuccessfully brought an action for perpetual injunction restraining the wife to get the pregnancy terminated, but the suit was dismissed as withdrawn.

**20.** When the husband has no right to compel her wife not to get the pregnancy terminated, he has no right to sue the wife for compensation. The husband also has no cause of action against the wife on this account. Keeping in view the strained relations between the husband and wife, the decision of the wife to get the termination of unwanted foetus was right.-It was not the act of termination of pregnancy, due to which relation became sour, but the relations between the husband and the wife were already strained. So, keeping in view the legal position, it is held that no express or implied consent of the husband is required for getting the pregnancy terminated under the Act.

**21.** Now the next question arises for consideration is as to whether the husband has any cause of action or right to sue against the medical practitioners, for getting the pregnancy terminated under the Act. Section 8 of the Act provides as under:—

**“8. Protection of action taken in good faith-No suit or other legal proceeding shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything - which is in good faith done or intended to be done under this Act.”**

22. It is a personal right of a woman to give birth to a child, but it is not the right of a husband to compel her wife to give birth to a child for the husband. No doubt the judicial precedents are there, where the courts have considered the termination of pregnancy by the wife as mental cruelty and gave divorce to the husband on this ground, keeping in view the unique facts and circumstances of the case. But, in the case in hand, the parties have a son born on 14.02.1995. The relations of the parties became strained and in the year 1999 the wife started living separately from her husband at Chandigarh. At the time of the second conception the age of the son was about eight years, who is with the mother/wife. No body can interfere in the personal decision of the wife to carry on or abort her pregnancy which may be due to the reason that an effort to live together under one roof has failed and that their son was of eight years. She approached the petitioners, who are admittedly an authorized hospital to have the pregnancy terminated. A woman is not a machine in which raw material is put and a finished product comes out. She should be mentally prepared to conceive, continue the same and give birth to a child. The unwanted pregnancy would naturally affect the mental health of the pregnant women. When the husband/plaintiff, came to know that his wife was pregnant from his loins, it was his duty to convince his wife to continue with the pregnancy, but his coming to the court by filing a Civil Suit for permanent injunction restraining the wife from getting the pregnancy terminated was a shameful act on his part. Because in the mean time, the wife was successful in getting the pregnancy terminated from a duly authorized medical practitioner, so he had to withdraw the Civil Suit, the same having become infructuous. He does not pause there, but came to the court bringing an action by filing a Civil Suit, for recovery of Rs. 30 lacs towards damages on account of alleged pain, agony and harassment undergone by the plaintiff on account of termination of pregnancy. The act of the medical practitioners (herein the Revision petitioners) was perfectly legal. No offence or tortuous act was committed by the medical practitioners. So it is held that the act of the medical practitioners Dr. Mangla Dogra and Dr. Sukhbir Grewal, in Civil Revision No. 6337 of 2011 was legal and justified. The plaintiff/husband has failed to bring any document on record to show that the act of the medical practitioners was illegal or unjustified and thus they are liable to pay the damages. The act of the medical practitioners can not be termed as unethical.

...

27. The medical termination of pregnancy Act 1971 does not empower the husband, far less his relations, to prevent the concerned woman from causing abortion if her case is covered under section 3 of that Act. Under section 312 of the Indian Penal Code, 1860 causing miscarriage is a penal offence. Relevant civil law has since been embodied in the Act legalising termination of pregnancy under certain circumstances. Since law is liberal for effecting such termination, the Act does not lay down any provision on husband's consent in any situation.

...

30. Keeping in view the above discussion, it is held that no cause of action accrued to the plaintiff-husband against the present petitioners, in Civil Revision No. 6337 of 2011 and No. 6017 of 2011. They are not necessary and proper parties in the suit and the suit qua them appears to have been filed with ulterior motive best known to the husband/plaintiff. The continuation of the Civil Suit against these petitioners would amount to the abuse of process of law and miscarriage of justice and this Court would not feel hesitate to come to the rescue of the petitioners.

..."

## IN THE SUPREME COURT OF INDIA

**Anil Kumar Malhotra v. Ajay Pasricha & Ors.**

**Civil Appeal No. 4704 of 2013 (Order dated October 27, 2017)**

**Dipak Misra C.J., A.M. Khanwilkar and D.Y. Chandrachud, JJ.**

***The husband filed an appeal in the Supreme Court against the Punjab and Haryana High Court order in Dr. Mangla Dogra v. Anil Kumar Malhotra (ILR (2012) 2 P&H 446) wherein the High Court had dismissed his suit claiming damages from his wife, her relatives and doctors for an abortion without the husband's consent. The Supreme Court was asked to test the reasoning of the High Court judgment which had held that Section 3(4)(b) of the MTP Act read with Rule 8 of the MTP Rules 1975 indicates that a woman does not require her husband's consent for terminating her pregnancy.***

**Misra, C.J., and Khanwilkar and Chandrachud, JJ.:** "...

Having considered the submissions advanced by learned counsel for the parties, we are not inclined to entertain these appeals and the same are accordingly dismissed. No order as to costs."

## IN THE HIGH COURT OF MADHYA PRADESH

**Hallo Bi @ Halima v. State of Madhya Pradesh**

**2013 Cri LJ 2868 (MP)**

**S.C. Sharma, J.**

***An incarcerated woman filed an application with the jail authorities requesting for termination of her pregnancy, which resulted from forced prostitution. The jail authorities forwarded her application to a chief judicial magistrate who rejected her application. The woman then filed a petition in the High Court of Madhya Pradesh for directions to the concerned State authorities to permit her to terminate her pregnancy. The issue before the Court was whether the termination of pregnancy was permissible under Section 3(2)(ii) Explanation 1 of the MTP Act.***

**Sharma, J.:** “The petitioner before this Court, who is in Jail ... for an offence punishable under section 302 of the Indian Penal Code, has filed this present petition for issuance of an appropriate writ, order or direction directing the respondents to permit the petitioner to terminate her pregnancy.

**2.** The contention of the petitioner is that she was forced into prostitution by one Usman and on account of forced prostitution, she became pregnant. Petitioner has further stated that an application was submitted to the Jail Authorities for termination of pregnancy and the matter was forwarded to the Indore (sic) for grant of necessary permission and the CJM in a mechanical manner, on 14-12-2012 has rejected the petitioner's application for grant of termination of pregnancy.

**3.** Section 3 of The Medical Termination of Pregnancy Act, 1971 provides a medical opinion by a registered medical practitioner and, therefore, the matter was immediately referred to obtain an opinion from the Head of the Department, Gynaecology and Obstetrics, M.G.M. Medical College/M. Y. Hospital, Indore. The petitioner was subjected to medical examination by Dr. Laxmi Maroo, Professor and Head of the Department, Gynaecology and Obstetrics, M.G.M. Medical College, Indore and her report reflects that at the time of medical examination, the petitioner has stated that she is not willing for termination of pregnancy.

**4.** Again the matter was listed before this Court on 11-1-2013 and as a statement was once again made before this Court by the learned counsel for the petitioner that the petitioner now wants to terminate the pregnancy, the Superintendent of Jail, Distt. Jail, Indore was directed to produce the petitioner before this Court on 15-1-2013.

**5.** The petitioner was present before this Court on 15-1-2013 and the petitioner in open Court categorically stated that she was forced into prostitution, she was sold in the State of Rajasthan and on account of the forced prostitution, she has become pregnant. The petitioner has categorically stated in the open Court that she wants to terminate pregnancy and at the relevant point of time the medical examination took place she was nervous and scared of the surrounding environment as well as she was very tense. The observation has been made by the Doctor that she does not want to terminate the pregnancy. This Court, by way of abundant caution has requested respected lady Lawyers of this Court to interact with the petitioner and Ms. Meena Chaphekar and Mrs. Vinita Phaye, Advocates have interacted with the petitioner and have informed this Court that the petitioner wants to terminate the pregnancy. The first medical examination of the petitioner took place on 10-1-2013 and the age of the foetus was assessed at 11 weeks and 4 days and therefore, keeping in view Rule 3, clause (2), subclause (b), a report of two registered medical practitioners/Government Doctors was required.

**6.** This Court has again referred the matter for medical opinion and now, today, a fresh report has been received. The report has been submitted on behalf of two Doctors posted at M.Y. Hospital, Indore and both are Gynaecologist. They have opined that the pregnancy can be terminated. The report has been received through Superintendent of Jail, District Jail, Indore and the same is taken on record.

**7.** Mrs. Vinita Phaye, learned counsel for the respondent-State has also argued before this Court that pregnancy can be terminated keeping in view section 3 of The Medical Termination of Pregnancy Act, 1971.

**8.** As statement was made by the petitioner in the open Court that she was subjected to forced sex/rape, she was also directed to submit an affidavit and she has submitted an affidavit dt. 15-1-2013. The affidavit reflects that she was subjected to forced sex. She has stated that she wants to terminate the pregnancy and does not want to give birth to the child. Thus, the petitioner has not only filed an affidavit, but had stated in open Court that she was subjected to forced sex and wants to terminate the pregnancy. The report as required under The Medical Termination of Pregnancy Act, 1971 is also in favour of the petitioner.

...

**12.** In the present case, the petitioner wants to abort the child and has challenged the order passed by the CJM, rejecting her prayer to abort the child. Section 3 provides for medical opinion of a registered medical practitioner and as the length of pregnancy is about 12 weeks, the matter was referred to M.Y. Hospital, Indore for obtaining medical opinion of two Doctors. Two lady Doctors including the Head of the Department, Gynaecology and Obstetrics, M.G.M. Medical College/M. Y. Hospital, Indore has categorically stated that pregnancy of the petitioner can be terminated vide report dt. 16-1-2013, meaning thereby the medical opinion to abort the child is in her favour.

**13.** ...The Medical Termination of Pregnancy Act, 1971 was enacted in 1971. The Medical Termination of Pregnancy Act, 1971 provides for abortion, in case of woman whose physical/mental health are endangered by the pregnancy, woman facing birth of a potentially handicapped or malformed (sic) child, rape, pregnancy in unmarried girls under the age of 18, with the consent of guardian, pregnancies in lunatics, with the consent of a guardian, pregnancies which are result of failure in sterilization. This Act provides for termination of pregnancy in case of rape which is in fact, forced sex with the victim who was led into prostitution by use of force and, therefore, in the peculiar facts and circumstances of the case, keeping in view, the statement of the petitioner, the Act of 1971 does permit abortion in the peculiar facts and circumstances of the present case also. The Act of 1971 provides for a legal method of abortion in respect of cases mentioned in the Act. It is really shocking that in our country every year almost 11 million abortions takes place and 20000 women die every year due to abortion related complications. Most abortion related maternal deaths are attributable to illegal abortions and, therefore, the Medical Termination of Pregnancy Act, 1971 has authorised a procedures for abortion in respect of cases mentioned in the Act. It certainly provides for a safeguard to women to abort a child keeping in view the statutory provisions as contained under the Act. Pre-natal Test for determining the sex of the foetus, is a crime under the Indian laws and a punishment is also provided under various statutory provisions for termination of pregnancy and for determining the sex of foetus. However, the present case is having a distinguishing feature, the sex of the child has not been determined, foetus is on account of the forced prostitution, as alleged by the petitioner, and, therefore, case of the petitioner in respect of the abortion, is squarely covered under the Explanations where permission can be granted for abortion as per the statutory provisions as contained under The Medical Termination of Pregnancy Act, 1971.

...

**15.** The Medical Termination of Pregnancy Act, 1971 provides for termination of pregnancy on health grounds and in those cases where there is a danger to life or risk to physical or mental health of a woman and also on humanitarian ground where the pregnancy arises from sex crimes like rape or intercourse with lunatic woman etc...

**16.** Section 3 provides for Opinion from a registered Medical Practitioner where the length of pregnancy does not exceed 12 weeks and where the length of pregnancy exceed 12 weeks, from two medical practitioners and permission can be granted where pregnancy is alleged by the pregnant woman to have been caused by rape and the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of a pregnant woman. The Statement of Objects & Reasons for enacting the Act of 1971 was to help a victim of a sex crime like rape or intercourse with a lunatic woman also.

**17.** In the present case, the petitioner who was present in the Court was brave enough to state before everyone that she was forcibly forced into prostitution. She was sold for prostitution and every day she was subjected to forced prostitution/rape. Forced prostitution, in the considered opinion of this Court, virtually amounts to rape and, therefore, this Court is of the considered opinion, that the petitioner's case falls under Explanation 1 of section 3, clause (ii) of the Act of 1971.

**18.** We cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the petitioner is suffering daily, will certainly cause a grave injury to her mental health. Not only this, the child will also suffer mental anguish in case the lady gives birth to a child.

**19.** The Apex Court in the case of *Suchita Srivastava v. Chandigarh Administration*, reported in (2009) 9 SCC 1, in paras, 20 to 27, 31 and 58 has held as under :—

“ ...

22. There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively

the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

23. A perusal of the abovementioned provision makes it clear that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a '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 per section 3(2)(i)] or when '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' [as per section 3(2)(ii)]. While the satisfaction of one medical practitioner is required for terminating a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period.

...

25. In all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in section 3(4)(b) of the MTP Act, 1971.

..."

20. In the present case, the petitioner understands what pregnancy is. She has consented for abortion. The medical opinion is in her favour. She does not want to raise the child of a rapist and, therefore, the relief prayed for in the relief clause is granted to the petitioner directing the respondents to carry out the process of abortion immediately...

...

23. In the result, the writ petition is allowed. The petitioner is granted permission to abort the child keeping in view the statutory provisions as contained under The Medical Termination of Pregnancy Act, 1971. The Superintendent of District Jail, Indore is directed to admit the petitioner in M.Y. Hospital, Indore for terminating the pregnancy. It is needless to mention that the petitioner shall be provided with all medical assistance and care after the pregnancy is terminated, she will again be provided with all medical assistance by the respondent State. It is needless to mention that the Superintendent of District Jail, Indore after the pregnancy is terminated shall file status report to the Principal Registrar of this Court and for a further period 6 months, he will file a monthly status report in respect of health of the petitioner.

..."

## IN THE HIGH COURT OF DELHI

**Sushil Kumar v. Govt of NCT of Delhi**

**2013 SCC OnLine Del 2068**

**R.V. Easwar, J.**

***Criminal cases under Sections 498A and 313 of the IPC were registered against a husband and his family for forcing his wife to consume abortion pills. The husband and parents-in-law of the woman filed applications for anticipatory bail before the Delhi High Court.***

Easwar, J.: "...

2. The present applications have been filed in the following circumstances. Aarti Gupta, the complainant, was married to Ashish Gupta on 15.01.2013. On 09.04.2013, she filed the complaint with the police narrating that immediately after the marriage, her husband Ashish Gupta, father-in-law Sushil Kumar and mother-in-law Mithilesh started torturing her and also verbally abusing her. According to the complainant, her husband Ashish Gupta used to allege that she was having

an illicit affair with some other boy. Unable to bear the torture Aarti went to her parental house but her parents sent her back to the matrimonial home. The mental and physical torture and abuse, however, continued. On 02.04.2013, on coming to know that the complainant was pregnant her in-laws took her to the house of one Sunita (one of the applicants herein) and after verbally abusing the complainant and alleging that the child in her womb was not that of Ashish Gupta, they forcibly made her swallow abortion pills. She was left unattended and it was on 05.04.2013 that the in-laws of the complainant came back and called the parents of the complainant, apparently to inform them of her condition. The complainant was taken to the parental house on 05.04.2013. On that day she started bleeding. She was treated by Dr. Sapna Verma at Kondli. The doctor told the complainant that the child may be saved. Some ultrasound treatment was given to the complainant. However, on 09.04.2013 she started bleeding again heavily whereupon her mother brought her to the hospital. There her statement was recorded. On the basis of the statement and the MLC of the complainant a case under section 498A/313/34 of the IPC was registered.

3. The applicants herein filed bail applications under section 438 of the Cr.P.C. before the Sessions Court which were turned down. The learned Sessions Judge perused the MLC wherein the girl had informed the doctor that some MTP pill (abortion pill) was given to her forcibly by her father-in-law. The Sessions Court also noted that in her statement recorded under section 164 of the Cr.P.C., the complainant had stated that she had been pressurised by her in-laws and husband to give statement in their favour. The complainant told the Sessions Judge in the Court that she was made to consume the medicine forcibly and was pressurised to make statements exonerating the bail applicants.

4. On a consideration of the entirety of facts and the nature of the allegations, the Sessions Court found no ground for the grant of anticipatory bail; the applications were dismissed.

...

7. I have carefully considered the rival submissions and weighed the circumstances of the case. The complainant was present in Court. From her demeanour and the manner in which she responded to the queries of the Court, it appears to this Court that she was under tremendous pressure and compulsion. She clearly appeared traumatised. From the complaint it is seen that there is enough material to show that all the three applicants had significant roles in forcing her to swallow the abortion pills. The complainant Aarti Gupta is of tender age and at this age serious damage could have been caused to her reproductive system by forcing her to swallow abortion pills without medical advice or supervision. In her complaint, she has referred to some *Sadhu Baba* whose assistance was taken by the applicants for causing the miscarriage. The MLC has been perused by the lower court wherein it has been recorded that the complainant had informed the doctor that she was forcibly given abortion pills. The letters alleged to have been written by her exonerating the applicants herein do not appear to me to be voluntary and in fact she has stated so before the lower court. She has also stated before the lower court, as recorded in the impugned order, that she was made to consume the medicine forcibly and was pressurised into giving a statement exonerating the applicants. The so-called settlement between the complainant and her husband appears unreal and concocted.

8. Considering the MLC and the serious nature of the allegations made in the complaint, the applications for anticipatory bail cannot be allowed. I reject them.

9. This Court takes a serious view of the matter. It is clear that unbearable pressure is being brought upon her by the in-laws of the complainant. The safety and security of the complainant is another concern in this case. The complainant says that she is now residing in her parental home and this has been confirmed by her father who is also present in Court. I, therefore, direct the SHO concerned to afford adequate protection to the complainant by arranging a visit by a constable to her parental home every day in the morning and in the evening to ensure that no harm is caused to her. I also direct the trial court to verify the age of the complainant at the time of the marriage. It also appears to me that the police should, as a part of their investigation in this case, trace the so-called *Sadhu baba* whose assistance was allegedly taken by the applicants and make a thorough investigation by recording his statement and dealing with him in accordance with law.

..."



## IN THE HIGH COURT OF BOMBAY

Dr. Saraswati v. State of Maharashtra &amp; Ors.

2013 SCC OnLine Bom 1014

T.V. Nalawade, J.

***These bail applications were filed before the Bombay High Court in a case where the two applicants allegedly caused or aided in sex determination and abortion contrary to the provisions of the MTP Act. The applicants were also accused of non-maintenance of proper records under the Pre-Conception and Pre-Natal Diagnostic Techniques (PCPNDT) Act, 1994.***

Nalawade, J.: "...

2. The first application is filed by Dr. Smt. Mundhe in R.C.C. No. 163/2012, which is filed by Appropriate Authority for offences punishable under sections 3-A, 4(5), 5, 6, 8 and 19 of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (hereinafter referred to as 'PCPNDT Act' for short) and also under the Rules framed under this Special Act. The second application is filed by the State against Dr. Smt. Mundhe, for cancellation of bail, granted to her by Additional Sessions Judge, Ambajogai, District Beed in C.R. No. 42/2012 registered in Parli City Police Station. The chargesheet is filed in this crime for offences punishable under section 304, 312, 314, 315, 316 and 201 r/w. 34 of Indian Penal Code and also for offences punishable under section 3, 4-B and 6 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as 'MTP Act' for short). The chargesheet is also filed for the offences punishable under the provisions of PCPNDT Act. The third application is filed for bail by Dr. Shri. Sudam Mundhe in C.R. No. 42/2012 registered in Parli City Police Station for aforesaid offences, in which chargesheet is filed against this applicant also.

...

4. Dr. Shri. Mundhe is General Orthopedic Surgeon. Dr. Smt. Mundhe is Obst. and Gynecologist. At the relevant time, they owned and run Mundhe Hospital in Parli. In R.C.C. No. 302/2010, which was filed under the provisions of PCPNDT Act prior to the incident in question, the sonography machine of this hospital was seized by Appropriate Authority and they were prevented from using pre-conception and pre-natal diagnostic techniques. The permission given to this hospital for termination of pregnancy was also cancelled by Appropriate Authority by order dated 6.9.2011. One more case of illegal termination of pregnancy, abortion was filed against them in the past.

5. On 17.5.2012 one Smt. Vijaymala Patekar, a married woman, was brought to this hospital by her husband, accused No. 3 from C.R. No. 42/2012. She was having four daughters and she was again pregnant. This couple wanted to determine sex of the foetus. After clinical examination of this lady, Dr. Shri. Mundhe referred this lady to Padmawati Hospital from Jalgaon of Dr. Kolhe for sex determination ... Case Nos. 473/2011 and 505/2011 were already filed against Dr. Shri. Kolhe in Jalgaon by the Appropriate Authority under PCPNDT Act. His sonography machine was seized. He was also prevented from using such diagnostic techniques. In spite of these circumstances, Dr. Kolhe was using one sonography machine and in the present case, he determined the sex of foetus of Vijaymala. It was female foetus and it's age was around 18 to 20 weeks.

6. When Smt. Vijaymala was brought back to Mundhe Hospital after sex determination, medicines were given and operation was performed for abortion on 18.5.2011. The foetus was destroyed by burning it in the field of Dr. Shri. Mundhe by his employees. Smt. Vijaymala died due to this operation on 18.5.2011 itself. Dr. Shri. Mundhe informed to Parli City Police that Vijaymala had come to the hospital as she had bleeding (PV) and she died in his hospital. Neither in the hospital of Dr. Kolhe, nor in the hospital of Shri. Mundhe, complete and correct record in respect of Smt. Vijaymala was created. Dr. Mundhe informed to police that the pieces of foetus were thrown by him in drainage system. After receipt of this report, one Police Inspector of Parli Police Station gave report to the police station and on the basis of this report, the crime was initially registered for offences punishable under section 304-A and 201 of I.P.C. vide C.R. No.42/2012. The offences punishable under the provisions of MTP Act and PCPNDT Act were also mentioned in the report. There are allegations made against this Police Officer that he joined hands with Dr. Mundhe. After completion of investigation, the chargesheet came to be filed for aforesaid offences.

7. On 13.6.2012 the Appropriate Authority under PCPNDT Act filed complaint, R.C.C. No. 163/2012, in the Court of Judicial Magistrate, First Class, Parli.

8. C.R. No. 42/2012 was registered on 18.5.2012 and this couple came to be arrested on 19.5.2012. On the same day, J.M.F.C. granted bail to them as the crime was initially registered for offence punishable under section 304-A of I.P.C. On 16.7.2012 another Police Officer gave report to J.M.F.C. and requested for permission to add section 304 of I.P.C. and

other offences also. The permission came to be granted. This couple then came to be arrested for commission of the newly added offences. In Criminal Application No. 425/2012, Additional Sessions Judge granted bail to Smt. Mundhe on 24.9.2012. Initially the bail was refused to Smt. Mundhe by the same Presiding Officer by order dated 23.8.2012. The subsequent application came to be filed after filing of the chargesheet and only on the ground of filing chargesheet, the bail came to be granted to Dr. Smt. Mundhe. The Sessions Court has, however, refused bail to Dr. Shri. Mundhe.

9. In private complaint, R.C.C., No. 163/2012 process was issued by J.M.F.C. This couple appeared before J.M.F.C. J.M.F.C. refused bail to both these accused. Criminal Application No. 145/2013 was filed in Sessions Court by both the accused. Their application came to be rejected on 12.6.2013. Thus, in R.C.C. No. 163/2012 Dr. Smt. Mundhe has been behind bars since 3.4.2013. In C.R. No. 42/2012, Dr. Shri. Mundhe has been behind bars since 13.6.2012. Bail is refused to him up to Supreme Court in other case like R.C.C. No. 302/2010.

...

15. The aforesaid record and the submissions show that both the applicants were causing or aiding for the determination of sex. They were also causing abortion illegally in their hospital. Atleast two cases of such abortion are filed against this couple. There is allegation that they were causing abortion of female foetus and they were never maintaining proper record as provided under PCPNDT Act.

16. The two special Acts like MTP Act and PCPNDT Act are made with specific purpose. The provisions of MTP Act show that the termination of pregnancy is ordinarily to be done in the Government Hospital. The termination can also be done at a place approved by the State or District Level Committee (Section 4). At other places, the termination of the pregnancy is not allowed. There is Rule 5 regarding approval of places and conditions of the same are also laid down. Section 5(5) provides that when the termination of pregnancy is caused at other places than the places mentioned in section 4 of the Act, it is made punishable with imprisonment of two years and it may extend to seven years. The abortion can be caused only when the conditions laid down in section 3 of the Act are fulfilled. The opinion of one registered medical practitioner, which needs to be given in good faith, needs to be obtained in writing, when the age of the foetus does not exceed 12 weeks. If the age of the foetus is above 12 weeks and it does not exceed 20 weeks, the opinion of two such registered medical practitioners needs to be obtained. Some exceptions are given in that regard. But, it can be said that in the first places the abortion, termination can be caused only in the approved places. The provisions show that they are made to save registered medical practitioner from use of provisions of I.P.C. against them, but for that, he must satisfy the aforesaid conditions. There are some exceptional circumstances, but for that also the act must be done in the approved places. No pregnant woman can be allowed to abort at her will. This position of law also needs to be kept in mind. Prima facie, there has been breach of all such provisions in the present case.

17. The object behind the provisions of PCPNDT Act is the prohibition of sex selection either before or after conception. The sex selection leads to female foeticide [sic]. The object shows that it is to prevent the abuse of diagnostic techniques as it is discriminatory against the female sex and it affects the dignity and status of woman. The Act provides the modes, which need to be used to give effect to the provisions of Act. For that, procedure for permission and regularisation of use of such techniques is provided. The diagnosis is possible only under certain conditions and only by registered institutions. Punishment is provided for violation of the provisions. The other object is to uphold the medical ethics. The provisions of section 3 (3) of this Act show that no medical practitioner shall conduct or cause to be conducted or aid in conducting himself or through any other agency to any other person any pre-natal diagnostic technique at place other than the place registered under the Act. Thus, the provision is wide enough to include the instances in which doctors like present matter refer the case to other doctor for diagnosis. Section 3-A is on the same line and it is particularly for sex selection. Section 3 (3) is meant for the use of diagnostic techniques for sex determination. These provisions need to be read together. Section 5 shows that there is prohibition of communicating the sex of foetus. Thus, the doctor, using the techniques, is not allowed to tell the sex of foetus to the pregnant woman or her husband or anybody. Section 6 is made to prevent the use of techniques for sex determination. The wording used in this section is also similar and it is wide enough to include doctor like Shri. Mundhe, who refers the cases to other doctor for sex determination. Section 23 provides for punishment and it shows that for first offence, the imprisonment for three years is provided, but for subsequent offence, the imprisonment may extend for five years. These offences are made cognizable and non bailable. The provision of section 28 regarding cognizance of such offence is already mentioned.

18. As the record was not maintained in both the hospitals, even at later stage, it will be difficult for the applicants to show that there was some emergency and so, they took decision to terminate the pregnancy. When there is a breach of the provisions of such special Acts and when such act is done with the intention to make money, it becomes very easy to draw

inference that there was no emergency as such. Further, when there is material of aforesaid nature, prima facie, it can be said that there was the intention to do an act, which was likely to cause death of Vijaymala. The age of foetus was around 18 to 20 weeks. In view of the facts and circumstances of the present case, it can be said that there is strong prima facie case for offence punishable under section 304-I of I.P.C. The punishment of imprisonment for life is provided for this offence. This offence was committed after getting released on bail in other case of illegal abortion by the applicants. If such persons are at large, they are dangerous to the society. It is sure that they will commit similar offence after getting released on bail.

19. The learned counsel for Authority appointed under PCPNDT Act supplied the data regarding the ratio of male-female birth in Beed District, where the applicants were practicing. It is as under :-... The aforesaid material is sufficient to show that the applicants had played leading role in bringing down the rate of birth of female child in Beed District.

20. Dr. Shri. Mundhe is behind bars in C.R. No. 42/2012 and also in cases filed under PCPNDT Act. There is no question of granting discretionary relief in favour of Dr. Shri. Mundhe in view of the aforesaid circumstances. Hon'ble Apex Court has refused bail to him in one PCPNDT case. Thus, it is not a fit case to grant bail to Dr. Shri. Mundhe. So, the Criminal Application bearing No. 1055/2013 needs to be rejected.

...

25. In view the aforesaid position of law and the facts of this case, this Court holds that bail cannot be granted to Smt. Mundhe in Criminal Application No. 3350/2013. Further, the bail granted to her by Sessions Court in C.R. No. 42/2012 needs to be cancelled. After cancellation of bail granted to Smt. Mundhe in C.R. No. 42/2012, granting of bail in application No. 3350/2013 would become meaningless. As the proceedings have arisen out of the same incident and the applicants are the main offenders, this Court holds that no bail can be granted to them. So the order.

..."

## IN THE HIGH COURT OF DELHI

**X v. Govt. of NCT of Delhi & Anr.**

**2013 SCC OnLine Del 6473**

**Sunita Gupta, J.**

***The petitioner was rescued from forced prostitution in a police raid and lodged in a protection home. The medical examination revealed that she was HIV positive and about 18 weeks pregnant. The respondent authorities denied her request for termination of pregnancy, which was sought on the grounds that it was a result of rape and was likely to cause grave injury to her physical and mental health. She then approached the Delhi High Court seeking directions to respondent authorities for facilitating the medical termination of her pregnancy.***

**Gupta, J.:** "This is a writ petition under Article 226 of the Constitution of India read with Section 482 Cr. P.C. for issuance of appropriate directions to the respondent to facilitate medical termination of pregnancy which is likely to cause grave injury to the petitioner and put the child at substantial risk, if born.

2. Notice of the petition was issued to the respondents. Status report has been filed by the State wherein it is stated that on 29th August, 2013 an information was received from J.R. Sharan, Project Coordinator, Rescue Foundation and Ms. Hem Lata, Probation Officer, Rescue Foundation that 3-4 girls were forcibly kept in Kotha No. 41, 1st Floor, G.B. Road, Delhi and they were subjected to forcible prostitution. On this information a raiding team was constituted and raid was conducted at the Kotha. Four girls, including the petitioner, were rescued. On the statement of one of the rescued girl FIR No. 124/2013 dated 30th August, 2013 under Sections 376/365/342/109 IPC read with Section 3/4/5/6 ITP Act was registered at Police Station Kamla Market. During investigation petitioner disclosed that she was brought to Delhi from her village by an unknown boy and was sold at GB Road where she was compelled to do prostitution. Her statement under Section 164 Cr. P.C. was recorded wherein she supported her previous statement. Present petition has been filed by the petitioner stating therein that she is now about 19 years of age. When the petitioner was taken by the authorities of respondent No. 1 Nirmal Chhaya for medical examination at Deen Dayal Upadhyay Hospital, New Delhi it was found that she is HIV positive and is about 19 weeks pregnant. She informed the authorities and the doctors that the child was conceived in forceful and undesired sexual intercourse against her will and given her ill-health and the likelihood that the child will also be born at risk, she wishes to medically terminate her pregnancy as it is a cause of stress and grave injury to her medical health. Since

the petitioner is in the protective custody of respondent No. 1 she has not been permitted to exercise her legal rights of medically terminating her pregnancy which she expresses to cause grave threat to her physical and mental safety. As such, it was prayed that directions be issued to the respondent to facilitate medical termination of pregnancy.

**3.** I have made inquiries from the petitioner in the presence of her counsel Ms. Nandita Roy, Advocate in my Chamber. She has expressed her willingness to get her pregnancy terminated. She states that her parents have already died. She has a younger brother to support. She is unable to carry her pregnancy to full term due to social stigma as she is victim of circumstances whereby she was taken to brothel and was forced to indulge in prostitution.

**4.** In the status report filed by the State, State has given no objection if permission is granted for termination of pregnancy as it will not affect the investigation in any manner. Superintendent, Department of Women and Child Development, Nirmal Chhaya, Jail Road has also given no objection to the decision taken by the petitioner for terminating her pregnancy.

**5.** On 5th December, 2013, she was examined by the medical board consisting of Dr. Poonam Aggarwal and Dr. Ritu Goel and the board opined that she is 18 months (18 weeks?) plus pregnant hence her pregnancy can be terminated after routine investigation. The victim has expressed her willingness to terminate the pregnancy and she understands the consequences of her act.

**6.** In *Suchita Srivastava v. Chandigarh Administration*, 2009 (4) R.C.R. (Criminal) 232 : 2009 (4) R.C.R. (Civil) 258 : 2009 (5) Recent Apex Judgments (R.A.J.) 306 : (2009) 9 SCC 1, Supreme Court has held as under:

“37. As evident from its literal description, the “best interests” test requires the Court to ascertain the course of action which would serve the best interests of the person in question. In the present setting this means that the Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim. It is important to note that the Court’s decision should be guided by the interests of the victim alone and not those of the other stakeholders such as guardians or the society in general. It is evidence that the woman in question will need care and assistance which will in turn entail some costs. However, that cannot be a ground for denying the exercise of reproductive rights.”

**7.** A plain reading of provision in the Medical Termination of Pregnancy Act, 1971 clearly indicates that consent is an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer any “mental illness”. The Explanations to Section 3 have contemplated the termination of pregnancy when the same is the result of a rape or a failure of birth control methods since both of these eventualities have been equated with a “grave injury to the mental health” of a woman. In such circumstances, consent of the pregnant woman is an essential requirement for proceeding with the termination of the pregnancy under Section 3 of the Act. A woman has the option to get the pregnancy terminated by a registered medical practitioner, if it does not exceed 12 weeks. If the duration of the pregnancy exceeds 12 weeks but does not exceed 20 weeks such a termination can be done by not less than two registered medical practitioners, who will give the opinion whether the continuance of the pregnancy would involve a risk to the life of the pregnant woman and grave injury to her physical and mental health.

**8.** To carry a child in her womb by a woman as a result of conception through an act of rape is extremely traumatic, humiliating and psychologically devastating. In similar circumstances, permission was granted by this Court in *K.M. Mahima v. State* 2004 (1) R.C.R. (Criminal) 546 : 2003 VI AD (Delhi) 510; *X v. The State (N.C.T. of Delhi)* 2013 (2) R.C.R.(Criminal) 430 : 2013 (2) JCC 1068 and *Janak Ramsang Kanzariya (Minor) through Manjuben Ramsang Kanzar v. State of Gujarat*, 2012 (7) R.C.R. (Criminal) 2025 : 2011 CrL.J. 1306.

**9.** The petitioner, aged 19 years, hails from poor strata of the society and is likely to face innumerable mental, physical, social and economical problems in future. There are no reasons to prevent her not to exercise her option voluntarily in her interest.

**10.** For the foregoing reasons, the petition is allowed with the directions to respondent No. 1 to accompany the petitioner ‘X’ and to produce her before medical superintendent, Deen Dayal Upadhyay Hospital, New Delhi within three days to get her pregnancy terminated where board of two medical practitioners would be constituted by Medical Superintendent which will take the decision immediately for termination of the pregnancy and it will be terminated in accordance with the provision of Section 3 of the Act.

**11.** The petition is allowed in the above terms. Respondent No. 1 shall ensure that the petitioner is provided proper medicine, diet and nutritious food as may be necessary for her health...

...”

## IN THE HIGH COURT OF PUNJAB AND HARYANA

**Bashir Khan v. State of Punjab****AIR 2014 P&H 150****K. Kannan, J.**

***This writ petition was filed by the parent of a minor girl who became pregnant as a consequence of rape, challenging the Magistrate's order declining the application for termination of her pregnancy. The High Court examined whether any judicial authorization is required for termination of pregnancies in accordance with Section 3 of the MTP Act especially when there is no dispute on whether the pregnancy should be terminated.***

**Kannan, J.:** "The writ petition is at the instance of the parent of a minor girl, called 'the victim' here, who is reported to have been raped as a consequence of which, she has become pregnant..."

2. The petitioner has approached the SDJM, Balachaur, through an application under Section 3 for termination of her pregnancy. It has been stated in the petition that the victim is only 14 years of age, that she had been illegally abducted and raped. The victim is in fragile health and she did not want to retain the foetus. It was claimed on her behalf by the parent that continuance of pregnancy would involve risk to the life of the victim and cause grave injury to physical and mental health. A statement had been recorded from the victim's mother Alima that she does not want to carry foetus and that she wanted to terminate the pregnancy. The Magistrate has recorded the statement of the victim herself that she had been raped and that she did not want the pregnancy. A doctor by name Kiran Kaushal, Gynaecologist, attached to the Government Hospital at SBS Nagar, has certified that the termination of pregnancy was possible, though the person was anaemic and a minor. The doctor has also given a status report which was called for from the doctor stating that she was anaemic with RH-Ve Blood group. She has observed that before termination of pregnancy, her hemoglobin count would require to be built up to ensure availability of blood and that termination could be effected in a hospital where there were two or more gynaecologists as teenage pregnancy termination carries many risks to the patient. Apart from even the risk of surgery to gynaecologist who perform the procedure. It is also suggested in the report that she would require NDT injection to ensure her future obstetric carrier. The Sub Divisional Magistrate, however, was of the view that the application was not maintainable before a Judicial Magistrate since there was no specific provision empowering the Judicial Magistrate to pass an order granting permission to terminate the pregnancy. The petitioner has approached the court after an adverse order of the Magistrate declining to terminate the pregnancy.

3. There can be no two opinions that the conditions necessary for terminating the pregnancy do exist. There is prima facie case material available through lodging of FIR for offences under Section 376 and other related provisions. Section 3 of the Medical Termination of Pregnancy Act, 1971 sets out the circumstances when pregnancy may be terminated by registered medical practitioner. Clause 2 states that 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 the opinion, formed in good faith, that the continuance of pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health, medical termination of pregnancy could be performed. Explanation 1 lays down that where 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. In this case, there is a statement recorded by the Magistrate from the victim that she had been raped and that she does not want to retain the foetus. Since she is woman who has obtained the age of puberty and the party is a Muslim, the father is the guardian. He has also expressed that he would desire the pregnancy to be terminated. The mother's statement has also been given before the Magistrate that she wanted to terminate the pregnancy for her daughter.

4. Section 4 of the MTP Act sets out the place where the pregnancy may be terminated. It shall be in a hospital established or maintained by government or a place approved for the purpose of this Act by government. Since the pregnancy is reported to be more than 14 weeks, the requisite certification of two registered medical practitioners has not been brought forth before this court in the manner contemplated under Section 3(2)(b). It should have been possible for either the State or the parties themselves to have approached the District Medical Officer and who should have given direction for constitution of a two members committee of doctors to give opinion on the fact that the continuance of pregnancy would have involved risk to the life of the woman and there was grave injury of physical or mental health of the petitioner. The State need not have applied to the magistrate, a procedure which has been adopted in this case. On the other hand, if the Investigating Officer comes by information that the offence of rape has resulted in pregnancy and the victim had expressed that she did not want to retain the foetus, the State could have assisted the victim to secure the necessary certification and admitted her in a government hospital or a recognized institution for carrying out the

other medical procedure necessary for such termination. The Magistrate was justified in holding that he did not have the competency, but here again, a little more resourcefulness on his part would have helped the party to secure what was redressable through the procedures that were in conformity with law, namely, of a direction to the competent head of medical institution to examine the petitioner by two medical practitioners in the manner contemplated under Section 3(2) and secured their opinion and taken further medical steps for carrying out the opinion, if it were to involve in the medical termination of pregnancy. The dismissal of the petition and an application before this court has again resulted in a needless waste of time by another 10 days.

5. In a matter relating to termination of pregnancy of a minor who is a victim of rape, there needs to be a greater sense of urgency which has been lost in this case. Thankfully things are not far too beyond the period when appropriate reparation is still possible. Between the time when the party has appeared before the Magistrate on 01.07.2014 till now, 4 additional weeks have passed.

6. I wanted to assure myself that the victim girl was taking a decision about termination of pregnancy knowing its actual implications. I therefore attempted to wean her from her immediate parents' presence and sought the assistance of Ms. Vandana Malhotra, Additional Advocate General, Punjab, to speak to her and elicit from her whether she was expressing her will to terminate the pregnancy. I also enquired the victim in the presence of the counsel of both sides whether she wanted to retain foetus or terminate the same. She does not want to retain the foetus and though, she looks young, she seems reasonably collected in her faculties to take an informed decision to herself. The father, who is the petitioner, is also in court to state that he stood by what he has stated in the petition regarding his own consent for termination of pregnancy.

7. Considering the fact every passing day could harm her physically and mentally, I am of the view that she must be examined by the two medical practitioners attached to the Obstetric and Gynaecology department at PGI and the Director, PGI, Chandigarh, will immediately constitute an ad hoc Medical Board to examine the petitioner on 04.08.2014 and if they are of the view that the length of pregnancy does not exceed (sic) 20 weeks, proceed to terminate the pregnancy by appropriate medical procedure. No further direction is necessary from the court before the actual procedure is done, needless to say, care being taken to ensure physical and mental safety of the victim.

8. To ensure that the victim of rape who becomes pregnant does not lose time by applying from court to court, there shall be general instructions given by the Director General of Police to all the police stations who register cases of rape and who come by information that the victim has become pregnant to render all assistance to secure appropriate medical opinions and also provide assistance for admission in government hospitals and render medical assistance as a measure of support to the traumatized victim. The need to apply to the court for permission would arise only in a situation where there is a conflict of whether the pregnancy must be terminated or not or when the opinions of two medical-practitioners themselves differ. It is hardly necessary in a situation where there is no contest and the victim gives her own consent and the guardian also gives consent and there is proof of such pregnancy was resultant to an offence of rape. This instruction shall also be circulated to all the Station Inspectors manning police stations in the State of Punjab... Since the birth certificate of the victim is not available, I have taken the age to be 14 years on the assertion of the parent. The medical practitioner may carry out such test as it finds necessary to ascertain her age. This is only by way of caution, for, even without reference to the age and if she was more than 14 years of age if she was a victim of rape, there is not an age restriction for carrying out the termination of pregnancy. There is also a direction to take appropriate samples of the foetus for DNA testing that could be used, if necessary at an appropriate time.

...

## IN THE HIGH COURT OF PUNJAB AND HARYANA

**Kamla Devi v. State of Haryana**

**CWP No. 2007 of 2015, decided on February 9, 2015**

**K. Kannan, J.**

***The petitioner became pregnant as a consequence of rape and approached the High Court for permission to terminate her pregnancy. The Court examined whether any judicial authorization is required for termination of pregnancies under Section 3 of the MTP Act.***

**Kannan, J.:** “1. The petitioner has adopted a needless procedure which has landed herself in difficulties. There is no provision that requires a person to apply before the Deputy Commissioner for permission to terminate the pregnancy. The medical termination whose foetal gestation is less than 12 weeks requires no permission and the medical practitioner in a Government hospital will be competent to undertake such a procedure. The fact that a person is a victim of rape is itself a circumstance in the Medical Termination of Pregnancy Act to carry out the termination. If it is beyond the period of 12 weeks and less than 20 weeks of foetal gestation, it would require to be placed before a committee of two doctors and the decision will be taken for termination of pregnancy after taking consent from the victim and if she is a minor with the guardian's consent. The issue has already been dealt with by this Court and there is no need to re-state the law. The petitioner may get herself admitted before the Government hospital in the jurisdiction within which she is a permanent resident and seek for appropriate procedure for termination of pregnancy. The same be done on the medical examination of the person confirming the pregnancy and after the hospital satisfies itself about the mental and physical condition of the petitioner to go through with the procedure.

2. Lessons are not learnt, neither by the parties nor by the State authorities even after decisions of this Court. Even apart from a direction that the order of this Court should be circulated to all the jurisdictional police to assist a victim of rape to secure an immediate attention for medical termination of pregnancy, if a petition seeking for termination of pregnancy is filed, the matter does not appear to have sunk in the manner that it should have been done. There is an urgent call to the police operating within the State of Punjab and Haryana to sensitize the investigating officers to play a positive role and secure full emotional support to relieve the trauma for a rape victim. The exhortation of Court falls to deaf ears and this is yet another case which spells out utter insensitivity to respond to the wailings of a woman who is already traumatized by the act of rape on her.

3. The writ petition is disposed of. On production of this order, the termination of pregnancy will be carried out by the hospital, as referred to above.”

## IN THE HIGH COURT OF GUJARAT

**Ashaben v. State of Gujarat & Ors.**

**2015 AIR CC 3387**

**J.B. Pardiwala, J.**

***The petitioner was abducted and kept in unlawful confinement, where she was gang-raped for several months. As a result, she became pregnant. On escaping, she filed an FIR and informed the investigating officer that she wanted to terminate her pregnancy. The doctor and subsequently the lower court declined her request for termination of pregnancy as she had crossed the 20-week gestational limit prescribed under Section 3 of the MTP Act. In this writ application challenging the lower court's order and seeking permission to terminate the pregnancy, the Court examined whether termination of pregnancy could be permitted post 20 weeks gestation if the conception was the result of rape.***

**Pardiwala, J.:** “Two questions of considerable importance i.e.,

(1) Is the foetus a human being with a fundamental right to life?

and

(2) Does a woman have the right to choose whether or not to have an abortion?

fall for my consideration in this writ application filed by a victim of an alleged rape who is carrying pregnancy as on today of around 28 weeks.

...

**2.1** The applicant - a married lady aged 23 and mother of two children lodged a First Information Report bearing C.R. 1-10/2014 with the Ranpur Police Station on 16.3.2015 for the offence punishable under sections-366, 376(D), 354, 506(2), 323. 344 r/w sec. 114 of I.P.C. inter alia stating that on 13.7.2014 while she was outside her house on a road, all of a sudden one of the accused persons grabbed her from behind and took her away forcibly. Later on six other accused persons joined the accused who had forcibly kidnapped the first informant and was kept in unlawful confinement at different places for a period of about 9 to 10 months. During that period she was subjected to forcible sexual intercourse...

**2.2** It is her case that on account of forcible sexual intercourse by seven accused she became pregnant and by the time she could lodge the FIR and get herself freed from the clutches of the accused she was pregnant by 24 weeks.

**2.3.** It appears that after the registration of the FIR she expressed her desire before the Investigating Officer to get the pregnancy terminated. The Circle P.I. of the Botad Circle filed an application dated 23rd March, 2015 addressed to the JMFC, Dhandhuka seeking permission for termination of the pregnancy as prayed for by the victim. It also appears that the victim was forwarded to the General Hospital, Sola at Ahmedabad for her medical examination and the medical examination revealed that there was a "single intrautaine Live foetus of 23 weeks and 3 days". In the certificate at Annexure-C it has been stated that although the patient requested for the termination of the pregnancy yet having regard to the provisions of the Medical Termination of The Pregnancy Act the foetus could be aborted provided the same is upto 20 weeks in age. Since the foetus in the case of the victim was of 24 weeks, the Doctor refused to terminate the pregnancy without any valid permission from the Court.

**2.4.** The Principal Civil Judge, Dhandhuka vide order dated 26th March, 2015 refused to accord the permission for termination of the pregnancy having regard to the provisions of the law and the age of the foetus.

**2.5.** In such circumstances referred to above, the applicant has come up with a fervent appeal that being a victim of rape she would not like to continue with the pregnancy and deliver the child.

...

**4.4.** The above provisions of law comprised under the said Act clearly disclose the circumstances under which the pregnancy can be terminated. Undoubtedly, section 5 of the said Act relates to the right of a pregnant woman to terminate pregnancy in case it is found necessary to save her life. Section 5 nowhere speaks of any right of a pregnant woman to terminate the pregnancy beyond 20 weeks on the ground of having conceived on account of rape. It strictly restricts to the cases where the life of the pregnant woman would be in danger in case the pregnancy is not terminated and does not refer to any other circumstances. Undoubtedly, the opinion in that regard has to be formed by a registered medical practitioner and such opinion should be in good faith. The expression "good faith" discloses that the opinion has to be based on the necessary examination required to form such an opinion.

**4.5.** As far as section 3(2)(b)(ii) is concerned, it clearly speaks of the right to terminate the pregnancy where there is a substantial risk in allowing the child to take birth as it would suffer from such physical or mental abnormalities as to be seriously handicapped. However, such right is restricted to the maximum period of twenty weeks of pregnancy and not beyond it. Section 3(2)(b)(ii) is very clear in that regard. It also provides that before opting for such pregnancy within the said period, it is necessary for two registered medical practitioners to form an opinion in good faith for termination of the pregnancy. In case, the pregnancy has not exceeded twenty weeks, then such an opinion can be formed in good faith by any one medical practitioner.

**4.6.** The Apex Court in the case of *Suchita Sriuastava [sic] v. Chandigarh Administration*[AIR 2010 SC 235.] , in paras, 20 to 27, 31 and 58 (Paras 10, 11, 12, 13, 15 and 30 of AIR) has held as under:

*"20. In this regard we must stress upon the language of section 3 of the Medical Termination of Pregnancy Act, 1971 [Hereinafter also referred to as 'MTP Act'] which reads as follows:...*

*A plain reading of the abovequoted provision makes it clear that Indian law allows for abortion only if the specified conditions are met.*

*21. When the MTP Act was first enacted in 1971 it was largely modelled on the Abortion Act of 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified 'right to abortion' and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers.*



22. There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise, of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a compelling state interest in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MIT Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

23. A perusal of the above mentioned provision makes it clear that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a '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 per section 3(2)(i)] or when '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' [as per section 3(2)(ii)]. While the satisfaction of one medical practitioner is required for terminating a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period.

24. The explanations to this provision have also contemplated the termination of pregnancy when the same is the result of a rape or a failure of birth-control methods since both of these eventualities have been equated with a 'grave injury to the mental health' of a woman.

25. In all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in section 3(4)(b) of the MTP Act, 1971.

26. The exceptions to this rule of consent have been laid down in section 3(4)(a) of the Act. Section 3(4)(a) lays down that when the pregnant woman is below eighteen years of age or is a 'mentally ill' person, the pregnancy can be terminated if the guardian of the pregnant woman gives consent for the same. The only other exception is found in section 5(1) of the MTP Act which permits a registered medical practitioner to proceed with a termination of pregnancy when he/she is of an opinion formed in good faith that the same is immediately necessary to save the life of the pregnant woman'. Clearly, none of these exceptions are applicable to the present case.

...

31. As mentioned earlier, in the facts before us the victim has not given consent for the termination of pregnancy. We cannot permit a dilution of this requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim. We must also be mindful of the fact that any dilution of the requirement of consent contemplated by section 3(4)(b) of the MTP Act is liable to be misused in a society where sex-selective abortion is a pervasive social evil.

58. In our considered opinion, the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority. Since none of the other statutory conditions have been met in this case, it is amply clear that we cannot permit a dilution of the requirement of consent for proceeding with a termination of pregnancy. We have also reasoned that proceeding with an abortion at such a late stage (19-20 weeks of gestation period) poses significant risks to the physical health of the victim."

...

6. While up-holding the constitutional validity of the Act, the Division Bench in the case of **Nand Kishore Sharma & Ors. vs. Union of India & Anr.**, AIR 2006 Raj.166 observed thus –

*“4. [...] At the outset, it may be mentioned that the petition was sought to be argued as if the Act has been enacted to legalise abortions but from a bare reading of the relevant provision it would appear that Act aims at termination of pregnancy in the interest of the woman or the to-be-born child. Section 3 may be quoted in extenso as under:...*

*...*

*6. It would appear that dominant object to achieve which the law has been enacted is to save the life of the pregnant woman or to relieve her of any injury toward physical and mental health or prevent the possible deformities in the child - to be born. We find support from the Statement of Objects and Reasons of the Act, the relevant portion of which reads as under :*

*7. The object of the Act being to save the life of the pregnant woman or relieve her of any injury to her physical and mental health, and no other thing, it would appear the Act is rather in consonance with Article 21 of the Constitution of India than in conflict with it. While it may be debatable as to when the foetus comes to life so as to attract Article 21 of the Constitution of India, there cannot be two opinion that where continuance of pregnancy is likely to involve risk to the life of the pregnant woman or cause grave injury to her physical and mental health, it would be in her interest to terminate the pregnancy.*

*8. The perusal of Section 3 also makes it clear that the Act does not give a carte blanche to any person, even a medical practitioner, to cause termination of pregnancy. The Act provides in express terms that the pregnancy can be terminated upto twenty weeks and only by registered medical practitioner. If the length of pregnancy exceeds twelve weeks upto twenty weeks, it can be terminated only if a Board of at least two registered medical practitioners is of the opinion, in good faith, that the continuance of pregnancy involves risk to the life of the pregnant woman or cause grave injury to her physical and mental health.*

*...*

*11. Read in the context of Sections 312 and 315, IPC, it would appear that the object of the Act was to make the provisions relating to termination of pregnancy stringent and effective rather than to permit blatant termination of pregnancy. Section 312 of the IPC made causing miscarriage an offence except in good faith for the purpose of saving the life of the woman without laying down the manner in which pregnancy could be medically terminated. Section 3 of the Act provides the guidelines or limitation within which the pregnancy could be terminated.”*

7. As I am considering the issue of the right to life of foetus, I deem it appropriate to quote a West German Constitutional Court decision in the abortion reform law case (1975) 39 B Verf GE. In the said case the West German Constitutional Court laid down the following proposition:

- (1) “Everyone” in Article 2 includes an unborn being;
- (2) Human life exists in embryo from the fourteenth day of the conception;
- (3) It is the duty of the State to protect and promote the life of the foetus and defend it from unlawful interference by other person;
- (4) The right of development accrues in the foetus from the mother’s womb and is not complete even after birth;
- (5) If the foetus was considered only as a part of the maternal organism, the termination of pregnancy would remain entirely in the sphere of private life, not warranting public interferences. But because the foetus is “an autonomous human being” under the protection of the Constitution, the termination of pregnancy has a social dimension which demands public regulation;
- (6) The Constitution also protects a woman’s right to free development of her personality, which includes freedom to decide against parenthood. But this right is not guaranteed without limitations. The right of others, the constitutional order, and the moral code all restrict it;

(7) A compromise which guarantees both the protection of foetus as well as the freedom of abortion of a pregnant woman is impossible because the termination of pregnancy always means “destruction of unborn life”. The legal order cannot, therefore, make a woman’s selfdetermination, the principle of its regulations. On the other hand, the protection of foetus must be given priority to the woman’s right of self-determination;

(8) The State is to effectively fulfil its duty to protect the “developing life”. In discharging this duty the State is to make a reasonable adjustment between unborn right to life and the woman’s right to her own life and health. The unborn’s right to life can lead to burdens for the woman which sharply exceed those of a normal pregnancy. In such a case, the State may exempt the pregnant woman from punishment for destroying the foetus where there is necessity to protect the pregnant woman from a threat to her life or a threat of a serious impact on her health or other cases, where the burden is extraordinary; and

(9) The duty of the court is not to put itself in the legislator’s place, but to determine whether the legislator has fulfilled its duty to protect the “developing life” and made a reasonable adjustment between the right of the unborn and the right of the pregnant woman. (see D.D. Basu, Commentary on Constitution of India, Vol.III Edn, 2008 3143)

**8.** *Roe Vs Wade* 35 L Ed 2d 147 : 410 US 113 (1973) became one of the most politically significant decisions of the Supreme Court of the United States. This is a landmark United States Supreme Court decision establishing that most laws against abortion violate a constitutional right to privacy, thus overturning all State laws restricting the abortion that were inconsistent with the decision. *Jone Roe*, wanted to terminate her pregnancy because she contended that it was a result of rape. Relying on the then current state of medical knowledge, the decision established a system of Trimesters that attempted to balance the State’s legitimate interests with the individual constitutional rights. The Court ruled that the State cannot restrict a women’s right to an abortion during the first trimester, the State can regulate the abortion procedure during the second trimester “in ways that are reasonably related to maternal health” and in the third trimester, demarketing the viability of the foetus, a State can choose to restrict or even to prescribe abortion as it would deem fit. It was held that “the childbirth endangers the lives of some women, voluntary abortion ‘at any time and place’ regardless of medical standards would impinge on a rightful concern of the society. The woman’s health is part of that concern as is the life of the foetus after quickening. These concerns justify the State in treating the procedure as medical one.”

**8.1** The Supreme Court of Canada, interpreted Article 7 of the Canadian Charter which guarantees an individual’s right to life, liberty and freedom and security of a person. In the leading case of *Morgentalor Smoling and Scott vs. R* (1988) 44 DLR (4th) 385, the Court focused on the bodily security of the pregnant women. The Criminal Code of the country required a pregnant woman who wanted an abortion to submit an application to a therapeutic committee, which resulted in delays. The Supreme Court found that such a procedure infringed the guarantee of security of a person. This subjected the pregnant woman to psychological stress.

**8.2** The Abortion Act, 1967 of the UK also in its Article 2 does not confer an absolute right to life to the unborn. It was so held in *Paton Vs. United Kingdom* (1980) 3 EHRR 408. Abortion is permitted if the continuance of the pregnancy involves risk. The right to life of foetus is subject to an implied limitation allowing the pregnancy to be terminated in order to protect the life of a mother. The same was upheld in *H Vs. Norway* ( (1992) 73 DR 155 )

**8.3** I may quote with profit a decision of the Supreme Court in the case of *Jacob George Versus State of Kerala*, (1994) 3 SCC 430, in which the Supreme Court observed as under:

“[...]”

**7** *After the enactment of the Medical Termination of Pregnancy Act, 1971, the provisions of the Penal Code relating to miscarriage have become subservient to this Act because of the non obstante clause in Section 3, which permits abortion / miscarriage by a registered practitioner under certain circumstances. This permission can be granted on three grounds:*

- (i) *Health when there is danger to the life or risk to the physical or mental health of the woman;*
- (ii) *humanitarian such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman;*
- (iii) *eugenic - where there is substantial risk that the child, if born, would suffer from deformities and diseases. (See Statement of Objects and Reasons).*

**8** *The above shows that concern for even unborn child was evinced by the legislature, not to speak of hazard to the life of the woman concerned.”*

...

11. Having heard the learned Counsel for the parties and having gone through the materials on record, I find myself unable to grant the relief as prayed for mainly for two reasons.

11.1. First, considering the background facts and pendency of investigation I am not in a position to directly come to the conclusion that it had been a matter of rape. Secondly, for the time being I leave this aspect of rape aside. Assuming that the pregnancy for whatever reason had been against the wish and desire of the applicant, the intriguing aspect in the present case is that by the time the applicant chose to file this writ petition i.e., on 31.3.2015, the pregnancy had been of about 27 weeks as is borne out from the medical reports. Although it is the case of the applicant that since she was in unlawful confinement of the accused persons she had no opportunity to get the pregnancy terminated within the statutory time period as provided in the Act, yet I am unable to accept such submission as the law does not permit the termination of pregnancy beyond 20 weeks except in cases where the life of the mother is in danger.

11.2. The learned Counsel for the applicant strenuously contended that when read in the context of the Explanation-1 to section 3, where pregnancy caused by rape is said to be of grave injury to the mental health of a pregnant woman, the same aspect must ipso facto ought to have been made applicable to the provisions of section 5 of the Act of 1971 too whereby the pregnancy could be terminated if required immediately in order to save the life of the pregnant woman. Mr. Barot wants this Court to read something on the statute which the legislature has not thought fit to provide.

11.3. A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operating. A statute must of course be given effect to whether a Court likes the result or not.

11.4. I may quote with profit a decision of the Supreme Court in the case of *Rohitash Kumar v. Om Prokash* [2013 (121) AIC 163 (SC); 2013 (136) FLR 92; (2013) 11 SCC 451 : AIR 2013 SC 30] :

“22. The Court has to keep in mind the fact that, while interpreting the provisions of a Statute, it can neither add, nor subtract even a single word. The legal maxim “A Verbis Legis Non Est Recedendum” means, “From the words of law, there must be no departure”. A section is to be interpreted by reading all of its parts together, and it is not permissible, to omit any part thereof. The Court cannot proceed with the assumption that the legislature, while enacting the Statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the statute, and it is not open to the Court to add and amend, or by construction, make up for the deficiencies, which have been left in the Act, The Court can only iron out the creases but while doing so, it must not alter the fabric, of which an Act is woven. The Court, while interpreting statutory provisions, cannot add words to a Statute, or read words into it which are not part of it, especially when a literal reading of the same, produces an intelligible result. (Vide: *Nalinakhya Bysack v. Shyam Sunder Haidar*: [AIR 1953 SC 148.] *Sri Ram Ram Narain Medhi v. State of Bombay* [AIR 1959 SC 459.] ; *M. Pentiah v. Muddala Veeramallappa* [AIR 1961 SC 1007.] ; *The Balasinor Nagrik Co-operative Bank Ltd. v. Babubhai Shankerlal Pandya* [AIR 1987 SC 1107.] ; and *Dadi Jagannadham v. Jammulu Ramulu* [(2001) 7 SCC 71; AIR 2001 SC 2699; 2001 AIR SCW 3051.] .

23. The Statute is not to be construed in light of certain notions that the legislature might have had in mind, or what the legislature is expected to have said, or what the legislature might have done, or what the duty of the legislature to have said or done was. The Courts have to administer the law as they find it, and it is not permissible for the Court to twist the clear language of the enactment, in order to avoid any real, or imaginary hardship which such literal interpretation may cause.”

11.5. I am conscious of the fact that to carry a child in her womb by a woman as a result of conception through an act of rape is not only extremely traumatic for her but humiliating, frightening and psychologically devastating and as a human being, more particularly in the Indian society she becomes an object of scorn and ostracisation. This is very unfortunate. However, at the same time, assuming for the moment that termination at this stage is permissible, there would be likelihood of danger to the life of the applicant in case of carrying-out termination of pregnancy. If labour is induced for carrying-out termination of pregnancy, in every possibility the same would result in a live birth of a new born as the maturity of foetus is 28 weeks.

12. I may only say having regard to the peculiar facts and circumstances of the case that the applicant will have to bravely go ahead with the pregnancy and when time comes, she should deliver the child. I am conscious of the fact that it is easy for a judge to say so in his judgment because it is ultimately the applicant who will have to face the hard days ahead, but as observed above, howsoever harsh one may find the law yet it remains the law and one has to respect it. She must understand that termination at this stage will put her own life in peril...

...

14. In the result, this application fails and is hereby rejected. However, I would like to issue few directions in the matter:

(i) The District Superintendent of Police, Botad shall take over the investigation of the first information report bearing No. C.R. No. I-10 of 2015 registered with the Ranpur Police Station and see to it that it is completed at the earliest in accordance with law...

(ii) ...The Collector shall ensure that proper medical facilities are provided to the applicant and the child is delivered safely. The Collector shall also see to it that after the delivery of the child, the child is looked after well and is not abandoned in any manner. If necessary, the Collector can avail of the services of any NGO or any other govt, social organization in this regard.

...

## IN THE HIGH COURT OF PUNJAB AND HARYANA

Kavita v. State of Haryana

2015 SCC OnLine P&H 7425

Surya Kant and P.B. Bajanthri, JJ.

***A minor girl, aged 12 years, became pregnant as a result of rape. By the time her mother became aware of the pregnancy, she had crossed the 20-week gestational limit prescribed under Section 3 of the MTP Act. A single judge of the High Court rejected the request for termination of her pregnancy under Section 5 (1) based on the medical opinion that continuation of pregnancy did not pose any immediate threat to her life. Aggrieved by the said order, this letters patent appeal was filed before the High Court seeking permission to terminate the minor rape victim's pregnancy of about 34 weeks.***

**Kant, J.:** "This letters patent appeal assails the order dated 31.03.2015 passed by learned Single Judge which indeed unfolds an extremely painful and heart breaking story of a rape victim. The appellant's daughter is a 12 years old minor girl who has been subjected to repeated sexual assaults and is now burdened with pregnancy of about 34 weeks. By the time, the hapless mother came to know about this hideous act, it had already crossed the maximum limitation of 20 weeks prescribed under Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as 'the Act'), for lawful termination of an unwanted pregnancy. Since the appellant and her minor daughter (rape victim) both were desirous of getting the involuntary pregnancy terminated, the only recourse could have been under Section 5 ((1) of the Act, which bids the immediate termination of such a pregnancy if is urgently necessary to save the life of the mother.

2. The learned Single Judge undertook such an exercise. The victim was examined by the Medical Board of Post Graduate Institute of Medical Education and Research (for short, 'PGIMER'), Chandigarh on 26.03.2015, who opined that at that particular time, there was no imminent danger to the life of the victim if the pregnancy was to continue.

3. When this appeal came up for preliminary hearing before us on 06.04.2015, we were informed that physical and mental health of the victim has deteriorated. We, thus, directed the PGIMER authorities to constitute another Medical Board preferably comprising five subject-specialists from different streams to independently re-examine the victim.

4. The PGIMER authorities have promptly complied with that order and a Medical Board consisting seven senior subject-experts of PGIMER, Chandigarh, re-examined the victim on 07.04.2015 at 12.00 noon and have opined as follows:-

"...The records of the patient \_\_\_\_ (victim) were reviewed. The patient was examined in the presence of her mother Kavita. An ultrasound was performed.

On examination, the patient was found to be mildly anaemic and had normal blood pressure. The gestation of pregnancy is about 34 weeks. Ultrasound shows a healthy live fetus of around 33 weeks with estimated baby weight of 1.98 kg.

A psychiatric consultation was taken to assess the mental health of \_\_\_\_ (victim). A psychiatric and psychological assessment has been initiated.

Interpretation: Each pregnancy poses a risk to the health of a woman. In this case, the risk of pregnancy is higher because of the age of the girl. However, termination of pregnancy at this period of gestation carries a higher risk to the girl than allowing the pregnancy to continue with regular pregnancy check up in Gynae OPD at weekly intervals.

It needs to be emphasized that termination of pregnancy at this period of gestation is likely to result in the birth of a live baby. The Board is of the opinion that termination of pregnancy now is not necessary and may be rather more harmful to the life of the girl.

However, psychological assessment of the child requires time owing to the sensitive nature of the issue and her age. The child is needed to come for further psychiatric evaluation and counseling, if necessary (Room No. 210, Psychiatry OPD, Level-II, New OPD Block, PGIMER, Chandigarh).....”

5. Having regard to the above reproduced medical opinion, nothing is left to our discretion exercisable under Section 5 or any other provisions of the Act.

6. Faced with this, learned counsel for the appellant submits and very aptly that the Medical Board has viewed that the victim child, owing to the sensitive nature of the issue and her age, requires periodical medical check-up and supervision to prevent any harm to her own life. He, thus, rightly contends that interventions of this Court for the safety of victim's life are certainly called for. We are in outrightly agreement with the learned counsel, hence, dispose of this appeal with the following directions:-

(i) The Director, PGIMER, Chandigarh, would admit the victim as an indoor patient as and when she is taken for this purpose by the appellant.

(ii) The Director, PGIMER, Chandigarh shall provide a private room to the victim and her mother or any other family-member who is the attendant of victim in the private ward.

(iii) It shall be the duty of the authorities of the PGIMER, Chandigarh to provide all the requisite medicines, food, clothing and other facilities as are required to be made available to the victim or her attendant, well in advance.

(iv) We request Dr. Vanita Jain, Professor, Department of Obst. & Gynaecology, to personally monitor such requirements. The Medical Superintendent, PGIMER, shall be obligated to ensure meticulously compliance of every advice, recommendation, suggestion or order of Dr. Vanita Jain, in this regard.

(v) Dr. Vanita Jain would further supervise the periodical needs like psychiatric consultation or related assistance from other departments of PGIMER which shall also be provided timely.

(vi) The expenditure incurred so far by the appellant on the medical examinations of the victim by the Medical Boards constituted by the PGIMER under the orders of this Court, shall be reimbursed to her by the State of Haryana forthwith but not later than two weeks from the date of submission of the bills.

(vii) The PGIMER authorities shall be entitled to seek reimbursement of their entire expenditure including the room charges etc. etc., from the State of Haryana.

(viii) The Chief Secretary to the State of Haryana, Principal Secretary, Department of Health and all other concerned departments of State of Haryana are directed to ensure the reimbursement of bills or expenditure incurred on the victim by PGIMER, Chandigarh, within a period of two weeks of submission of such bills.

(ix) The PGIMER authorities shall ensure that adequate privacy is provided to the victim and her family while she is an indoor patient and the identity of victim is not disclosed. She shall be kept as an indoor patient without permitting the general public including Media etc. to have any access to her.

...

...”

## IN THE HIGH COURT OF GUJARAT

Chandrakant Jayantilal Suthar v. State of Gujarat

(2016) 2 GLH 662

Abhilasha Kumari, J.

***A minor girl became pregnant as a result of rape. An application filed by her parents before the Sessions Court seeking permission to terminate her pregnancy was denied as her pregnancy had crossed the 20-week gestational limit prescribed under Section 3 of the MTP Act. In this writ application, the petitioners challenged the order of the Sessions Court and sought permission to terminate the minor's pregnancy arguing, inter alia, that the provisions under Section 3 are discretionary and do not constitute an absolute bar on termination of pregnancy beyond 20 weeks.***

Kumari, J.: “...

2. Sometimes, the Court is confronted with a dilemma where the case before it is such that the legal implications of the decision would have repercussions upon the life of an individual. The present is one such case.

...

4. The petitioners before this Court are the parents of the victim girl, who have challenged the order dated 10.07.2015, passed by the learned Additional Sessions Judge, Sabarkantha, in Miscellaneous Criminal Application No. 332 of 2015, whereby, their application for permission to terminate the pregnancy of their minor daughter, came to be rejected.

...

6. The victim girl, aged fourteen years, made a complaint on the basis of which a First Information Report (FIR) being C.R.I-60/2015 came to be registered on 29.06.2015, before the Talod Police Station, under Sections 376 and 328 of the Indian Penal Code and Sections 5(4)(2), 6, 9I and 10 of the Protection of Children from Sexual Offences Act, 2012 (“the POCSO Act”). The narration in the FIR is to the effect that the victim, who is a student of the tenth standard, was suffering from typhoid; therefore, sometime in February 2015, her mother took her to Ranasan. The clinic of Dr. Jatinbhai K. Mehta (the doctor) is located near the Bus stand at Ranasan and the mother of the victim took her there for treatment, at about 9:30 am on the fateful day. The doctor took the victim into his chamber and asked her mother to wait outside. After drawing the curtains, the doctor allegedly asked the victim indecent questions and gave her an injection, after which the victim lost her consciousness. When the victim recovered and regained her consciousness she realised that her clothes were in disarray and she was suffering from pain in her private parts. She realised she had been raped by the doctor and asked him why he had done such a thing. The doctor allegedly threatened the victim that if she disclosed the incident to her mother or uncle (who lived in Ranasan), he would ruin her life. The victim, therefore, did not disclose the incident to her mother.

7. When the victim did not get her menstrual periods for two or three months, her mother and her uncle took her for a check-up to Dr. Karshanbhai Patel at Nikoda, on 28.06.2015. After examining the victim, it was found that she was pregnant. The victim then disclosed the incident of rape to her mother and uncle. The FIR was lodged the next day, on 29.06.2015.

8. On 09.07.2015, the parents of the victim, the petitioners herein, filed Criminal Miscellaneous Application No. 332 of 2015 in the Court of the learned Additional Sessions Judge, Sabarkantha at Himmatnagar, who is also the designated Special Judge under the POCSO Act, seeking permission to terminate the pregnancy of the victim as the said pregnancy was the result of rape and the victim was not ready to accept the pregnancy. It was stated in the application that the victim, being a minor, is not in a position to physically or mentally go through the pregnancy and was in depression. The family, being financially weak, could not bear the additional burden. It was stated that the studies of the victim would suffer, she would face social stigma and her life would be ruined, if permission to terminate the pregnancy was not granted.

9. The Sessions Court directed that the victim be examined by a Gynaecologist. Dr. Anita K. Purohit examined the victim on 10.07.2015. On the basis of the Sonography report dated 10.07.2015, prepared by “Sarita Digital X-Ray and Sonography Clinic” and signed by Dr. Ketan M. Gadhvi, the Gynaecologist opined that as per the Sonography Report, the pregnancy cannot be terminated in view of the provisions of the Medical Termination of Pregnancy Act, 1971 (“the MTP Act”). However, if the Court so directs, the pregnancy could be terminated after arrangements for providing blood are made.

10. As per the Sonography Report dated 10.07.2015, the foetus was of about 23 weeks and 6 days, that is, about 24 weeks. Taking into consideration the aspect that the pregnancy of the victim was over twenty weeks, the Sessions Court declined to accord permission for the termination of the pregnancy, keeping in view the provisions of the MTP Act. It is this order of the Sessions Court that is impugned before this Court.

...

25. This Court would have to admit that, to arrive at a decision in a case such as the present one involving a minor victim of rape, saddled with an unwanted pregnancy with all its physical, mental, emotional and social implications on the one hand and the statutory provisions of law on the other hand, is a difficult task. There is not the remotest doubt that the law of the land is to be upheld, obeyed and applied and every judge of the High Court is bound by a constitutional oath to do so. However, there are times when a poignant situation arises in a case where the application of the law gives rise to a situation that would have physical, mental and social connotations upon the life of an innocent girl. Nevertheless, the law is the law, and has to be obeyed.

26. The legislature has enacted the MTP Act after due deliberation, taking into consideration all surrounding and relevant factors. The intention of the legislature in enacting the statute is evident from the language employed. The first and foremost rule in construing a statutory provision is the rule of literary construction. If the provision of the statute is unambiguous and the legislative intent is clear from it, no other rules of interpretation are required to be resorted to and the statutory provision is to be followed as it is.

27. In the present case, the relevant statutory provision is Section 3 of the MTP Act, which is reproduced hereinbelow, for ready reference: ...

28. A bare reading of the entire section makes it clear that the language is straightforward, clear and unambiguous. The section begins with a non-obstante clause, overriding the provisions of any other law in force. It states that no registered medical practitioner shall be held guilty of an offence under the IPC or any other law, if any pregnancy is terminated by him in accordance with the provisions of this Act. Therefore, the legislature intended that the termination of pregnancy by any registered medical practitioner has to be **in accordance with the provisions of the MTP Act**. Section 3(2) of this Act permits the termination of pregnancy [subject to sub-section (4)] only on two grounds, namely, when (i) 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 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. Only under the above two situations can an opinion be formed for the termination of the pregnancy. If the length of the pregnancy does not exceed twelve weeks, the opinion of one registered medical practitioner is required. If the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, the opinion of two registered medical practitioners is necessary. There is no provision in Section 3 that permits the termination of a pregnancy, the length of which **exceeds twenty weeks**. As per sub-section (4) of Section 3, the written consent of a guardian is necessary in the case of a woman below eighteen years or a mentally ill woman. Section 5 of the MTP Act permits the termination of the pregnancy in case a registered medical practitioner is of the opinion formed in good faith, that the termination of the pregnancy is immediately necessary to save the life of the pregnant woman. This section, as well, nowhere states a pregnancy exceeding twenty weeks can be terminated.

29. An argument has been advanced by the learned counsel for the petitioners that the unwanted pregnancy that is a result of rape and has caused great anguish to the victim and, therefore, constitutes a grave injury to her mental health in terms of explanation I to Section 3(2) of the MTP Act. Therefore, as per Section 3(2)(b)(i), this is a ground for the termination of the pregnancy, especially when the parents of the minor girl have given their consent.

30. This Court is unable to accede to this proposition, as Section 3(2)(d)(i), read with Explanation-1, specifically state the duration of the pregnancy, which duration does not exceed twenty weeks. Had the length of the pregnancy not exceeded twenty weeks, the argument of the learned counsel for the petitioners could have been accepted. However, as it is an admitted fact that the pregnancy is now a little over twenty-four weeks, this Court is unable to accept the submissions of the learned advocate for the petitioners.

31. The legislative intent running through the MTP Act, especially Section 3 thereof, is clear and unambiguous. The maximum length of pregnancy permissible of being terminated is twenty weeks. Had the Legislature intended that a pregnancy, the length of which exceeds twenty weeks can be terminated, it would have clearly stated so, while enacting the provision. The Court cannot read into the provisions of a statute something that is not there or is not intended to be there by the Legislature. It is bound to follow the law as it is. As stated earlier, there is no ambiguity in the provisions of



Section 3, so as to make it necessary to follow any other rule of interpretation, except the literal rule of construction. The Court cannot legislate under the garb of interpretation [*B. Premanand v. Mohan Koik-I* - (2011) 4 SCC 266].

...

**33.** As this Court has observed earlier, the provisions of a statute, if clear and unambiguous, are to be read as they are and the plain and unambiguous meaning, which is indicative of the legislative intent, is to be given effect. There is nothing in Section 3 of the MTP Act which provides for the termination of a pregnancy, the length of which **exceeds** twenty weeks. If the Legislature had intended so, it would have been so enacted. The function of the Court is only to expound the law and not to legislate. It cannot read into the law what has not been either enacted, or intended. Section 3 of the MTP Act is a clear-cut provision of law which specifically provides for the termination of a pregnancy, clearly specifying the length of such pregnancy, not exceeding twenty weeks. The proposition advanced by Mr. Popat that Section 3 is not a mandatory provision, is not convincing. The clear and unambiguous provisions of a statute are to be followed as they are, being the law of the land. No discretion has been granted to any Court or authority in Section 3, to deviate from its provisions. The submission that Section 3 of the MTP Act is a discretionary provision, is untenable.

**34.** Another relevant aspect is that in the present case, there is no opinion of any registered medical practitioner that the continuance of the pregnancy of the victim would involve a risk to her life or grave injury to her physical or mental health. Nor has it been opined that if the child were born, it would suffer from any physical or mental abnormalities as to be seriously handicapped. In any case, even under the above situations, an opinion to terminate the pregnancy can only be formed if the length of the pregnancy does not exceed twenty weeks. In the present case, the length of the pregnancy now exceeds twenty four weeks. There is no medical opinion that the termination of the pregnancy is immediately necessary to save the life of the pregnant woman as per Section 5 of the MTP Act. Viewed from every angle, the provisions of the MTP Act do not permit the termination of the pregnancy of the victim.

...

**36.** It has been pointed out to the Court by the learned counsel for the petitioners that in the report of the Gynecologist, it has been stated that, though the pregnancy of the victim cannot be terminated as per the MTP Act, however, if the Court so directs, it can be terminated after making proper arrangements for blood. With due respect to the Gynecologist, the Court is required to see what is **legally permissible** and not what is possible dehors the legal provisions. A thing that may be possible medically, may not be permissible legally. One such example is the sex determination of a foetus. It may be medically possible but it is prohibited by law. Therefore, to say that what cannot be done in terms of the MTP Act can be done if the Court so directs, is a contradiction in terms. The Court cannot direct anything to be done that is not permissible in law.

**37.** As regards the legal position, the above discussion leads only to one conclusion, and that is that since the length of the pregnancy of the victim is over twenty-four weeks, this Court cannot permit its termination in view of the provisions of Section 3 of the MTP Act.

**38.** Under the circumstances, the impugned order dated 10.07.2015, passed by the learned Additional Sessions Judge, Sabarkantha, does not suffer from any error of law. Consequently, the application cannot be accepted.

**39.** Having arrived at the above conclusion, this Court is painfully conscious of the implications of the decision on the life of the victim. The girl is only fourteen years old, is a student of Standard-X and has her whole life ahead of her. The economic condition of the petitioners (her parents) is weak and they can ill-afford the additional burden of the child. The pregnancy is unwanted and is the result of rape. The physical, mental, emotional and psychological trauma faced by the victim is formidable.

**40.** Rape is a crime not only against a woman but against humanity at large as it brings out the most brutal, depraved and hideous aspects of human nature. It leaves a scar on the psyche of the victim and an adverse impact on society. In the present case, the rape suffered by the victim has left a more visible impact-an unwanted child. Only the sufferer knows the extent of the suffering. But sometimes, there is no other option but to go through the trauma, such as in the present case. It is heart-wrenching to imagine the situation of the victim and what lies ahead of her. Her welfare is, therefore, the paramount consideration for this Court. It would be in the best interest of the victim if she manages to continue with her studies after the child is born. The State Government can be requested to provide help for herself and her child and its upbringing. There is also the factor of social stigma, society being as it is. This has to be countered boldly by all concerned. Whatever has happened to the victim and whatever its consequences, are not her fault at all.

She cannot, and should not, be blamed for it. She needs the support of the authorities and enlightened citizens of society, more than anything else. She, too, deserves to be educated, dream her dreams, and, in times to come, have a home and family of her own, just like any other young girl. Humanity and society should assist, her and others like her, in this regard.

...

**44.** In giving birth to the child, the victim and her parents are required to be given full assistance and co-operation by the Government authorities, at every level. To this end, this Court considers it appropriate to issue the following directions:-

1) The Collector, Sabarkantha, shall ensure that arrangements are made to provide proper diet, medical supervision and medicines as may be necessary, to the victim throughout the duration of her pregnancy. When the time for delivery arrives, proper medical facilities be made available to effect a safe delivery.

2) Though the studies of the victim are bound to be interrupted for some time, however, the Collector, Sabarkantha, shall try to ensure that she continues her studies even after the birth of the child, maybe as a private student, if it is not possible for her to study as a regular student for some time.

3) The Collector, Sabarkantha, shall ensure that the child, when born, is not abandoned or neglected. He should also keep a watch to ensure that no harm comes to the child. If the victim and her parents so permit, efforts can be made for the child to be adopted in case the victim does not want to, or is unable to, bear the burden of its upbringing. The services of a reputed NGO can be availed of in this regard.

4) In addition to the amount of Rs. 25,000/- ordered to be given to the victim by the Sessions Court as interim compensation, the State Government shall pay her an amount of Rs. 1,00,000/-.

5) ... The District Superintendent of Police, Sabarkantha, shall supervise the investigation of the case and ensure that it is completed expeditiously.

..."

## IN THE SUPREME COURT OF INDIA

**Chandrakant Jayantilal Suthar & Anr. v. State of Gujarat**

**(2015) 8 SCC 721**

**Anil R. Dave and Kurian Joseph, JJ.**

***In this appeal filed against the decision of the Gujarat High Court in Chandrakant Jayantilal Suthar v. State of Gujarat ((2016) 2 GLH 662), the Supreme Court directed the hospital authorities to terminate the minor rape victim's pregnancy without obtaining any permission from the Court, if the medical opinion indicates that such termination is immediately necessary to save her life and consent to abortion is given by her guardian and herself. The Court added that majority view of the doctors should be considered if the medical opinion is not unanimous.***

**Dave and Joseph, JJ.:** "..."

**3.** Looking at the peculiar facts of the case, we direct that Ms. M [*name redacted by editors*] shall be examined by three seniormost available Gynaecologists of Civil Hospital, Ahmedabad at Asarwa, along with Dr Riddhi Ketan Shukla, who had examined Ms [M] on 25-7-2015 and also by a Clinical Psychologist attached to the Civil Hospital. The aforesaid team of doctors shall examine Ms [M] and after having an interaction with her, shall decide whether there is a serious threat to her life, if the child is not aborted.

**4.** If the team of the aforesaid doctors is of the view that termination of the pregnancy is immediately necessary to save the life of Ms [M], the doctor concerned of the Civil Hospital shall perform necessary surgery, if the petitioner and Ms [M] desire to go through to such abortion, without taking any permission from this Court. If there is no unanimity among the doctors, majority view of the doctors shall prevail.

**5.** In case of abortion, the hospital authorities shall take necessary tissue from the foetus for DNA identification.

..."

## IN THE HIGH COURT OF GUJARAT

**Bhavikaben v. State of Gujarat & Ors.****(2016) 3 RCR (Cri) 362****Sonia Gokani, J.**

***The petitioner became pregnant as a result of rape while she was a minor. She attempted suicide by consuming acid which damaged her internal organs. Due to her pregnancy, she could not undergo the required surgical operation and therefore, filed this writ petition seeking permission to terminate her pregnancy of about 24 weeks. In its decision, the High Court considered the “best interest” of the rape victim in view of her young age and medical opinion indicating grave injury to her mental and physical health from continuation of pregnancy resulting from rape.***

**Gokani, J.:** “This petition is preferred under Article. 226 of the Constitution of India seeking termination of pregnancy under the Medical Termination of Pregnancy Act, 1971 (“MTP Act” for short) in the following factual background.

2. The petitioner herein was born on 1st June 1997 and is aged 18 years. She is victim of rape. Her mother has lodged a complaint against the accused persons, being IC. R No. 55 of 2015 registered with Chorwad Police Station, District Junagadh for the offence punishable under Sections 376,506 (2) & 114 IPC. According to complainant on 26th September 2015, the victim was found from the bathroom, after having consumed acid, and therefore, she was immediately removed to Raghuvanshi Hospital at Keshod. On 2nd October 2015, a letter written by the accused to the victim since was found from the residence, she had revealed to the parents that as a minor she was lured by the accused and rape was committed on her. When she missed her monthly periodical cycle and on realizing that she was carrying pregnancy, she revealed the fact to the accused and insisted on marrying him. The accused refused any such relation and perturbed victim had chosen to end her life by consuming acid. A complaint also came to be filed by the mother of the victim which set the criminal machinery into motion. By preferring the present Application, it is urged by the victim that consumption of acid in solid liquid form has damaged her organs like Esophagus, Liver, etc. She was advised to undergo surgery of esophagus, but the surgery could not be performed on account of her pregnancy. Having found that this continuance of pregnancy is causing serious threat to her physical and mental health and this may also create serious complications to the child that may be born, she contemplated termination of pregnancy under the provisions of MTP Act. The victim's parents are carrying on agricultural labour work on the field of others and the family has scant financial resources. Therefore, a request is made to allow her to terminate pregnancy, which is of 24 weeks.

3. This Court, vide its Order dated 17th February 2016, had passed the following order:

“A detailed medical report needs to be called for before permission of termination of pregnancy is acceded to. And therefore, the Medical Superintendent, Sola Civil Hospital, Sola, Ahmedabad is directed to cause to examine the petitioner by a panel of senior-most Gynecologists of the Sola Civil Hospital. The aforesaid team of doctors shall examine the victim on 18th February 2016 and after an interaction with her, shall give in writing opinion at the earliest, bearing in mind the advanced stage of pregnancy and her physical and mental condition, whether there will be a substantial risk to the life of the petitioner, if the child was born, or that the child would suffer from such physical or mental abnormalities as to be seriously handicapped.

The Medical Superintendent, Sola Civil Hospital, Ahmedabad shall admit the petitioner today itself and shall only discharge her after the Court's order.

...”

4. Today, the report of Medical Superintendent, GMERS Medical College & Hospital, Sola, Ahmedabad dated 18th February 2016 is produced on the record. It appears that a committee of six members was constituted by the Medical Superintendent and the said team of Doctors have given their opinion that continuation of pregnancy will adversely affect her mental status; of course, it will not affect her physical status. It had then been referred to the Professor & Head, OBGY Department, GMERS Medical College, Ahmedabad and according to the Professor & Head-OBGY Department, the pregnancy since at present is of 24 weeks and MTP Act permits termination of pregnancy till 20 weeks, the same can be carried out, if permitted by the Court's order, in extreme situation and considering the increased risk of termination at this gestational age. However, as per the opinion of team of Doctors, the survival of new born is very less due to extreme prematurity.

...

8. Before advertizing to the facts in the instant case, provisions of MTP Act, particularly Section 3 requires reproduction—...

9. This Act permits termination of pregnancy where the length of pregnancy does not exceed twelve weeks or where such length of pregnancy exceeds twelve weeks but does not exceed twenty weeks, if in the opinion of two registered medical practitioners, in cases of sub section [2](b) of Section 3, continuance of pregnancy would involve a risk to the life of a pregnant woman or of grave injury to her physical or mental health, or there is a substantial risk that if a child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. Explanation provides that 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. Pregnancy thus can be terminated by registered medical practitioner where it is not of more than twelve weeks. If it is of more than twelve weeks, but less than twenty weeks, two medical practitioners need to opine that continuance of pregnancy would involve a risk to the life of pregnancy woman or that it may cause grave injury to her physical or mental health. Likewise, physical or mental abnormalities of a child to be born is also one of the grounds for medical practitioners to terminate the pregnancy. Further, no pregnancy of any woman who has not attained the age of 18 years, or who having attained the age of eighteen years, is a mentally ill person, shall be terminated except with the consent in writing of her guardian.

10. The Apex Court in case of *Chandrakant Jayantilal Suthar v. State of Gujarat* [Su pra] had left it to the discretion of the medical practitioners, considering the peculiar facts, who were to decide after interaction with the victim, as termination of pregnancy was immediately necessary to save life of the victim herself, it did not want the Doctors to wait for the permission of the Court, if there was a unanimity amongst the doctors; otherwise directed the majority view to prevail. While so doing, the Court directed the Hospital authorities to take necessary tissue from the fetus for DNA identification.

11. In case of *Suchita Srivastava v. Chandigarh Administration*, reported in 2009 (3) GLH 468, the Apex Court has laid down the theory of best interest test to hold that the Court is required to ascertain the course of action which would serve the best interests of the per son in question. The Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim. The Court's decision should be guided by the interest of the victim alone and not those of stakeholders such as guardians or society in general...

12. Bearing in mind the decision of the Apex Court and keeping the 'Best interests' test as the parameter, in the opinion of this Court, in the present set of circumstances, careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim, if are considered, this Court is of the opinion that termination of pregnancy requires to be permitted, which is in the best interest of the victim.

13. It is to be noted that the team of Doctors have on 18th February 2016 submitted report and opined, thus—

"After reviewing history and detailed examination, blood reports and sonography done at Civil Hospital, Sola, our opinion is as follow:

- Psychiatric evaluation suggest patient is not suffering from any psychiatric disorder and patient is psychiatrically fit. Considering involuntary pregnancy and unwillingness of victim to continue pregnancy her mental trauma may increase if pregnancy continues.

- Anesthetic evaluation suggest that slightly more risk of anesthesia if pregnancy will terminated at present.

- Medical and surgical evaluation suggest that if proper nutrition and care is maintained through feeding jejunostomy, there is no physical harm in continuation of pregnancy or termination of pregnancy at present.

- There is same or slight increase risk to victim if pregnancy is terminated before term than physiological normal delivery at term.

- As per MTP Act, termination of pregnancy can be done up to 20 week of pregnancy. At present, patient had 24 week live pregnancy.

- If the child will born [sic] at present, the chances of survival of new born is very less due to extreme prematurity. But, if it delivers at term there will not increase chance of physical or mental abnormalities or seriously handicapped.

Considering all experts opinion continuation of pregnancy will adversely affect her mental status but will not affect her physical status."

14. Professor & Head, OBGY Department, GMERS Medical College, Sola, Ahmedabad has opined, thus—

“(1) Pregnancy at present is 24 weeks. As per MTP law, MTP can be carried out only till 20 weeks in said case.

(2) However termination can be carried out, if permitted by the Court order in extreme situation considering increased risk of termination at this gestational age in the said situation. As per the opinion of Pediatrician, the child born at this age is not likely to survive due to extreme prematurity.”

15. If the opinion of the team of Doctors is taken into consideration, it could be noticed that her mental status will adversely be affected, if pregnancy continues. She, therefore, falls under the criteria set out in the MTP Act. This continuance of pregnancy since involves grave injury to her mental health as her pregnancy being the result of rape, the anguish caused also is to be constituted as a grave injury to the mental health of the victim, and therefore also; termination of pregnancy is permitted.

16. This Court had noticed, before referring the victim to the team of medical experts, that she is being fed through Rielis tube and except liquid naturally nothing could be provided. Her frail physical and mental health is on account of trauma of rape she underwent and it appears almost an impossibility for her to look after herself. She also attempted suicide when humiliated by the accused. All these factual circumstances that emerge on record, particularly very young age of the petitioner leads this Court to conclude in favour of grant of her request. Delay in approaching this Court has placed statutory constraints which is because of various grounds narrated - chief amongst the same is her poor health and poverty stricken condition of parents. However, when medical opinion does not indicate this act of termination to risk her life, following the best interest test, request warrants to be acceded to.

17. Therefore, it is being directed that with best medical facilities available and on ensuring the proper care and supervision, termination of pregnancy shall be carried out. Doctors shall take necessary tissue from the fetus for DNA identification by following scientific practice prescribed by the Standard Medical Practice for DNA identification.

...”

## IN THE HIGH COURT OF PUNJAB AND HARYANA

**R v. State of Haryana**

**2016 SCC OnLine P&H 18369**

**Paramjeet Singh Dhaliwal, J.**

***A minor girl had become pregnant as a result of a rape. Despite being tasked to undertake an initial medico-legal examination, the concerned doctor did not examine her for pregnancy. This contributed to the loss of time and her pregnancy exceeded the statutory limit of 20 weeks by the time she approached the High Court seeking termination of pregnancy. The petitioner repeatedly stated that she would commit suicide if she was made to carry the pregnancy to term. The Court had to decide whether permission could be granted to terminate a 21 weeks pregnancy of a minor rape survivor whose termination of pregnancy was delayed due to the laxity of a government doctor.***

**Dhaliwal, J.:** “1. In this judgment, a complex set of issues connected with different fields of law arise for consideration. The issue, although, relates to the medical termination of pregnancy of a minor girl beyond the legally permissible gestation period of 20 weeks but other issues such as right to life, health and abortion (which includes victim-mother and the foetus), human rights and issues of social and religious concerns are involved. The main focus will be on the issue of late termination of pregnancy resulting from the alleged rape and a brief reference to other ancillary issues which are intricately connected with this complex issue will also be made.

...

3. Instant writ petition has been filed under Articles 226/227 of the Constitution of India for issuance of a writ in the nature of mandamus directing respondent No.7 to terminate the pregnancy of the child in the womb of petitioner No.1, a minor girl, who is an alleged victim of rape, as the continuation of pregnancy would cause grave injury to her and would also be unsafe and dangerous for the life of the petitioner-victim...It is further prayed that during the pendency of the present writ petition, petitioner-victim may be permitted to terminate the pregnancy and directions be issued to respondent no. 7. i.e. Civil Surgeon, Civil Hospital-cum-Government Medical College, SHK Mewat Government Medical

College, District Mewat or any other Specialized Government Hospital for providing all medical help to petitioner No.1- victim and direction may be issued to the hospital authorities to preserve the fetus, which would enable the investigating agency for DNA test in order to prove the commission of offence of alleged rape by the accused person.

...

**31.** The Courts allowing or declining termination of pregnancy always depend upon the opinion of the doctors. It may be a rare case where court passes order contrary to opinion of medical boards. This is due to reason that medical and health professionals are the experts in this field. The catena of judgments referred above clearly indicates that many a time, time is wasted in getting the opinion of the medical board and by that time even statutory period lapses.

**32.** In fact, the statute provides for early termination of pregnancy not on demand but on satisfaction of certain conditions. The requirements that need to be fulfilled are enumerated in Section 3(2) of the MTP Act. Apart from that, upto 20 weeks of pregnancy, there are no impediments in law for termination of pregnancy, if those conditions exist. Even then, there appears to be a practice of approaching the courts for termination of pregnancy before the completion of 20 weeks. Many a time, even doctors while examining the rape victims do not probe the possibility of pregnancy and many a time in spite of pregnancy, its notice is not taken and medico-legal reports are prepared in a casual manner, unmindful of the consequences specifically in rape cases. The practice stems from lack of awareness on the part of the doctors, investigating officers, lawyers and courts. The cases are filed by the counsel without sometime being aware of the provisions of the Act and the need of urgency in such cases. The practice of filing such cases has been condemned by this Court in *Bashir Khan's case (supra)* and subsequently, in the case of *Vijender's case (supra)*. The judgments in the said cases mention issuance of orders to the Director General of Police of the State of Punjab, Haryana and the U.T. to ensure that such cases of termination of pregnancy should not be brought to court.

### **33. Why are the late abortions still necessary?**

**33.1** Unwed teenagers who may have suffered pregnancy due to the alleged rape may not know that they are pregnant until they feel the baby kick. This is known as quickening. At this stage, foetal movements occur between 17<sup>th</sup> to 20<sup>th</sup> week of pregnancy, when at this stage issue of termination of pregnancy arises the legal scholars, ethicists and others continue to dissect this complicated issue. Social policy makes the issue of late abortion worse. The doctors, physicians and social policy makes the issue of late abortion worse. The doctors, physicians, gynaecologists and obstetricians grapple the following issues in relation to the late termination of pregnancy

- (i) what is appropriate or not as per their own beliefs;
- (ii) whether abortion should now be carried out in obstetrical wing of the hospital where foetus can be monitored and
- (iii) whether neonatologist should be present at the time of termination of pregnancy; where a live birth is a possibility.

Terminating pregnancy at advanced stage, say 28 weeks, may not be advisable as this may be high risk pregnancy. We can make an attempt to draw a line at 24 weeks, as this period is fixed by the statutes in various other countries. Even Draft Medical Termination of Pregnancy (Amendment) Bill, 2014 is pending in the Parliament, according to which decision to allow abortion between 20 and 24 weeks can be taken in good faith by the competent person. The revision of the legal limit for termination of pregnancy is long due. In fact, medical technology has leaped beyond the MTP Act and assumptions of medical ethics. Most of the doctors try to remain within law and do not consider the peculiar circumstances of the case before them. Advances in neonatology may have an impact on the judgment in *Roe vs. Wade's case (supra)* to render it obsolete. Some abortions are necessary beyond the statutory limit in the light of circumstances under which they are sought and, therefore, we require to streamline the system in this regard.

**33.2** There is a possibility that when a child is born alive, he/she may be required extraordinary care. The saying is '*fear inspires caution*'. In case, foetus is born alive during late termination of pregnancy, physician, gynaecologist and obstetricians confront a serious problem as performing late abortion is the gap between abstract theory on foetal viability and realities of medical practice. Pregnancy due dates, date of conception and foetal viability are still an uncertain area. Viability is more difficult to assess. As per the opinion of the gynaecologist, 24 weeks foetus physically appears to resemble a child but his lungs and brain are still not fully developed, nor its eye-lids are open.

**33.3** The MTP Act is an inadequate act and only appears to have been designed to serve the interest of the family planning programme. Under the MTP Act, women have restricted right to termination of pregnancy. The declared objects of the MTP Act are to help women, who become pregnant as a result of rape, women who are pregnant due to contraceptive failure (applicable to married women/marital sexuality) or to reduce the risk of severely handicapped children being born.

**33.4** Right to abortion involves the fundamental right of the mother and the foetus. Now the issue arises at what stage a foetus can be seen as an individual in its own right. It is a disturbing issue. The notion that the foetus is an individual in its own right infuses an emotional angle to the entire issue on abortion. The abortion causes emotional turmoil for many women and their families. The woman has an exclusive and inalienable right over her body and her reproduction and that cannot be transferred to her family or the State. This is more relevant in our country where child bearing is governed by social mores. Article 21 of the Constitution of India provides right to life and right to privacy. Article 6(1) of the International Covenant on Civil and Political Rights prohibits the arbitrary deprivation of life. But, the right of the mother is to be balanced with the right of unborn. One view is that human being does not exist as a legal person until after birth. The foetus does not enjoy independent legal personality. In the case of *Mr. Vijay Sharma and Mrs. Kirti Sharma vs. Union of India* AIR 2008 Bom. 29, it was held that foeticide of girl child is a sin; such tendency offends dignity of women. It undermines their importance. It violates woman's right to life. It violates Article 39 (e) of the Constitution which states that the principle of state policy that the health and strength of women is not be abused. It ignores Article 51 (A) (e) of the Constitution which envisages that it shall be the duty of every citizen of India to renounce practice derogatory to the dignity of the women. The legislature in the MTP Act has not defined anguish that it must be termed as grave injury to the physical and mental health of the victim. The Hon'ble Supreme Court in catena of judgments has developed the various rights under the concept of personal liberty under Article 21 i.e. right of free enjoyment, right to human dignity, right to have access to justice, right to privacy. Thus even in the best circumstances, this Court believes that no law or a person can ethically compel a woman to carry on pregnancy that she does not want. When pregnancy has progressed to a point where the foetus has become viable, one is compelled to view the situation from the point of the woman as well as the potential child.

#### **34. Psychological Effects of rape, impregnation and refusal of termination of pregnancy for want of legal sanction on the victim:**

Victims of rape impregnated due to the act experience both short and long term psychological effects. Deep physical trauma is most common and lasting effect of rape. The medical literature and studies are galore with the instances of Post Traumatic Stress Disorder (PTSDs) in rape victims. Due to the less evolved society, more so in this part of the world, till date the rape victim carries more stigma than the person accused of the offence of rape. Those assaulted repeatedly at very young age may need treatment and counselling for the rest of their lives. Rape of minors and young girls, at the hands of unconscientious criminals continuously increasing in various parts of the country, is itself a matter to be ashamed of as a society and needs deliberations to curb the menace. What makes it worse is the callous attitude of the person in authority, specifically the investigating officers. Rape of innocent and minor girls on the one hand, and the complete absence of sensitivity, empathy in the society towards the victims and, moreover, the misogynistic response by the authorities on the other hand, is highly condemnable. The daughters of India are falling prey to a deeply misogynistic society. We need sensitive people at various echelons in the set up of investigation of criminal cases and rehabilitation of victims of crime who will hear the cries of anguish of the victims with an open mind and a sensitive heart. The perpetrators of such heinous crimes roam in streets like wolves in forests and threaten the victims and their families of dire consequences as a result of which tears stream down their faces.

#### **35. Need for Counselling and Mental Health Evaluation from time to time:**

**35.1** There is extensive research to the fact that the incident of violence on the body of a victim re-visits her thinking process many times a day. The counselling is necessary to help her overcome this trauma. The Indians are perceived to have faith in religions and God. God is a wonderful counsellor; we have learnt from scriptures and holy books. The sufferings must reach to a minimum level of severity and for this purpose, counselling is a necessity. The denial of such services which are critical for making an informed decision as to whether to seek abortion or not also violates the right to be free from inhumane and degrading treatment. The assessment of minimum level of suffering is a relative term. It depends upon the circumstances of the case, such as duration of treatments, its physical and mental effects and the age and state of health of the victim. Paradoxically, both the rape and abortion are violations and infringement of right to life

**36.** In this case, the alleged pregnancy is the result of a crime of rape. The minor and her legal guardian have expressed in an unequivocal desire to get the pregnancy terminated. The doctors at Civil Hospital cum SHKM Government Medical College, Nalhar, Nuh should have examined the possibility of pregnancy of the petitioner-victim in terms of Section 164-A of Code of Criminal Procedure and helped the minor and her legal guardians to make an informed decision with regard to termination or continuation of the pregnancy. The doctors who conducted the initial medico-legal examination at Nalhar did not perform their duty as doctors with due diligence and did not carry out pregnancy test in spite of the information that she is victim of alleged sexual assault. The petitioner No. 1 during the course of conversation in camera with Amicus Curiae had given the threat to commit suicide if the pregnancy, which is causing her a lot of mental anguish and embarrassment in the society as per her understanding, was not allowed to be terminated. Such a statement of the victim reflects the state of acute mental and physical health problem. Even in the medical report dated 3rd of May 2016 submitted by the Board of Doctors, PGIMER it is mentioned that “there is a possibility of harm to the patient due to social and emotional consequences of continuation of pregnancy.” This court vide order dated 13.05.2016 directed the Medical Board of PGIMER to reassess the termination of pregnancy of Petitioner No. 1 and, if the same is medically feasible, they should go ahead with the termination of pregnancy without further orders from the court. The Medical Board of the PGIMER also determined the bone age of petitioner No. 1 through X-Ray examination to be 18 to 20 years.

**37.** Section 3 of MTP Act stipulates that the pregnancy which exceeds 12 weeks but does not exceed 20 weeks may be terminated if not less than 2 registered medical practitioners can form an opinion in good faith that continuation of pregnancy will pose risk to the life of the pregnant woman or will cause grave injury to her physical and mental health. The pregnancy in the present case is the result of rape and the victim is a minor as per the assertion in the Writ Petition and admission in the written statement of State Government. However, the age of the petitioner No. 1 as per x-ray examination of her bones has been determined between 18 to 20 years by the Medical Board, PGIMER constituted on 03.05.2016 under the the directions of this Court. Meaning thereby she might be major and is legally capable to take a decision with regard to her termination of pregnancy. Even if she is a minor, her father –her natural Guardian, had given the consent for the same and has approached this Court. This Court is of the opinion that in the present case applying the 'best interest test' as explained by the Hon'ble Supreme Court in *Suchita Srivastava's* case (*supra*), the pregnancy of petitioner No. 1, which is the result of alleged rape and has caused deep mental anguish to her, constraining her to demand the termination of the same in unequivocal terms, may have been terminated by the doctors of PGIMER, which is an imminent institution on the medical sciences. This observation finds strength from the fact that the gestation period of pregnancy was not beyond 24 weeks at that time and this Court had given the legal authority to the medical board to carry out the termination if the same is necessary for preserving the life and health of Petitioner No. 1. This court is of the considered opinion which is corroborated from the opinion of psychiatrist of PGIMER that continuance of the pregnancy is certainly a grave injury to petitioner No. 1's physical and mental health. The doctors in such circumstances cannot be penalized when they act in good faith and help a hapless victim to abort the pregnancy caused due to rape. It appears that doctors did not carry out termination of pregnancy for fear of prosecution under the penal provisions referred to in the foregoing paras of this judgment. This court is of the view that the fear of chilling effect of prosecution needs to be removed from the mind of doctors. Section 3 of MTP Act provides a defence when the termination is done in accordance with the conditions set out in the MTP Act. Further, a medical practitioner is protected by Section 8 of MTP Act for “any damage caused or likely to be caused by anything” for any act done in good faith under the MTP Act. This court has to base its judgment completely upon the opinion of the experts in the field and cannot issue directions on its own. The courts only interpret the provisions of law and pass the order accordingly. To remove this fear of prosecution in the minds of the doctors, the authorities concerned should issue procedural guidelines so that they may act without fear in the interest of the patient.

**38.** Way back in 1938 in the case of *King vs. Broune (supra)*, it was held that when a doctor on reasonable grounds and with adequate knowledge in the field comes to a conclusion of probable consequences of pregnancy that it will make the concerned victim /woman physically and mentally wrecked then the concerned doctor/doctors, if decide for termination of pregnancy, are proceeding with purpose of preserving the life of women. On the anvil of the settled position of law, the best interests parameters and the social circumstances that may be faced by the rape victim, the decisions of Court as well as of the doctors should be guided by the interest of the victim alone. Bearing this in mind, this court had given liberty to the doctors of the PGIMER to go ahead with termination of pregnancy if it is not harmful to the victim and, rather, is required to preserve her mental and physical health. But the board decided according to their wisdom not to go ahead with the same and came to a conclusion that the termination of pregnancy should not be carried out at this stage. In view of the opinion of Medical Board of PGIMER, this court cannot pass the order to terminate the pregnancy of petitioner No. 1.



**39.** This Court is of the considered opinion, in the light of the findings in the report dated 3rd of May 2016 to the effect that there is a possibility of harm to the patient due to social and emotional consequences of continuation of pregnancy, then the inference can be drawn that it will certainly cause grave injury to her physical and mental health. Moreover, in the order dated 13.05.2016, this Court had referred to the judgements of the Hon'ble Apex Court and the Hon'ble Gujarat High Court vide which the Courts have granted the permission for termination of pregnancy beyond the prescribed period of 20 weeks under the MTP Act. The order also contains reference to Section 5 of the MTP Act which gives power to the doctor to go ahead with the termination of pregnancy if the same is necessitated on account of saving the life of the woman. Therefore, pursuant to the order of this Court, there was no risk of prosecution of the doctors if they would have gone ahead with the termination of pregnancy of petitioner No.1. At that juncture, petitioner No.1 and her father - her natural guardian, were ready to give consent for termination of pregnancy.

**40.** During the course of arguments, Ms. Tanu Bedi, amicus curiae submitted that the petitioners come from area nearer to Delhi and she may be referred to AIIMS for exploring further possibilities of termination of pregnancy in view of the advancement in medical sciences.

**41.** I would request Director of AIIMS to constitute another medical board of equivalent or larger number of doctors as of the PGIMER to explore the possibility of termination of pregnancy. The Court requests the Director of AIIMS to do the needful as soon as possible and inform the Court about the actions taken. The petitioners will be at liberty to appear before the medical board of AIIMS at the earliest possible. The medical experts of AIIMS are further requested to provide all the facilities including counselling etc. and explore the possibility for carrying out the termination of pregnancy if possible or other option in the best interest of the petitioner-victim. They are also requested to reserve a special room for petitioner No.1 and her family, as required at the appropriate time. In case the Board rules out the termination at this stage and petitioner No. 1 is required to take the pregnancy to its full term and the petitioners inform the Board about their unwillingness to keep the child, efforts should be made to make arrangements for the adoption of child by involving the concerned officials from Central Adoption Resource Authority (CARA). All the expenses incurred in this regard shall be borne by the department of health and family welfare, Haryana. The State of Haryana is directed to tentatively deposit 50,000/- as expenses forthwith with the authorities of AIIMS. If the amount of expenses exceeds, the same shall also be payable by the Health Department, Government of Haryana.

**42.** In view of the foregoing discussion, interim directions are issued as under:

(i) Principal Secretary, Department of Health & Family Welfare, Government of Haryana, shall deposit a sum of 5000/- per month in the account of petitioner No. 1 for food and medical expenses. The deposit shall be made on or before 7th of each calendar month w.e.f. 01.06.2016 for one year.

(ii) The Chief Medical Officer, Nuh and the Medical Superintendent of Civil Hospital-cum-SHKM Government Medical College Malhar shall depute a senior obstetrician/ gynecologist to examine petitioner No. 1 from time to time and give proper advice in the matter of medicine and due medical facilities of health professionals i.e nurses etc. This will be in addition to the help and assistance to be provided to Petitioner No. 1 by AIIMS, New Delhi.

(iii) The Medical Superintendent of AIIMS shall also provide the adequate medical help as aforesaid to victim-petitioner No. 1.

(iv) Whenever Petitioner No. 1 visits for medical checkup and counselling, the concerned doctors shall deal with her sympathetically. The counselling shall be provided to her regularly as per the mental health of petitioner No. 1 and the requirement for the same in view of the alleged threat of suicide by her.

(v) The State of Haryana shall also deposit an amount of Rs.5 lakh in fixed deposit in the name of petitioner No. 1 as damages and expenses as the officers at the helm of affairs failed to act with due diligence. This amount will be in addition to the other claim of petitioner No. 1 under the provisions of law. The said amount shall remain in fixed deposit in a scheduled Bank; however, the interest accruing on it can be paid to petitioner No.1 only after 31.06.2017, by the concerned bank, if demanded by petitioner No. 1.

(vi) It is clarified that the amounts awarded by this Court are in addition to the entitlement as per provisions of Code of Criminal Procedure.

(vii) This Court has already issued directions in various cases as Kavita, Vijender and Bashir Khan (supra), referred in the earlier part of the judgement. It is emphasized that each of those directions should also be followed in letter and spirit.

(viii) The Central Government is advised to consider making amendments to the Medical Termination Of Pregnancy Act, 1971 and clarify in so many words to the doctors that they will not be unnecessarily prosecuted if they act in accordance with the rules in good faith to save the life of a victim of rape or to prevent grave injury to her physical and mental health. Termination of pregnancy in good faith which results from crime is otherwise permitted under the provision of MTP Act.

(ix) Seminars for investigating agencies, doctors, lawyers and judicial officers who have occasion to deal with such cases should be organized periodically. They should be sensitized about the urgency and immediate need of counselling and other medical assistance required to a rape victim. The respective departments having control over these agencies should regularly update its officers/officials about the legal provisions and settled law on the subject.

(x) The Refresher Courses for the members of the Superior and Subordinate Judiciary of the States of Punjab, Haryana and U.T.Chandigarh be held to make them aware of the provisions of the MTP Act and urgency in such cases. In order to ensure that if any case is brought before the gestation period reaches 20 weeks, victim be informed about her choice to seek termination at the earliest.

(xi) The copy of this judgment be sent to the offices of Advocate Generals of Punjab and Haryana and the Standing Counsel for U.T., in order to ensure that if, and when, any case is brought to Court for passing of any orders under the MTP Act, the said case can be determined on the first day itself by sending the woman to the medical board immediately for quick action if possible under the provisions of law. The need for filing of reply should not arise so as to avoid wasting of precious time available with the pregnant victim.

(xii) The Registry is directed not to mention the name of rape victim in the cause list, judgment order, but they may refer to her name by mentioning the first alphabet of her name.

(xiii) The Counsel representing the victim of rape are also requested not to disclose the identity of victim in the petition in the head-note of petition. They may also write the first alphabet of name of the victim and may quote 'name withheld' in particulars.

**43.** Taking the facts and circumstances of the case into account, this Court holds that the prayer of the petitioners for the termination of pregnancy of petitioner No. 1 cannot be granted at this stage in view of the medical reports so far submitted before this Court.

**44.** As an abundant caution and leaving no stone unturned to time out some solution to the woes of a hapless victim heard in this Court, this Court requests the authorities of AIIMS, New Delhi to reassess the possibility of termination of pregnancy of the victim in this case and take a call keeping in mind the advancement in medical sciences and the spirit behind the MTP Act. The Medical Board of AIIMS, New Delhi may take decision in good faith in the best interest of the victim of crime.

**45.** Though, this Court has issued some directions in the interest of the victim as regards the care and attention to be given to her during her pregnancy and other procedure, if any, carried out by the medical expert, for the post-delivery period, the directions issued by this Court in the present case and in other cases involving similar issue to the concerned authorities are not exhaustive and monitoring of these directions by this Court is necessary as it has come into notice of this Court during the hearing of this case that the same are not being implemented faithfully.

...

## IN THE HIGH COURT OF GUJARAT

Madhuben Arvindbhai Nimavat v. State of Gujarat

2016 SCC OnLine Guj 662

Sonia Gokani, J.

***This writ petition was filed by a minor girl seeking permission for termination of her pregnancy resulting from rape, after her request was declined by the Sessions Court. The High Court considered the “best interest” of the minor rape victim, relying on Suchita Srivastava v. Chandigarh Administration ((2009) 9 SCC 1), to decide whether termination of her pregnancy of over 20 weeks should be allowed.***

**Gokani, J.:** “Petitioner herein is a minor girl who through her legal guardian and father who is a labourer has preferred this petition under Article 226 of the Constitution of India seeking termination of pregnancy. She is a victim of rape and aged about 14 years. The FIR came to be filed with Mahila Police Station, Rajkot being I-CR No. 51 of 2016 for the offence punishable under Section 376 of the Indian Penal Code.

...

3. An application was given to the learned Sessions Judge in relation to the said I-CR No. 51 of 2016 seeking termination of pregnancy on 24.5.2016. It was urged that she is having pregnancy of 18 months (*sic*) and as per the Medical Rules, upto 20 weeks, she can be permitted to terminate the pregnancy.

4. Sessions Court rejected such request relying on the provisions of Medical Termination of Pregnancy Act 1971 (“MTP Act” for short). It also appears that the Court had called the Assistant Professor (Ob & Gy) Government Medical College, Rajkot personally and he was also asked to give exact opinion in respect of the length of pregnancy. In continuation of his earlier opinion, he has examined the victim carefully and opined that he was unsure whether pregnancy exceeds 20 weeks.

5. Both the sides have been heard at length.

...

7. Learned APP Mr. Ronak Raval has also relied upon some of the judgments delivered by this Court and submitted that the Court may direct for termination of pregnancy, if deems fit, considering the mental health and overall picture.

8. A short question that arises in this petition is as to whether termination of pregnancy be permitted as requested for as the girl is only 14 years of age, having hemoglobin level of 6.5% only and when she is carrying pregnancy of 22 weeks presently.

9. This Court, in case of *Chandrakant Jayantilal Suthar v. State of Gujarat*, reported in **Special Criminal Application No. 4255 of 2015** dealt with the law on the subject extensively and denied the permission this wise; ...

10. The said order was challenged before the Apex Court and the Apex Court overruled the order as reported in (2015) 8 SCC 721. Relevant paragraphs are reproduced hereunder:

“3. [...]

4. If the team of the aforesaid doctors is of the view of that termination of the pregnancy is immediately necessary to save the life of Ms. Maitri, the doctor concerned of the Civil Hospital shall perform necessary surgery, if the petitioner and Ms. Maitri desire to go through to such abortion, without taking any permission from this Court. If there is unanimity among the doctors, majority view of the doctors shall prevail.

5. In case of abortion, the hospital authorities shall take necessary tissue from the foetus for DNA identification.

[...]”

...

**11.** This Court in case of *Bhavikaben d/o Rameshbhai Solanki v. State of Gujarat* in Special Criminal Application (Direction) No. 1155 of 2016 while dealing with the case of a rape victim who had made a request for termination of pregnancy considering the decision rendered in the case of *Chandrakant Jayantilal Suthar v. State of Gujarat*. (Supra) and on discussing the provisions of Medical Termination of Pregnancy Act 1971, the pregnancy was permitted to be terminated. It would be appropriate to reproduce relevant paragraphs which reads as under:- ...

**12.** This Court in case of *Poojaben Vershibhai Charla (Minor) through Vershibhai @ Varsingh Govindbhai Charla v. State of Gujarat* in Special Criminal Application (Direction) No. 1681 of 2016 has also dealt with the similar issue and also took note of the decision in the case of *Suchita Srivastava v. Chandiagarh Administration*, reported in 2009 (3) GLH. 468, and keeping parameters of “Best Interest Test, permitted termination after seeking medical opinion.

**13.** In the matter on hand, this Court shall have to consider the course of action bearing in mind the ‘best interest’ theory victim girl is very young. Her trauma, mental agony and possibilities of social ostracism needs to be kept in view. In the present set of circumstances, on careful inquiry of the medical opinion on continuing feasibility of continuing pregnancy as well as social circumstances faced by the victim, the Court's decision has to be guided by the best interest of the victim alone and not of the stakeholders not of the guardian also.

**14.** At this stage, the certificate issued by the Associate Professor of Department of Obstetrics and Gynecology, PDU, Government Medical College, Rajkot, is reproduced hereunder: -...

**15.** It can be noticed that patient has severe anemia with 6.5% haemoglobin as mentioned hereinabove and the pregnancy of 22 weeks and 3 days as on 7.6.2016. The Medical opinion suggests that termination can be carried out with the order of the Court and after correction of anemia with due risk of the procedure.

**16.** Since the request is made by the petitioner herself with the consent of the parents, bearing in mind, her very young age and incident of rape with pregnancy, grave injury to her mental health is to be presumed. Her fragile health and poor haemoglobin level requires that the team of the Doctors needs to examine her once again and also ensure her safety as this Court is of the opinion that it would be in the best interest of the victim to permit the termination of pregnancy, if otherwise, there is unanimity amongst the Doctors to the effect that such termination would be carried out safely.

**17.** Let the Senior Expert Doctor interacting with the prosecutrix - petitioner and her parents and without further reference to this Court, take a decision bearing in mind the ‘best interest principle’ and terminate her pregnancy as soon as possible.

**18.** The outcome and well being of the petitioner shall be reported to this Court within one week. The concerned Doctors shall examine the level of haemoglobin and carry out all other necessary tests before proceeding to terminate the pregnancy. Once termination is over, the petitioner - minor shall continue to receive treatment for the length of period deemed necessary by the Senior Most Doctor of the team.

**19.** Medical Superintendent PDU Civil Hospital, Rajkot shall hand over, in scientific manner, the tissues drawn from the foetus for DNA identification to the Police Inspector, Mahila Police Station, Rajkot for onward transmission of the same to the concerned Forensic Science Laboratory.

...”

## IN THE SUPREME COURT OF INDIA

**X v. Union of India**

**(2016) 14 SCC 382**

**Jagdish Singh Khehar and Arun Mishra, JJ.**

***The petitioner was 24 weeks pregnant and was diagnosed with several foetal impairments incompatible with extra uterine life. Having crossed the 20 week limit prescribed under Section 3(2) of the MTP Act, the petitioner filed a writ petition before the Supreme Court seeking permission to terminate her pregnancy. The Supreme Court was to adjudicate upon the issue of whether it would be justified and legal to terminate the 24-week pregnancy of the petitioner.***

**Khehar and Mishra, JJ.:** “

...

6. By our Motion Bench order dated 22.07.2016, we had accepted the suggestion of the learned Solicitor General for India, and the learned counsel for the State of Maharashtra in directing respondent No. 2 - the State of Maharashtra, to constitute a Medical Board at KEM Hospital and Medical College, Mumbai, to medically examine the petitioner.

7. In furtherance of the direction issued by this Court, a Medical Board comprising of the following seven doctors was constituted at the KEM Hospital and Medical College, Mumbai. ...

8. The Medical Board has submitted a report dated 23.07.2016, which is taken on record and marked as Annexure A. In its analysis, the report inter alia recorded as under:

“4. From General Medical Examination she has no active medical complaints.

5. Obstetric examination shows 24 weeks pregnancy, with severe polyhydramnios, with foetal parts not felt. On internal examination, the cervix is closed and high up.

6. Radiological diagnosis is single live foetus with gestational age of 23 weeks 3 days with following malformations: 1) exencephaly, i.e. evidence of no skull vault above orbit, with presence of brain tissue floating in amniotic fluid, 2) Omphalocele (presence of liver, intestines and stomach bubble outside the abdomen and in the amniotic cavity). 3) Heart is bulging into the omphalocele sac.

4) Kyphoscoliosis which is an anomaly of the spine involving the thoracolumbar vertebrae with polyhydramnios (excessive amniotic fluid) with closed vertex.”

9. Based on the above medical examination, the findings of the Medical Board were expressed as under:

“1. Current pregnancy is about 23-24 weeks by clinical and radiological evaluation.

2. In view of severe multiple congenital anomalies, the foetus is not compatible with extra-uterine life.

3. Risk to the mother of continuation of pregnancy can gravely endanger her physical and mental health.

4. Risk of termination of pregnancy is within acceptable limits.

Hence the Medical Board advises that the patient, Ms. X should not continue with this pregnancy.”

10. The question that arises for our consideration is, whether it would be justified and legal, to terminate the pregnancy of the petitioner, which the Medical Report itself shows, as of 24 weeks duration?

11. Learned Attorney General representing the Union of India has invited our attention to Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter referred to as ‘the Act’) which is extracted below:

“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 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.

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 a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken to 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 [mentally ill person], shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman."

...Section 3 leaves no room for doubt, that it is not permissible to terminate a pregnancy, after 20 weeks. However, Section 5 of the Act lays down exceptions to Section 3.

**12.** Section 5 of the Act is also reproduced hereunder:

"5. Sections 3 and 4 when not to apply.-

(1) The provisions of section 4, and so much of the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

(2) Notwithstanding anything contained in the Indian Penal Code (45 of 1860), the termination of pregnancy by a person who is not a registered medical practitioner shall be an offence punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years under that Code, and that Code shall, to this extent, stand modified.

(3) Whoever terminates any pregnancy in a place other than that mentioned in section 4, shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

(4) Any person being owner of a place which is not approved under clause (b) of section 4 shall be punishable with rigorous imprisonment for a term which shall not be less than two years but which may extend to seven years.

Explanation 1.-For the purposes of this section, the expression "owner" in relation to a place means any person who is the administrative head or otherwise responsible for the working or maintenance of a hospital or place, by whatever name called, where the pregnancy may be terminated under this Act.

Explanation 2.-For the purposes of this section, so much of the provisions of clause (d) of section 2 as relate to the possession, by registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply."

A perusal of Section 5 of the Act reveals, that the termination of pregnancy, which is necessary to save the life of the pregnant woman, is permissible.

...

13. Having perused the Medical Report (relevant extracts whereof have been reproduced hereinabove), we are satisfied, that a clear finding has been recorded by the Medical Board, that the risk to the petitioner of continuation of her pregnancy, can gravely endanger her physical and mental health. The Medical Board has also expressed an advice, that the patient should not continue with the pregnancy. In view of the findings recorded in para 6 of the report, coupled with the recommendation and advice tendered by the Medical Board, we are satisfied that it is permissible to allow the petitioner to terminate her pregnancy in terms of Section 5 of the Medical Termination of Pregnancy Act, 1971. In view of the above, we grant liberty to the petitioner, if she is so advised, to terminate her pregnancy.

14. The writ petition is disposed of in the above terms..."

## IN THE HIGH COURT OF MADRAS AT MADURAI

### Marimuthu v. Inspector of Police

(2016) 6 CTC 90

S. Vimala, J.

***This writ petition was filed by a father seeking termination of his daughter's pregnancy. The petitioner alleged that his daughter was kidnapped and raped by a 17 year-old boy while she was a minor. However, the girl had attained majority at the time she was produced before the Court and wanted to continue her pregnancy. The issue before the Court was whether under Section 3(4) of the MTP Act, a minor's pregnancy could be terminated with the consent of her guardian when the minor does not consent to termination.***

**Vimala, J.:** "Whether the father/guardian of the minor pregnant daughter can get the fetus 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 allegedly 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.”

...

**4.3.** 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...

**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:

...

**11.2.** 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 Thiruvainankudi 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. ...

**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...

**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 [sic] 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*, 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.

...

**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 fetus 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.

...

## IN THE HIGH COURT OF BOMBAY

### High Court on its Own Motion v. State of Maharashtra

2017 Cri LJ 218

V.K. Tahiramani and Mridula Bhatkar, JJ.

***A judge during her visit to a women's prison, received a requisition from a woman inmate for termination of her 16 weeks pregnancy. The medical officer of the jail informed the judge that the jail authorities had sent a proposal for termination of the woman's pregnancy to a hospital committee and such proposal was still pending before the committee. The judge brought the woman inmate's requisition and pending proposal to the notice of the High Court of Bombay. She sought issuance of directions to the hospital and the jail authorities for urgent action to be taken on the woman's requisition for termination of the woman's pregnancy. Noting that other female inmates are also facing similar problems in accessing abortion services, the High Court took cognizance of the matter and treated it as a Public Interest Litigation. The Court examined the procedure followed in cases where medical termination of pregnancy is sought by a female prisoner.***

**Tahiramani, J.:** "The background of this PIL, coming before us, is that Ms. A.S. Shende, Judge, City Civil & Sessions Court, Greater Bombay visited Byculla District Prison on 25.4.2016 in view of directions of this Court. Generally women prisoners in Mumbai are kept in District Women Prison, Byculla, Mumbai. During the visit, one inmate/under-trial prisoner namely Shahana gave a requisition for obtaining permission to terminate her pregnancy. The requisition given by Shahana is part of this PIL. In the requisition, she has stated that she already has a baby who is five months old. The baby was suffering from convulsion/epilepsy, hernia, loose motion as well as fever. Shahana's health was also not good and she was suffering from repeated bleeding. Shahana was four months pregnant. Shahana stated that in all these circumstances, it was very difficult for her to maintain and take care of her five months old baby and herself and in addition, the baby which she was expecting, hence, she requested that she be allowed to medically terminate her pregnancy.

2. Ms. Shende, the learned Judge made inquiry with the Jail Superintendent as well as the Medical Officer attached to the jail. She was informed by the Medical Officer about the health condition of five months old baby of Shahana and pregnancy of Shahana. The medical officer also supported the contention of Shahana in respect of termination of pregnancy. Learned Judge Ms. Shende was further informed by the Medical Officer attached to jail that for obtaining permission for termination of pregnancy, a proposal has to be sent to the Committee which will take time, therefore, considering the state of health of the baby and the mother and the application given by Shahana, the learned City Civil & Sessions Judge thought it fit to forward all the papers including the application/requisition given by Shahana to the High Court for information and urgent action, by her letter dated 26.4.2016. Along with the letter, Ms. Shende sent requisition of Shahana along with her medical papers along with copy of application dated 21.3.2016 sent by the Superintendent, Mumbai District Women Prison, Byculla, Mumbai addressed to Sir J.J. Group of Hospitals, Mumbai for grant of permission for surgery/medical termination of pregnancy. The concern of the learned Judge was that though the letter dated 21.3.2016 was addressed to the hospital, till 26.4.2016, no medical termination of pregnancy was carried out. In view of that, the learned Judge Ms. Shende requested for urgent directions to be given to Jail Authorities as well as Dean of J.J. Hospital to take immediate necessary action according to law. In view of this report, the Registry of this Court then sought following directions:-...

**3.** The directions at 'A' to 'C' were approved and the matter was placed before the Hon'ble the then Chief Justice who directed that this matter be treated as Suo Motu PIL and assigned the matter to this Bench. This is how this matter has come up before us as a number of female prisoners are faced with a similar situation.

...

**7.** If a pregnancy is to be terminated, it is to be done strictly as per the norms provided in the Medical Termination of Pregnancy Act, 1971 (for short, 'The Act') especially Sections 3, 4 and 5...

**8.** Sections 3 and 5 of the Act are the only sections which allow termination of pregnancy. Section 5 can be invoked at any time if the registered medical practitioner is of the opinion in good faith that termination of pregnancy is immediately necessary to save the life of the pregnant woman irrespective of restriction of 12 or 20 weeks as mentioned in Section 3. Thus, Section 5 stands altogether on different footing. We are concerned with Section 3. Whether a woman can make her choice to continue with the pregnancy or to terminate it within a restricted period as contemplated in Section 3 of the Act.

**9.** In the affidavit of Dr. Khan Sayeed Ahmed, Medical Officer of Byculla District Prison, it is clearly stated that if a prisoner who is pregnant shows her willingness for termination of pregnancy, the norms set out in Section 3 of the Act are strictly followed and if the length of the pregnancy exceeds maximum of 20 weeks as stated in Section 3 of the Act, then Section 5 of the Act is followed.

**10.** It appears that earlier, there was some misconception that for obtaining permission for medical termination of pregnancy of a prisoner, the proposal has to be sent to a Committee. Referring the case to a Committee would entail delay in the termination of pregnancy. This delay in terminating the pregnancy could have some serious or unnecessary complications which may affect the pregnant lady adversely. However, on going through the Medical Termination of Pregnancy Act and the Rules, as well as the Prison Manual, we find that it is not necessary to refer the case of a pregnant prisoner who wants to terminate her pregnancy to a Committee. The Committee which is referred to under 2(e) of the Medication Termination of Pregnancy Rules 2003 and to which there is a reference in Section 4 of the Act is a Committee whose job is only to approve the place where a pregnancy can be terminated. A prisoner has to simply indicate that she wants to terminate her pregnancy as its continuance would cause grave injury to her physical and mental health. She would then be referred to the Government hospital and if her case was covered by Sections 3 or 5 of the Act, the pregnancy would be terminated.

**11.** Section 3(2) states that where the length of pregnancy does not exceed twelve weeks, it can be terminated by a registered medical practitioner if he is of the opinion that the case falls under Section 3(2)(a), (b)(i) or (ii). In case of termination of pregnancy exceeding twelve weeks and not exceeding 20 weeks, then same opinion but of not less than two registered medical practitioners is to be sought. The registered medical practitioners should opine that the continuance of pregnancy either would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health. Section 3(2)(b)(ii) pertains to the risk involved to the health of the child. The present case of medical termination of pregnancy is to be considered under Section 3(2)(b)(i) which allows the termination of pregnancy if there is risk to the life of the pregnant woman or of grave injury to her physical or mental health.

**12.** Besides physical injury, the legislature has widened the scope of the termination of pregnancy by including "a injury" to mental health of the pregnant woman. Thus, if continuance of pregnancy is harmful to the mental health of a pregnant woman, then that is a good and legal ground to allow termination if the pregnancy is not exceeding 20 weeks. Explanations 1 and 2 have stated the presumptions in respect of grave injury to mental health of the pregnant woman. The law-makers have considered and taken care of the mental condition of the pregnant woman. In the case of termination of pregnancy, the injury caused either to body or mind is considered. However, mental health can deteriorate if it is forced or unwanted pregnancy. Let us advert to Explanation 1. Under Explanation 1, if a woman is pregnant due to rape, then anguish caused by such pregnancy is to be presumed to constitute a grave injury to mental health of the pregnant woman. As per Explanation 2, if the pregnancy is accidental on account of failure of device or method used by married woman or her husband for the purpose of limiting the number of children, then the said pregnancy if unwanted, it may be presumed to constitute grave injury to mental health of the pregnant woman. These two explanations stating presumptions do not restrict the scope of the various other circumstances causing grave injury to mental health of woman who is pregnant. We do not want to deal with Explanation 1, as it is very specific about cases of rape and mental anguish to a woman in such cases is obvious. If pregnancy is due to rape, then there is bound to be complete mental break down of a victim. We need to interpret Explanation 2 which is restricted only to a married couple. However, today a man and a woman who are in live-in-relationship, cannot be covered under Explanation 2 whereas Explanation 2 should be read to mean any couple living together like a married couple.

**13.** A woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. To be pregnant is a natural phenomenon for which woman and man both are responsible. Wanted pregnancy is shared equally, however, when it is an accident or unwanted, then the man may not be there to share the burden but it may only be the woman on whom the burden falls. Under such circumstances, a question arises why only a woman should suffer. There are social, financial and other aspects immediately attached to the pregnancy of the woman and if pregnancy is unwanted, it can have serious repercussions. It undoubtedly affects her mental health. The law makers have taken care of helpless plight of a woman and have enacted Section 3(2)(b)(i) by incorporating the words “grave injury to her mental health”. It is mandatory on the registered medical practitioner while forming opinion of necessity of termination of pregnancy to take into account whether it is injurious to her physical or mental health. While doing so, the woman's actual or reasonable foreseeable environment may be taken into account.

**14.** 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. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child. These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.

**15.** According to international human rights law, a person is vested with human rights only at birth; an unborn foetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control their own body and fertility and motherhood choices should be left to the women alone. Let us not lose sight of the basic right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant.

**16.** Women in different situations have to go for termination of pregnancy. She may be a working woman or homemaker or she may be a prisoner, however, they all form one common category that they are pregnant women. They all have the same rights in relation to termination of pregnancy. As stated earlier, as per Prison Manual, for prisoners, there is provision for pregnant prisoners. Chapter XLI is on Women Prisoners. Rule 7 in said Chapter pertains to “Pregnancy of Women Prisoners, which is as follows:

“When a woman prisoner (convict or undertrial) is found or suspected to be pregnant at the time of her admission or at any time thereafter, the Medical Officer shall report the fact to the Superintendent. As soon as possible arrangements shall be made to get such prisoner medically examined at the hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery etc. After ascertaining necessary particulars, a report shall be sent to the Dy. Inspector of General of Prisons, stating the date of her admission, term of sentence, the date of release, duration of pregnancy, probable date of delivery etc.

**17.** Rule 8 states about Births in prison. Rule 9 is in respect of children of women prisoners. However there is no provision specifically relating to termination of pregnancy of women prisoners either convict or under-trial.

**18.** When a woman prisoner is admitted in prison, she is medically examined, history of her last menstrual period is taken and urine pregnancy test is carried out. One register is maintained in which noting on these aspects is made including if she is pregnant and if pregnant, procedure stated in paragraph 5 above is followed. However, we understand that sometimes a convict or under-trial women prisoner may not be aware of her pregnancy and she may be unable to disclose the fact of pregnancy at the time of admission in the prison. Hence, medical check up of all the women prisoners who are of reproductive age should be done at least once every month for two months from their admission in jail to ascertain whether the woman is pregnant. Moreover, a woman prisoner if found pregnant should be informed by the Medical Officer attached to the prison that she can get the pregnancy terminated if it is such that it falls under Section 3(2)(a), (b)(i) or (ii). This onus is cast on the medical officer. If she wants to terminate the pregnancy, she should be sent to the civil hospital on an urgent basis to help her to terminate the pregnancy.

**19.** Rule 1 of Section II of Chapter “Non Statutory Rules” falling in Chapter IV relating to Maharashtra Prisons (Prison Hospital) Rules 1970 reads as under:-

1. For all administrative purposes, the Medical Officer is subordinate to the Superintendent of the prison except as regards the medical treatment of the sick. He shall have a free hand in the medical treatment of the inmates of the Hospital whether sick or convalescent or under observation, subject to Jail discipline. He is under the general control of the I.G of Prisons.

**20.** Though pregnancy is not a sickness, the case of pregnant prisoner will fall in “Under Observation” category, hence, the Medical Officer will have the right to decide whether the prisoner requires termination of pregnancy and send her to Civil Hospital on urgent basis to help her to terminate the pregnancy.

**21.** If a pregnant prisoner wants to terminate her pregnancy, then provision of section 3(2)(b)(i) or (ii) are applicable. She being a prisoner should not be treated differently than any other pregnant women. We, with all responsibility state that Section 3 of Medical Termination of Pregnancy Act bestows a very precious right to a pregnant woman to say no to motherhood. It is the right of a woman to be a mother so also it is the right of a woman not be a mother and her wish has to be respected. This right emerges from her human right to live with dignity as a human being in the society and protected as a fundamental right under Article 21 of the Constitution of India with reasonable restrictions as contemplated under the Act. Human rights are natural rights and thus a woman has a natural right in relation to her body which includes her willingness to be a mother or her unwillingness to be a mother.

**22.** Section 3(2)(b)(i) is an extension of the human right of a woman and this needs to be protected. Woman owns her body and has right over it. Abortion is always a difficult and careful decision and woman alone should be the choice maker. A child when born and takes first breath, is a human entity and thus, unborn foetus cannot be put on a higher pedestal than the right of a living woman. Thus, fundamental right under Article 21 of Constitution of India protects life and personal liberty which covers women. This right of exercise of reproductive choice though is restricted by Medical Termination of Pregnancy Act, 1971, it also recognizes and protects her right to say no to the pregnancy if her mental or physical health is at stake. Thus, it is a regulated procedure.

**23.** We would like to refer to the decision of the Supreme Court in the case of *Suchita Srivastava v. Chandigarh Administration* (2009) 9 SCC 1 where it is observed that there is no doubt that a woman's right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choice can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected.”

**24.** Advocate Ms. Manjiri Shah stated that she had a discussion with the Head of the Department of Gynaecology in J.J Hospital where women prisoners in Mumbai are referred in cases of pregnancy. The Out Patient Department (O.P.D) timings are 8.00 a.m to 12.00 p.m and it was found that generally women prisoners were brought to the hospital at about 11.30 a.m to 12.00 p.m, hence, on that day, though the woman prisoner is examined, it is not possible to carry out all the tests which are necessary in relation to the pregnancy. Therefore, it was felt that it would be advisable that the woman prisoner who is pregnant reaches the hospital at about 8.00 or 8.30 a.m and after examination, the tests can be prescribed and carried out on the same day by the afternoon and the tests results would be received by the evening, hence, by the time, the woman prisoner went back to the prison, the entire tests and reports are ready due to which the next step can be decided and the next date of operation/medical procedure can be decided on that day itself.

**25.** In Mumbai, when the prisoners are to be taken to the Court or hospital, it is the job of L.A Squad to escort them, however, it is seen that except in cases of dire medical emergency, the L.A Squad gives preference to prisoners who are to be produced in the Court and sometimes, sufficient staff is not available to take the prisoners to the hospital. In case where there is no emergency, then that prisoner is not taken to the hospital on that day and may be taken to hospital after a day or two. In case of pregnant prisoner, if the pregnancy has to be terminated, normally it has to be done in 12 weeks as set out in Section 3(2)(a) or 20 weeks as set out in 3(2)(b) of the Act provided it falls under Section 3(2)(b)(i) or (ii). In cases of pregnancy, every day is important on account of growth of foetus. Once a woman prisoner is found to be pregnant and she indicates that she wants to terminate the pregnancy, she should be immediately referred to the hospital and it should be ensured that her pregnancy is terminated. The Jail Administration and Escort Division to ensure that as far as possible such lady prisoner reaches the hospital by 8.30 a.m A female prisoner cannot have access to facility of medical termination of pregnancy if her case falls under Section 3 or 5 of the Act, therefore not providing her with the facility amounts to forcing a woman to continue with a pregnancy she does not want which by itself constitutes a grave injury to her mental health and as such would fall under Section 3(2)(b)(i) of the Act. Hence, such a pregnancy can be lawfully terminated.

**26.** We are further informed that in the prison, OPD case papers are maintained in loose format. In such case, there is risk of the case papers getting mixed up or lost. In our opinion, it would be proper that in addition, an 'OPD Register' is maintained in the jail in which brief details of the patient are given. The name of the prisoner, medical problem and follow up should be stated briefly in the register. This OPD Register be produced for inspection to the Sessions Judge/Magistrate who is deputed to visit the jail.

**27.** In view of the above, directions are given as under:-

1. (i). Upon admission into a jail/prison, every woman prisoner of child bearing age shall undergo a Urine Pregnancy Test (UPT) within 5 days of being admitted to jail.
- (ii) Every woman prisoner of child bearing age shall undergo a second UPT approximately 30 days after admission into jail/prison in case the UPT under 1(i) is not positive.
2. In case, the urine pregnancy test is positive, the Medical Officer shall inform the prisoner that she can get the pregnancy terminated if her case falls under Section 3 or 5 of The Medical Termination of Pregnancy Act.
3. If the prisoner indicates she wants to terminate the pregnancy, her statement should be recorded by the Jail Authority or Medical Officer to that effect and the record of the statement be maintained. A copy of that statement be forwarded with the prisoner when she is referred to the hospital.
4. If the prisoner indicates that she wants to terminate the pregnancy, the Medical Officer and Jail Superintendent shall ensure that woman prisoner is sent on urgent basis to the nearest Government Hospital to help her terminate the pregnancy. It is made clear that they shall not wait for any order of the Court if the case falls under Sections 3 or 5 of the Act.
5. Every prison shall maintain "Prison OPD Register" where details of every prisoner examined either by the prison medical officer/doctor or visiting doctor are entered. Such register shall contain in brief (i) the name of the prisoner; (ii) convict or undertrial number, (iii) the medical complaint of the prisoner; (iv) the advice of the doctor (including referral of the patient to the nearest government Hospital) and (v) the date for follow up when necessary. The Prison OPD Register be produced for inspection of the Sessions Judge/Magistrate deputed to visit the prison.
6. The Jail Superintendent and escort division to ensure that such prisoner as well as other prisoners needing medical treatment in a hospital are sent to the hospital as far as possible by 8:30 a.m i.e when O.P.D opens.
7. After discharge from the said hospital, the prison authorities shall take due care of the woman prisoner until she fully recovers from the medical termination of her pregnancy.

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## IN THE HIGH COURT OF KERALA

Ms. X v. State of Kerala

(2016) 4 KLT 745

Shaji P. Chaly, J.

***The petitioner alleged that she had been raped and had conceived as a result. She filed an FIR to this effect and approached the hospital authorities for terminating her pregnancy. As the hospital authorities rejected her request repeatedly, she approached the Superintendent, Medical College Hospital who too declined her request stating that she had crossed the 20 week limit prescribed under Section 3 of the MTP Act. While deciding on her writ petition seeking permission to terminate her pregnancy, the High Court considered the grave injury caused to the mental health of the petitioner while carrying a pregnancy resulting from rape.***

Chaly, J.: “...

2. Petitioner is a victim of rape and is in need of Medical Termination of Pregnancy. She approached the Government Hospital, Kasaragod, but they declined to do MTP. Thereafter, she approached the 2<sup>nd</sup> respondent for termination, but there also, it was informed that MTP cannot be conducted as the pregnancy period has exceeded 20 weeks. It is in this background, this writ petition is filed seeking direction to respondent No. 2 to conduct MTP, and a direction to the 3<sup>rd</sup> respondent to collect sample and do the needful for DNA test of the child in the womb.

3. According to the petitioner, intimacy was developed by her with one person while she was working in a shop, and the said person has cheated the petitioner and by giving promise of marriage, she was successively subjected to sexual relationship, by which she became pregnant. However, the said person solemnized marriage with another lady on 14.05.2016, and accordingly she preferred a complaint, evident from Ext.P1 FIR.

4. Petitioner was admitted in Government Hospital, Kasaragod on 18.07.2016 and was treated for three days and discharged on 21.07.2016. Even though petitioner requested for MTP, the hospital authorities told her to come on another day. Thereafter, again she was admitted as in patient on 01.08.2016 and discharged on 03.08.2016. However, nothing took place. Again, she went to the hospital on 17.10.2016 and was treated as out patient. Being confronted with such situation, petitioner approached the 2<sup>nd</sup> respondent for MTP. However, stating that the pregnancy period has exceeded 20 weeks, 2<sup>nd</sup> respondent refused to conduct MTP. These are the circumstances persuaded the petitioner to approach this Court seeking the reliefs sought for.

...

6. Ext.P1 FIR reveals, petitioner has filed a complaint against the person and police has registered a crime, alleging offence under Sec.376 of the Indian Penal Code. Therefore, there is a prima facie case put forth by the petitioner. Now, the question is whether MTP could be done by the 2<sup>nd</sup> respondent as per the provisions of the Medical Termination of Pregnancy Act, 1971 [for short, Act 34 of 1971], and the Rules and Regulations thereto. Sec.3(1) of the Act enables a registered medical practitioner to terminate pregnancy in accordance with the provisions of this Act, irrespective of the penal provisions contained under the Indian Penal Code. Sub-section (2) of Sec.3 permits termination, subject to sub-section (4), which are as follows: ...

7. Therefore, on evaluating the circumstances under sub-section (2)(a), a pregnancy could be terminated if it does not exceed twelve weeks. However, an exception is carved out by which a pregnancy which exceeds the period of twelve weeks, but does not exceed twenty weeks, if not less than two registered medical practitioners are of the opinion formed in good faith that 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, it could be done. Explanation 1 thereto provides, where any pregnancy is alleged by the pregnant woman to have been caused by rape, the consequences thereto shall be presumed, to constitute a grave injury to the mental health of the pregnant woman. Petitioner is aged more than 18 years and therefore consequence of sub-section (3) do not arise.

8. Therefore, on an evaluation of sub-section (2) as such, it is clear, the maximum period up to which a MTP can be done is twenty weeks period of pregnancy. However, Sec.5 takes care of a situation, in order to save the life of the pregnant woman. Sec.5(1) reads as follows: ...

9. Therefore, on an evaluation of the said provisions, it is specific and clear, if it is in the opinion of two medical practitioners, formed in good faith, that the MTP is necessary to save the life of the pregnant woman, the stipulations contained under sub-section (2) of Sec.3 vanish.

10. When the situation in the present context is analyzed, petitioner is not mentally prepared to deliver a child and such situation can cause innumerable mental stress and change of attitude in the normal life of the petitioner. Moreover, the circumstances explained show that petitioner did not expect such conduct and behaviour from the person with whom she maintained intimate and affectionate relationship. The circumstances narrated will show, petitioner is and was not mentally prepared to accept the state of affairs at which she is now. The said circumstances, in my view is to be treated as one under Sec.5 of the Act.

11. The Apex Court had occasion to consider such a situation in '*Ms. X v. Union of India*' [AIR 2016 SC 3525]. There, the Court was considering a question with respect to termination of 24 weeks' pregnancy and held in paragraph 6 as follows:

"6. Having perused the Medical Report (relevant extracts whereof have been reproduced hereinabove), we are satisfied, that a clear finding has been recorded by the Medical Board, that the risk to the petitioner of continuation of her pregnancy, can gravely endanger her physical and mental health. The Medical Board has also expressed an advice, that the patient should not continue with the pregnancy. In view of the findings recorded in para 6 of the report, coupled with the recommendation and advice tendered by the Medical Board, we are satisfied that it is permissible to allow the petitioner to terminate her pregnancy in terms of Section 5 of the Medical Termination of Pregnancy Act, 1971. In view of the above, we grant liberty to the petitioner, if she is so advised, to terminate her pregnancy".

12. Reckoning the facts and circumstances and the law involved, I am of the considered opinion that 2<sup>nd</sup> respondent shall take necessary steps in conducting MTP in accordance with the provisions of Act 34 of 1971, after securing required permission from the petitioner or any of her close relatives, in compliance with the medical ethics as per the relevant Act and Rules, and after having sufficient and necessary consultation, even by constituting a Medical Board.

13. There will be a direction also to the 2<sup>nd</sup> respondent to preserve sufficient material if MTP is done in order to conduct the DNA test, enabling the 3<sup>rd</sup> respondent to carry on the investigation with sufficient proof and evidence in respect of Ext. P1 FIR registered. ...

..."

## IN THE SUPREME COURT OF INDIA

**Meera Santosh Pal v. Union of India**

**(2017) 3 SCC 462**

**S.A. Bobde and L. Nageswara Rao, JJ.**

***A 24 weeks pregnant woman invoked the writ jurisdiction of the Supreme Court seeking permission to terminate her pregnancy following a diagnosis of foetal anencephaly as she had crossed the 20-week limit prescribed under Section 3(2) of the MTP Act. According to the Medical Board's opinion, the condition of the foetus was not compatible with extra-uterine life and the continuation of pregnancy could gravely endanger the physical and mental health of the petitioner. The Supreme Court considered the issue of whether the rights to bodily integrity and reproductive autonomy call for permission to allow the woman to terminate her pregnancy.***

**Bobde and Rao, JJ.:** "1. Petitioner 1, Meera Santosh Pal, 22 years old, has approached this Court under Article 32 of the Constitution of India seeking directions to the respondents to allow her to undergo medical termination of her pregnancy. She apprehended danger to her life, having discovered that her foetus was diagnosed with anencephaly, a defect that leaves foetal skull bones unformed and is both untreatable and certain to cause the infant's death during or shortly after birth. This condition is also known to endanger the mother's life.

2. [W]hile issuing notice to the respondents, this Court gave a direction for examination of Petitioner 1 by a Medical Board consisting of...seven doctors:

...

4. By its report dated 12-1-2017, the Medical Board has examined Petitioner 1 with specific reference to their special expertise for general, medical, radiological, psychiatric and anaesthetic evaluation. An obstetric evaluation was done by two obstetricians. Ultrasonography was performed at KEM Hospital on 12-1-2017 by the Additional Professor, Radiology. The said Board has further reported that obstetric examination shows 24 weeks' pregnancy, external ballotement present, foetal parts not well felt with mild polyhydramnios. On internal examination, the cervix is posterior and OS is closed. Ultrasonography diagnosis has revealed a single live foetus with anencephaly with mild polyhydramnios with hypotelorism.

5. We have been informed that the foetus is without a skull and would, therefore, not be in a position to survive. It is also submitted that Petitioner 1 has undergone psychiatric evaluation. She is reported to be coherent, has average intelligence and with good comprehension. She understands that her foetus is abnormal and the risk of foetal mortality is high. She also has the support of her husband in her decision-making.

6. Upon evaluation of Petitioner 1, the aforesaid Medical Board has concluded that her current pregnancy is of about 24 weeks. The condition of the foetus is not compatible with extra-uterine life. In other words, the foetus would not be able to survive outside the uterus.

7. Importantly, it is reported that the continuation of pregnancy can gravely endanger the physical and mental health of Petitioner 1 and the risk of her termination of pregnancy is within acceptable limits with institutional backup.

8. This Court, as at present being advised, would not enter into the medicolegal aspect of the identity of the foetus but considers it appropriate to decide the matter from the standpoint of the right of Petitioner 1 to preserve her life in view of the foreseeable danger to it, in case she allows the current pregnancy to run its full course. The medical evidence clearly suggests that there is no point in allowing the pregnancy to run its full course since the foetus would not be able to survive outside the uterus without a skull.

9. In *Suchita Srivastava v. Chandigarh Admn.* [*Suchita Srivastava v. Chandigarh Admn.*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] a Bench of three Judges held "a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution". The Court there dealt with the importance of the consent of the pregnant woman as an essential requirement for proceeding with the termination of pregnancy.

10. The crucial consideration in the present case is whether the right to bodily integrity calls for a permission to allow her to terminate her pregnancy. The report of the Medical Board clearly warrants the inference that the continuance of the pregnancy involves the risk to the life of the pregnant woman and a possible grave injury to her physical or mental health as required by Section 3(2)(i) of the Medical Termination of Pregnancy Act, 1971. Though, the pregnancy is into the 24th week, having regard to the danger to the life and the certain inability of the foetus to survive extra-uterine life, we consider it appropriate to permit the petitioner to terminate the pregnancy. The overriding consideration is that she has a right to take all such steps as necessary to preserve her own life against the avoidable danger to it.

11. In these circumstances given the danger to her life, there is no doubt that she has a right to protect and preserve her life and particularly since she has made an informed choice. The exercise of her right seems to be within the limits of reproductive autonomy.

12. In the circumstances, we consider it appropriate in the interests of justice and particularly, to permit Petitioner 1 to undergo medical termination of her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971... We order accordingly.

..."

## IN THE SUPREME COURT OF INDIA

**X & Ors. v. Union of India & Ors.****(2017) 3 SCC 458****S.A. Bobde and L. Nageswara Rao, JJ.**

***The petitioner, a woman who was 22 weeks pregnant, invoked the writ jurisdiction of the Supreme Court seeking permission for medical termination of pregnancy as she had crossed the 20-week limit prescribed under Section 3(2) of the MTP Act. She had received a diagnosis of foetal bilateral renal agenesis and anhydroamnios. According to the Medical Board, these foetal impairments were incompatible with extra-uterine life and the pregnancy would endanger the physical and mental health of the mother. The Supreme Court considered the issue of whether permission for medical termination of pregnancy should be granted beyond 20 weeks in light of these facts.***

**Bobde, and Rao, JJ.:** “...

2. Petitioner 1 Mrs X is about 22 years old. She has approached this Court under Article 32 of the Constitution of India seeking directions to the respondents to allow her to undergo medical termination of her pregnancy. According to her, the foetus which is about 22 weeks old on the date of the petition has a condition known as bilateral renal agenesis and anhydroamnios. She apprehends that the foetus has no chance of survival and the delivery may endanger her life.

3. In order to verify the condition of Petitioner 1, this Court by order dated 3-2-2017 [*X v. Union of India*, WP (C) No. 81 of 2017, order dated 3-2-2017 (SC)] , while issuing notice to the respondents, directed examination of the petitioner by a Medical Board consisting of...seven doctors:...

4. By its report dated 4-2-2017, the Medical Board as constituted by this Court has given its expert opinion upon reviewing the complete history as narrated by Petitioner 1 and her brother along with all the papers. Petitioner 1 was examined by all the Board Members with specific recourse to the specialty.

5. The learned Solicitor General who appears on behalf of the Union of India had the report evaluated by Doctor Veena Dhawan from the Ministry of Health. The said doctor does not disagree with the findings by the Medical Board and is also in agreement with the proposed action by the Medical Board. The salient features of the report are:

“... Ultrasonography diagnosis is that single live foetus with gestational age of 24 weeks 3 days with bilateral renal agenesis with double outlet right ventricle with ventricular septal defect with two vessel cord with anhydroamnios....

Opinion of Paediatric Surgeon in charge of Birth Defect Clinic: There is risk of intrauterine foetal death/stillbirth and there is no chance of long-term post-natal survival, and no curative treatment is available at present for bilateral renal agenesis.”

6. There is thus a clear diagnosis of the condition of the single live foetus which is said to have bilateral renal agenesis which means the foetus has no kidneys and anhydramnios which means that there is an absence of amniotic fluid in the womb. Further, there is a clear observation that there is a risk of intrauterine foetal death i.e. death within womb and there is no chance of a long-term post natal survival. What is important is that there is no curative treatment available at present for bilateral renal agenesis.

7. The Medical Board has opined that the condition of the foetus is incompatible with extrauterine life i.e. outside the womb because prolonged absence of amniotic fluid results in pulmonary hypoplasia leading to severe respiratory insufficiency at birth. From the point of view of the petitioner, the report has observed risk to the mother since continuation of pregnancy can endanger her physical and mental health.

8. We have already vide order dated 16-1-2017 [*Meera Santosh Pal v. Union of India*, (2017) 3 SCC 462] upheld the right of a mother to preserve her life in view of foreseeable danger in case the pregnancy is allowed to run its full course. This Court in that case relied upon *Suchita Srivastava v. Chandigarh Admn.* [*Suchita Srivastava v. Chandigarh Admn.*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] , where a Bench of three Judges held: (SCC p. 15, para 22)

“22. ... a woman's right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution.”

In these circumstances we find that the right of bodily integrity calls for a permission to allow her to terminate her pregnancy. The report of the Medical Board clearly warrants the inference that the continuance of the pregnancy involves the risk to the life of the petitioner and a possible grave injury to her physical or mental health as required by Section 3(2)(i) of the Medical Termination of Pregnancy Act, 1971. It may be noted that Section 5 of the Act enables termination of pregnancy where an opinion is formed by not less than two medical practitioners in a case where opinion is for the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

9. Though the current pregnancy of the petitioner is about 24 weeks and endangers the life and the death of the foetus outside the womb is inevitable, we consider it appropriate to permit the petitioner to undergo termination of her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971. We order accordingly.

...

## IN THE SUPREME COURT OF INDIA

**Savita Sachin Patil & Anr. v. Union of India & Ors.**

**(2017) 13 SCC 436**

**S.A. Bobde and L. Nageswara Rao, JJ.**

***The petitioner, a 26-week pregnant woman, invoked the writ jurisdiction of the Supreme Court seeking permission for medical termination of her pregnancy. She learned that her foetus had Down syndrome, and according to the Medical Board, if born, the baby was “likely” to face mental and physical challenges. It also opined that the pregnant woman faced no physical risk upon continuation or termination of the pregnancy. The Supreme Court considered the issue of whether permission to medically terminate the pregnancy should be granted in light of these facts.***

**Bobde and Rao, JJ.:** “1. Petitioner 1 Savita Sachin Patil, has approached this Court under Article 32 of the Constitution of India seeking directions to the respondents to allow her to undergo medical termination of her pregnancy.

...

3. By order dated 23-2-2017, ...while issuing notice to the respondents, this Court gave a direction for examination of Petitioner 1 by a Medical Board consisting of...seven doctors...

4. Petitioner 1 is 37 years old and she is into her 26 weeks of pregnancy as on 25-2-2017. ...

5. It is not in dispute that the foetus of Petitioner 1 has been diagnosed with Trisomy 21, more commonly known as Down Syndrome, a condition that causes severe physical and mental retardation to the foetus. As in all such cases, two important considerations are involved — (i) danger to the life of the mother, and (ii) danger to the life of the foetus.

6. The Medical Board has submitted its report dated 25-2-2017. On perusal of the said report, we find that the said report contains the following two significant features for the purposes of passing this order:

(1) As far as the mother is concerned, the report states that “there is no physical risk to the mother of continuation or termination of pregnancy”;

(2) As far as the foetus is concerned, the report states that “if the baby is born with Trisomy 21, it is *likely* to have mental and physical challenges”.

As regards the prognosis, the said medical report clearly does not and possibly cannot, observe that this particular foetus will have severe mental and physical challenges. It states that the “baby is likely to have mental and physical challenges”.

7. In the earlier part of the said medical report, there is no observation made by the aforesaid Medical Board that every baby with Down Syndrome has low intelligence, but it was observed that “intelligence among people with Down Syndrome is variable and a large proportion may have an Intelligence Quotient of less than 50 (severe mental retardation)”.

8. In any case, it is not possible to discern the danger to the life of Petitioner 1 in case she is not allowed to terminate her pregnancy. In the facts and circumstances of the case, it is not possible for us to grant permission to Petitioner 1 to terminate the life of the foetus.

9. In view of the above, as is presently advised, we decline Prayer (a) of the petitioners for directing the respondents to allow Petitioner 1 to undergo medical termination of the pregnancy.”

## IN THE SUPREME COURT OF INDIA

**Sheetal Shankar Salvi & Anr v. Union of India & Ors.****(2018) 11 SCC 606****S.A. Bobde and L. Nageswara Rao, JJ.**

***The petitioner, a 27 weeks pregnant woman, invoked the writ jurisdiction of the Supreme Court seeking permission for medical termination of her pregnancy. According to the opinion of the Medical Board, the foetus had various severe physical anomalies and after birth, the child was likely to have severe physical and mental morbidity. It also opined that there was no physical risk to the pregnant woman and there was a likelihood of a live birth and survival of the baby once born for a variable period of time in case the pregnancy was terminated at 27 weeks. The Supreme Court considered the issue of whether medical termination of pregnancy should be granted in light of these facts.***

**Bobde and Rao, JJ.:** “1. Petitioner 1, Sheetal Shankar Salvi has approached this Court under Article 32 of the Constitution of India seeking directions to the respondents to allow her to undergo medical termination of her pregnancy.

2. By order dated 23-3-2017 [*Sheetal Shankar Salvi v. Union of India*, WP (C) No. 174 of 2017, order dated 23-3-2017 (SC)] , while issuing notice to the respondents, this Court gave a direction for examination of Petitioner 1 by a Medical Board consisting of...seven doctors:...

3. Petitioner 1 is into her 27th week of pregnancy...

4. It is not in dispute that the foetus of Petitioner 1 has been diagnosed with polyhydramnios with Arnold Chiari malformation Type 2, severe hydrocephalus with lumbosacral meningocele and spina bifida with tethered cord.

5. The Medical Board has submitted its report dated 25-3-2017. On perusal of the said report, we find that the said report contains the following significant features for the purposes of passing this order:

(1) The diagnosis of Arnold Chiari malformation Type 2 with meningocele with tethered cord has been made on the basis of ultrasonography.

(2) The mother's physical condition is normal and there is no physical risk to the mother, due to continuation or termination of pregnancy. But she is anxious about outcome of pregnancy.

(3) The foetus has severe physical anomalies which will compromise post natal quality of life and the child will have severe physical and mental morbidity on survival.

(4) If the pregnancy is terminated at 27 weeks, the baby may be born alive and may survive for variable period of time.

6. Apparently, it has not been possible for the aforesaid Medical Board to determine the period of time for which the baby is likely to survive. It also appears from the said report that the baby is not likely to survive like a normal baby. However, having regard to the fact that there is no danger to the mother's life and the likelihood that “the baby may be born alive and may survive for variable period of time”, we do not consider it appropriate in the interests of justice to direct the respondents to allow Petitioner 1 to undergo medical termination of her pregnancy. In fact, the aforesaid Medical Board has itself stated that it does not advise medical termination of pregnancy for Petitioner 1 on medical grounds.

7. The only other ground that appears from the observations made in the aforesaid medical report apart from the medical grounds, is that Petitioner 1 is anxious about the outcome of the pregnancy. We find that the termination of pregnancy cannot be permitted due to this reason.

8. In the facts and circumstances of the case, it is not possible for us to grant permission to Petitioner 1 to terminate the life of the foetus.

9. In view of the above, as at presently advised, we decline the prayer of the petitioners for directing the respondents to allow Petitioner 1 to undergo medical termination of the pregnancy. Hence, the writ petition is dismissed.”

## IN THE HIGH COURT OF GUJARAT

**Pujaben Subedar Yadav - Minor Through her Father Subedar Ramchandra Yadav v. State of Gujarat & Ors.**  
**2017 Cri LJ (NOC 719) 225**

**J.B. Pardiwala, J.**

***This writ petition was filed to seek permission for termination of pregnancy of a minor girl, who had conceived as a result of rape and had crossed the 20-week limit for termination of pregnancy prescribed under Section 3 of the MTP Act. Following its approach in Madhuben Arvindbhai Nimavat v. State of Gujarat (2016 SCC OnLine Guj 662), the High Court in its decision considered the young age of the minor rape victim and grave mental injury caused to her from continuation of pregnancy to determine whether to permit the termination of the pregnancy.***

Pardiwala, J.: “...

3. It appears from the materials on record that the minor daughter of *Sudedar Ramchandra Yadav* is a victim of rape. She is sixteen years of age. On account of rape, she got impregnated. As on date, she is carrying pregnancy of just above twenty weeks. She seeks appropriate orders or directions to the authorities concerned of the Civil Hospital to get the pregnancy terminated. Since the age of the foetus is a bit little above twenty weeks, the permission of the Court is necessary. An F.I.R. has also been registered being I-C.R. No. 98 2017 with the Ramol Police Station, Ahmedabad for the offence punishable under Section 376 of the Indian Penal Code and Sections 5 and 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, ‘POCSO Act, 2012’).

...

5. Indisputably, no application was filed before the Court below seeking the necessary permission. At this point of time, if I would relegate the writ applicant to apply before the Court concerned, it will take some more time and the same will not be in the interest of the victim. In such circumstances, as an exceptional case, I am taking up this matter.

6. Having regard to the fact that the victim is aged sixteen and is carrying pregnancy of above twenty weeks, the same will cause lot of mental stress and grave injury to her mental health.

7. A Coordinate Bench of this Court had an occasion to consider almost an identical issue in the case of *Madhuben Arvindbhai Nimavat (Minor) through Arvindbhai Narottambhai Nimavat v. State of Gujarat* [Special Criminal Application No. 3679 of 2016 decided on 8<sup>th</sup> June 2016]. Let me quote the entire judgment as under: ...

1. “[...]”

*15. Since the request is made by the petitioner herself with the consent of the parents, bearing in mind, her very young age and incident of rape with pregnancy, grave injury to her mental health is to be presumed. Her fragile health and poor haemoglobin level requires that the team of the Doctors needs to examine her once again and also ensure her safety as this Court is of the opinion that it would be in the best interest of the victim to permit the termination of pregnancy, if otherwise, there is unanimity amongst the Doctors to the effect that such termination would be carried out safely.*

[...]”

8. Dr. Shirish Jayprakash Toshniwal attached to the Civil Hospital is personally present in the Court. Dr. Toshniwal submits that as such the termination is not likely to endanger the life of the victim. The general risk will always remain. Dr. Toshniwal has personally examined the victim, and otherwise, the victim is in a fit condition to undergo termination of pregnancy.

9. In such circumstances referred to above, I dispose of this writ application with the following directions:

[I] Let two other Doctors along with Mr. Toshniwal examine the victim once again for the purpose of carrying out the procedure of termination of the pregnancy.

[II] After the necessary examination is undertaken, the team of Doctors shall proceed to terminate the pregnancy at the earliest.

[III] The pregnancy be terminated, if otherwise, there is unanimity amongst the Doctors to the effect that such termination would be carried out safely.

[IV] The Medical Superintendent of the Civil Hospital, Ahmedabad shall hand over, in a scientific manner, the tissues drawn from the foetus for the DNA identification to the Investigating Officer of the concerned police station for onward transmission of the same to the concerned Forensic Science Laboratory.

[V] Once the termination is over, the victim shall continue to receive treatment for the length period deemed necessary by the Senior Most Doctor of the Team.

10. With the above, this writ application is disposed of...

## IN THE SUPREME COURT OF INDIA

**Sarmishtha Chakraborty & Anr. v. Union of India & Ors.**

**2017 SCC OnLine SC 897**

**Dipak Misra and A.M. Khanwilkar, JJ.**

*The petitioners, a woman who was 26 weeks pregnant and her husband, invoked the writ jurisdiction of the Supreme Court for medical termination of pregnancy of the first petitioner because she had crossed the 20-week limit prescribed under Section 3(2) of the MTP Act. According to the Medical Board, the continuation of pregnancy could cause severe mental injury to the first petitioner. It further opined that the foetus had a cardiac malformation and would require intense surgeries post birth, which would have high risk of morbidity and mortality. The Supreme Court considered the issue of whether permission for medical termination of pregnancy should be granted beyond 20 weeks in light of these facts.*

**Misra and Khanwilkar, JJ.:** “1. The petitioners, the husband and wife, have moved this petition under Article 32 of the Constitution with manifold prayers. In the course of hearing, Mr. Colin Gonsalves, learned senior counsel appearing for the petitioners, has restricted his argument to prayer (g) which pertains to issue of direction for constituting a medical board to assess the pregnancy of the 1st petitioner and direct for termination of the pregnancy.

2. When the matter was listed on 21.6.2017, the Court took note of the prayer for appointment of a panel of doctors at a Government hospital in Kolkata to examine the state of health of the mother and accordingly directed the matter to be listed on 23.6.2017. When the matter was listed on 23.6.2017, this Court had passed the following order:—

In pursuance of the previous order of this Court “dated 21.06.2017, learned standing counsel appearing on behalf of the State of West Bengal has placed on the record his instructions indicating that a team of senior Doctors may be constituted to evaluate the mental and physical health of the first petitioner and the state of health of the foetus. At this stage, the pregnancy is in its 25th week.

The court has been apprised of the medical reports produced on record by the petitioners, including the opinion of Doctor Devi Shetty, which is annexed to the paper book. We accordingly constitute a Medical Board consisting of the following Doctors to examine the first petitioner and her foetus at the Institute of Post Graduate Medical Education & Research (SSKM Hospital) situated at 244 A.J.C. Bose Road, Kolkata-700 020:..”

...

4. It is submitted by Mr. Colin Gonsalves, learned senior counsel appearing for the petitioners that the medical report clearly stipulates the condition of the 1st petitioner and if the report is appositely appreciated, the direction, as prayed for, deserves to be granted. We think it appropriate to reproduce the observations and opinion of various members of the Medical Board. The report of the Medical Board reads as under:—

“...Opinion of Dr. Saroj Mondal, Asst. Professor of the Department of Cardiology, IPGMER-SSKM Hospita, Kolkata ...

As the foetus has complex cardiac anomaly and if pregnancy continued mother will need delivery in a highly equipped centre with facility of neonatal cardiac intervention and surgical facility and will need multiple staged cardiac surgical operation and each occasion, it will have high morbidity and mortality risk.

...



Impression of Dr. Santanu Dutta, Associate Professor of the Department of C.T.V.S., IPGMER-SS KM Hospital, Kolkata - ...

It is evident from the report that the neonate needs complex cardiac corrective surgery stage by stage after birth. But there is high mortality at every step of this type of staged surgeries.

Opinion of Dr. Sujitesh Saha, Associate Professor of the Department of Paed. Surgery, IPGMER-SSKM Hospital, Kolkata

...

After birth multiple staged cardiac corrective surgery will be required which will be associated with high mortality and morbidity at every stage.

Opinion of Dr. Suchandra Mukherjee, Professor & HOD of Neonatology, IPGMER-SSKM Hospital, Kolkata

...

In view of the cardiac malformation, the baby, after birth will require intensive cardiac monitoring and staged management through the surgical procedures which will have high risk of morbidity and mortality depending upon the postnatal course.

...

The patient, 1st Petitioner of the case Mrs. Sarmisth Chakraborty, 33 years old, w/o Mr. Anirban Chakraborty was examined by the Board Members and all the members expressed their views. Two Gynaecologists, (1) Professor Subhash Chandra Biswas & (2) Professor Arati Biswas, on good faith examined the patient physically and observed the following findings:

...

Patient, herself spontaneously expressed her wish not to continue this pregnancy in view of the detected foetal cardiac anomalies so far. On reviewing of the available records of the patient i.e. U.S.G., Foetal Echo-Cardiography including the prescription of the attending Obstetrician in Apollo Hospital, Kolkata, the other members of the Board (Radiologist, Cardiologist, Neonatologist, Pediatric Surgeon and Cardiac Surgeon) have opined that "the foetus has been detected to have cardiac malformation in the form of Tetralogy of Fallot, Large perimembranous VSD with inlet extension (bidirectional flow), Aorta from LV overriding the VSD, Pulmonary Atresia, Duct/MAPCA dependent pulmonary circulation and Good Ventricular function. The child, if born alive, need complex cardiac corrective surgery stage by stage after birth. But there is high mortality and morbidity at every step of this staged surgeries". The cardiac anomaly has been confirmed by serial investigations.

In view of the above facts and opinion, we, the two Gynaecologists, in good faith like to opine that the patient is at the threat of severe mental injury, if the pregnancy is continued.

Therefore, if the patient wants termination of this pregnancy, she may be allowed with prior informed consent of inherent risk of her health for procedural inventions, because there is additional risk of termination of the pregnancy once it is beyond 20 weeks as the present case is. However, this is a special case and conclusion has been drawn on its individual merits."

**5.** On a perusal of the aforesaid report, it is clear as crystal that the Medical Board is of the view that it is a case for termination of pregnancy, as a special case. As the last paragraph would show, the Board has mentioned that the patient is at the threat of severe mental injury, if the pregnancy is continued. It has also opined that the child, if born alive, needs complex cardiac corrective surgery stage by stage after birth. But there is high mortality and morbidity (sic) at every step of this staged surgeries.

**6.** Mr. Gonsalves, learned senior counsel has drawn our attention to two orders, one passed in *Meera Santosh Pal v. Union of India* [WP (C) No. 17 of 2017 decided on 16.1.2017], wherein this Court, after considering the report of the Medical Board, has held thus:—

"Upon evaluation of petitioner no. 1, the aforesaid Medical Board has concluded that her current pregnancy is of about 24 weeks. The condition of the foetus is not compatible with extra-uterine life. In other words, the foetus would not be able to survive outside the uterus.

Importantly, it is reported that the continuation of pregnancy can gravely endanger the physical and mental health of petitioner no. 1 and the risk of her termination of pregnancy is within acceptable limits with institutional back up.”

7. Learned senior counsel has also drawn our attention to another order passed in *Mrs. X v. Union of India* [WP (C) No. 81 of 2017 decided on 7.3.2017] wherein this Court had allowed the termination of pregnancy. The Court had taken the Medical report into consideration which was to the following effect:

“There is thus a clear diagnosis of the condition of the single live foetus which is said to have bilateral renal agenesis which (sic) means the foetus has no kidneys and anhydramnios which means that there is an absence of amniotic fluid in the womb. Further, there is a clear observation that there is a risk of intrauterine foetal death, i.e. death within womb and there is no chance of a long term post natal survival. What is important is that there is no curative treatment available at present for bilateral renal agenesis.

The Medical Board has opined that the condition of the foetus is incompatible with extra-uterine life, i.e. outside the womb because prolonged absence of amniotic fluid results in pulmonary hypoplasia leading to severe 4 respiratory insufficiency at birth. From the point of view of the petitioner the report has observed risk to the mother since continuation of pregnancy can endanger her physical and mental health.

8. Mr. A.K. Panda, learned senior counsel appearing for the Union of India has drawn our attention to two other orders, one passed in *Savita Sachin Patil v. Union of India* [WP (C) No. 121 of 2017 decided on 28.02.2017] and another in *Sheetal Shankar Salvi v. Union of India* [W.P. No. 174 of 2017 decided on 27.3.2017]. In the case of *Savita Sachin Patil*, the Court declined to grant permission by holding, thus:

“As regards the prognosis, the said medical report clearly does not and possibly cannot, observe that this particular foetus will have severe mental and physical challenges. It states that the “baby is likely to have mental and physical challenges.”

In the earlier part of the said medical report, there is no observation made by the aforesaid Medical Board that every baby with Down Syndrome has low intelligence, but it was observed that “intelligence among people with Down Syndrome is variable and a large proportion may have an intelligence Quotient of less than 50 (severe mental retardation)”.

In any case, it is not possible to discern the danger to the life of petitioner no. 1 in case she is not allowed to terminate her pregnancy.

In the facts and circumstances of the case, it is not possible for us to grant permission to petitioner no. 1 to terminate the life of the foetus.

In view of the above, as it presently advised, we decline the prayer (a) of the petitioners for directing the respondents to allow Petitioner No. 1 to undergo medical termination of the pregnancy.”

9. In *Sheetal Shankar Salvi*, after perusing the report, the Court observed that there is no danger to mother's life and the likelihood that the baby may be born alive and survive for variable period of time, and, therefore, it would not be appropriate to allow the petitioner No. 1 to undergo medical termination of her pregnancy.

10. The orders which have been referred to by Mr. Panda, in our considered opinion, rest on their own facts. Frankly speaking, cases of this nature have to rest on their own facts because it shall depend upon the nature of the report of the Medical Board and also the requisite consent as engrafted under the Medical Termination of Pregnancy Act, 1971.

11. In the instant case, as the report of the Medical Board, which we have produced, in entirety, clearly reveals that the mother shall suffer mental injury if the pregnancy is continued and there will be multiple problems if the child is born alive. That apart, the Medical Board has categorically arrived at a conclusion that in a special case of this nature, the pregnancy should be allowed to be terminated after 20 weeks.

12. In the case of *Suchita Srivastava v. Chandigarh Administration* [(2009) 9 SCC 1], the Court has expressed the view that the right of a woman to have reproductive choice is an inseparable part of her personal liberty, as envisaged under Article 21 of the Constitution. She has a sacrosanct right to have her bodily integrity. The case at hand, as we find, unless the pregnancy is allowed to be terminated, the life of the mother as well as that of the baby to be born will be in great danger. Such a situation cannot be countenanced in Court.

13. Regard being had to the aforesaid and keeping in view the report of the Medical Board, we are inclined to allow the prayer and direct medical termination of pregnancy of the 1st petitioner...”

## IN THE SUPREME COURT OF INDIA

**Alakh Alok Srivastava v. Union of India**

**WP (C) No. 565 of 2017 (Order dated July 28, 2017)**

**J.S. Khehar, C.J. and D.Y. Chandrachud, J.**

***This writ petition was filed to seek permission to terminate the pregnancy of a minor girl who had conceived as a result of rape and had crossed the 20-week limit for termination of pregnancy prescribed under Section 3 of the MTP Act.***

**Khehar, C.J. and Chandrachud, J.:** “1. In continuation of motion Bench order dated 24-07-2017, Mr. Mahavir Singh, Member Secretary, State Legal Services Authority, UT Chandigarh, who is present in the Court, has produced for our perusal a report of the Medical Board, in a sealed cover. We have perused the report, which contains the following recommendations:

“The girl child is in a good state of health at present except mild pallor (anemia). The girl child is a known case of congenital heart defect (Ventricular Septal Defect) which was corrected in 2013 at PGI Chandigarh. At present she is asymptomatic and the corrected Ventricular Septal Defect is unlikely to interfere with the progress of pregnancy.

On clinical and ultrasound examination the fetus is approximately 32 weeks old, alive and doing well (Biophysical profile, Non Stress Test and umbilical artery Doppler study – normal).

Estimated weight of the fetus is approximately 1.6 kg and there is no apparent fetal congenital malformation.

In view of the above, continuation of pregnancy may not pose any additional risk to the girl child and the fetus, other than the age related risk which is higher than adult pregnant woman. Continuation of pregnancy is less hazardous for the girl child and fetus than termination of pregnancy at this stage.”

**2.** We direct, that the report be resealed. In view of the recommendation made by the Medical Board, we are satisfied, that it would neither be in the interest of the girl child, nor of the life of fetus, which is approximately 32 weeks old, to order medical termination of pregnancy. We, therefore, hereby decline the instant prayer made in the petition.

**3.** We are however of the view, that the girl child should be extended due medical care. We are informed, that she is being treated at the Government Hospital, Sector-32, Chandigarh, which we are satisfied is fully equipped to render the best medical-aid possible. It shall be open to the treating doctors to evaluate the health of the girl child, for selecting the best mode of delivery, for the child.

...”

## IN THE SUPREME COURT OF INDIA

**Sonali Sandeep Jadhav & Anr. v. Union of India & Ors.**

**Writ Petition (Civil) No. 551 of 2017 (Order dated July 28, 2017)**

**Dipak Misra and A.M. Khanwilkar, JJ.**

***The petitioner, a woman who was 22 weeks pregnant, invoked the writ jurisdiction of the Supreme Court seeking permission for medical termination of pregnancy as she had crossed the 20-week limit prescribed under Section 3(2) of the MTP Act. She had received a diagnosis of foetal aqueductal stenosis and hydrocephalus, a foetal impairment with a very high probability of brain damage and possible cognitive impairment. According to the Medical Board, the continuation of pregnancy would pose severe mental injury to the woman. The Supreme Court considered the issue of whether permission for medical termination of pregnancy could be granted beyond 20 weeks in light of these facts.***

**Misra and Khanwilkar, JJ.:** “On 24<sup>th</sup> July, 2017, this Court had passed the following order:-

“...It is submitted by Mr. Colin Gonsalves, learned senior counsel that the petitioner is at present pregnant and her pregnancy is of 22 weeks who has been examined by Dr. K.N. Singh, a Paediatric Neurologist and has recorded the following findings:

“Sonography examination of gravid uterus (anomaly scan) done at Lilavati Hospital and Research Centre on 24.06.2017 showed both lateral ventricles are moderately dilated. Lateral ventricle at atrium measures: 14 mm. Hence, foetal MRI which is more sensitive was performed at Global Hospitals, Parel on 28.6.2017 which revealed moderate symmetric dilatation of the lateral ventricles. Each ventricle measures approximately 1.6. cm at the level of the atrium. The cavum septum pellucidum is well visualised. There is mild dilatation of the third ventricle. Fourth ventricle is normal. The cerebral aqueduct is not visualised. No flow is detected in the cerebral aqueduct. There is thinning of the surrounding cortical mantle and white matter.

Impression:

MRI of the foetal brain reveals moderate symmetric obstructive hydrocephalus. These findings are consistent with cerebral stenosis. There is thinning of the brain parenchyma.

The dilatation of the ventricles is likely to increase with the passage of time and may increase significantly before delivery causing harm to the developing brain and possibly cognitive impairment.

After birth baby will need neurosurgical procedure like shunting which may be quite costly.”

In view of the aforesaid, we are inclined to direct that the petitioner shall be examined by Medical Board consisting of Heads of the Departments of Gynecology, Neurology and Cardiology of J.J. Hospital at Mumbai. The examination shall take place within two days. ...”

In pursuance of the aforesaid order, the petitioner No.1 has been examined by a team of experts of Sir J.J. Group of Hospitals. The observations of the Obstetrician and Gynecologist reads as follows:-

“Pregnancy diagnosed in second month of pregnancy...

- USG done by Dr. Anirudha Badade, MD. DMRD., on 27/03/2017 shows pregnancy of 8 weeks 4 days.
- Her second visit was on 02/05/2017.
- In her third visit on 13/06/2017 she was advised foetal anomaly scan.
- Anomaly scan done on by Dr. Anirudha Badade, MD. DMRD., 23/06/2017 shows 21 weeks 1 day pregnancy.
- It shows ventriculomegaly (SIV) atrial diameter 13 mm.
- USG done at Lilavati Hospital 24/06/2017 shows lateral ventricle 14 mm. Isolated bilateral moderate lateral ventriculomegaly.
- Foetal MRI done at Global Hospital dt.28/06/2017 showed moderate symmetrical obstructive Hydrocephalus consistent with cerebral aqueductal stenosis with thinning of parenchyma.

- Dr. Deepak Ugra, MD. (PAED) FRCPCH (London). Consultant Paediatric at Lilawati Hospital, Research Centre, Mumbai on 30/06/2017 opined that the a very high probability that the baby will have a significant brain damage.

- On 04/07/2017 Dr. K.N. Shah, Pediatric Neurologist states that dilatation of ventricles is likely to increase with the passage of time and may increase significantly before delivery causing harm to the developing brain and possibly cognitive impairment. After birth, baby will need neurological procedure like shunting which may be quite costly.”

The Neurologist, who examined the petitioner No.1, has opined thus:-

“As per foetal MRI done on 28/06/2017 the foetus has complex Neurological condition called Aqueductal Stenosis and Hydrocephalus. This condition will continue to progress putting pressure effect on the brain. After the delivery, surgical treatment may be offered which entails risk of mortality and morbidity. In spite of best possible treatment the Neurological out come is guarded in nature.”

The opinion of the Cardiologist is as follows:-

“I have gone through the Ultrasonographic records of the foetus. The records do not reveal any foetal heart structural abnormalities at this time.”

The final opinion of the Committee reads as follows:-

“Patient spontaneously expressed her desire not to continue with the pregnancy. She has also submitted a letter which states that she desires termination of pregnancy since there is substantial risk of mortality and morbidity in the foetus if born alive. We find that continuation of pregnancy shall pose severe mental injury to her. We have explained hazards of the procedure which she has understood. Such terminations can only be possible if awarded by Hon'ble Supreme Court.”

In view of the individual opinions of the Obstetrician and Gynecologist and the Neurologist and the ultimate opinion of the Committee, we are inclined to allow the prayer (a), as prayed for by the petitioners in the writ petition.

...”

## IN THE SUPREME COURT OF INDIA

**Mamta Verma v. Union of India & Ors.**

**2017 SCC OnLine SC 1150**

**S.A. Bobde and L. Nageswara Rao, JJ.**

*The petitioner, a woman who was 25 weeks pregnant, invoked the writ jurisdiction of the Supreme Court seeking permission for medical termination of her pregnancy because she had crossed the 20 week limit prescribed under Section 3(2) of the MTP Act. The Medical Board confirmed a diagnosis of anencephaly in the foetus and found that it is unlikely to survive outside the uterus. Further, it opined that the continuation of pregnancy could pose severe mental health risks for the petitioner. The Supreme Court considered whether permission for medical termination of pregnancy could be granted beyond 20 weeks in light of these facts.*

**Bobde and Rao, JJ.:** “1. Petitioner - Mamta Verma, aged 26 years, has approached this Court under Article 32 of the Constitution of India seeking directions to the respondents to allow her to undergo medical termination of her pregnancy. She apprehended danger to her life, having discovered that her foetus was diagnosed with Anencephaly, a defect that leaves foetal skull bones unformed and is both untreatable and certain to cause the infant's death during or shortly after birth. This condition is also known to endanger the mother's life.

2. By order dated 04.08.2017, while issuing notice to the respondents, this Court gave a direction for examination of the petitioner by a Medical Board...

...

4. The aforesaid Medical Board has examined the petitioner and stated that as on 08.08.2017, she was into her 25th week and 1 day of pregnancy. The said Board has further opined as follows :

“Patient wants pregnancy to be terminated as the foetus is not likely to survive. It is causing immense mental agony to her.

After going through the Ultrasonography reports, Committee is of opinion that there is no point to continue the pregnancy as foetus has ANENCEPHALY which is non-compatible with life and continuation of pregnancy shall pose severe mental injury to her.”

5. We have been informed that the foetus is without a skull and would, therefore, not be in a position to survive. It is also submitted that the petitioner understands that her foetus is abnormal and the risk of foetal mortality is high. She also has the support of her husband in her decision making.

6. Upon evaluation of the petitioner, the aforesaid Medical Board has concluded that her current pregnancy is of 25 weeks and 1 day. The condition of the foetus is not compatible with life. The medical evidence clearly suggests that there is no point in allowing the pregnancy to run its full course since the foetus would not be able to survive outside the uterus without a skull.

7. Importantly, it is reported that the continuation of pregnancy can pose severe mental injury to the petitioner and no additional risk to the petitioner's life is involved if she is allowed to undergo termination of her pregnancy.

8. In the circumstances, we consider it appropriate in the interests of justice and particularly, to permit the petitioner to undergo medical termination of her pregnancy under the provisions of Medical Termination of Pregnancy Act, 1971...”

## IN THE SUPREME COURT OF INDIA

**Tapasya Umesh Pisal v. Union of India**  
(2018) 12 SCC 57

**S. A. Bobde and L. Nageshwar Rao, JJ.**

***The petitioner approached the Supreme Court by way of a writ under Article 32 of the Indian Constitution, seeking permission to terminate her pregnancy of 24 weeks. She sought termination on the ground that there was risk to her life from carrying a foetus with a cardiac anomaly which is associated with a high rate of morbidity and mortality if the child is born alive. The Court considered whether termination of pregnancy beyond 20 weeks could be permitted on this ground, especially when the medical opinion suggested that if the pregnancy resulted in a live birth, the child so born would have serious disabilities and would have a very short life span.***

**Bobde and Rao, JJ.:** “1. Petitioner Tapasya Umesh Pisal, aged 24 years, has approached this Court under Article 32 of the Constitution of India seeking directions to the respondents to allow her to undergo medical termination of her pregnancy. She apprehended danger to her life, having discovered that her foetus was diagnosed with tricuspid and pulmonary atresia, a cardiac anomaly in the foetus.

2. By order dated 4-8-2017, while issuing notice to the respondents, this Court gave a direction for examination of the petitioner by a Medical Board consisting of Dr Sambare, HOD, Gynaecology and Dr Nityanand Thakur, Paediatric Cardiac Surgeon of B.J. Govt. Medical College, Pune, and authorised it to appoint other necessary doctors, if required, for the said purpose.

3. As per the report dated nil, received from the Dean, B.J. Govt. Medical College & Sassoon General Hospital, Pune, Maharashtra, the following members of the said hospital were included in the Committee/Board:

- (1) Dr Ajay Chandanwale, Dean BJGMC, Pune.
- (2) Dr Pradip Sambarey, Professor & Head, Obstetrics and Gynaecology, BJGMC Pune.
- (3) Dr Nityanand Thakur, CVTS Department BJGMC Pune.
- (4) Dr Aarti Kinikar, Professor & Head, Department of Paediatrics BJGMC Pune.
- (5) Dr Shephali Pawar, Professor, Department of Radiology, BJGMC Pune.

4. The aforesaid Medical Board has examined the petitioner and stated that as on 7-8-2017, she was into her 24th week of pregnancy. She was accompanied by her husband and they are aware of the cardiac anomaly and the associated morbidity of the baby if born alive. The salient features of the said report are as under:

- (1) The foetus is diagnosed as having hypoplastic right heart with tricuspid and pulmonary atresia with small size pulmonary arteries.
- (2) The surgeries that will be necessary on the foetus have been reported to carry high morbidity and mortality.
- (3) It is also reported that in spite of the surgeries, such children do not achieve normal oxygen level and would remain physically incapacitated. The life span of these children even after corrective surgeries is limited as described in medical literature.
- (4) The paediatrician has reported that it appears to be an isolated complex congenital heart disease with increased morbidity and mortality post delivery.
- (5) The Radiologist has reported a complete absence of right ventricle and pulmonary and tricuspid valve atresia.

5. We also have on record the opinion of an eminent surgeon Dr Devi Shetty of Bangalore who has stated that most of these children do not live till the adult life. Their life is precarious because of the problems resulting from low oxygenation in the body. According to Dr Nityanand Thakur, Cardiac Surgeon, and member of the Medical Board, there is a near certain chance of severe handicap or sudden death of the baby after birth.

6. Upon evaluation of the petitioner, the aforesaid Committee/Medical Board has concluded that the baby if delivered alive, would have to undergo several surgeries after birth which is associated with a high morbidity and mortality.

7. But for the time period, it appears that the case falls under Section 3(2)(b) of the Medical Termination of Pregnancy Act, 1971, which reads as under:

**“3. When pregnancies may be terminated by registered medical practitioners.—**

- (1) \* \* \*
- (2)(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 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.”

8. In these circumstances, it is difficult for us to refuse the permission to the petitioner to undergo medical termination of pregnancy. It is certain that the foetus if allowed to born, would have a limited life span with serious handicaps which cannot be avoided. It appears that the baby will certainly not grow into an adult.

9. In view of the above, we consider it appropriate in the interests of justice and particularly, to permit the petitioner to undergo medical termination of her pregnancy under the provisions of Medical Termination of Pregnancy Act, 1971. Mr Ranjit Kumar, learned Solicitor General appearing for the respondents, has not opposed the petitioner's prayer on any ground, legal or medical. We order accordingly.

10. The termination of pregnancy of the petitioner will be performed by the Doctors of the hospital where she has undergone medical check-up. Further, termination of her pregnancy would be supervised by the abovestated Committee/Medical Board who shall maintain complete record of the procedure which is to be performed on the petitioner for termination of her pregnancy.

11. With the aforesaid directions, the instant writ petition is allowed in terms of prayer (a) seeking direction to the respondents to allow the petitioner to undergo medical termination of her pregnancy.”

## IN THE SUPREME COURT OF INDIA

**Murugan Nayakkar v. Union of India****WP (C) No. 749 of 2017 (Order dated September 6, 2017)****Dipak Misra, C.J., and Amitava Roy and A.M. Khanwilkar, JJ.**

***This writ petition was filed to seek permission to terminate the pregnancy of a minor girl, who had conceived as a result of rape and had crossed the 20 week limit for termination of pregnancy prescribed under Section 3 of the MTP Act.***

**Misra, C.J., and Roy and Khanwilkar, JJ.:** “The petitioner who is a 13 years old girl and a victim of alleged rape and sexual abuse, has preferred this writ petition for termination of her pregnancy. When the matter was listed on 28.8.2017, this Court has directed constitution of a Medical Board at Sir J.J. Group of Hospitals, Mumbai. Be it noted, this Court had also mentioned the composition of the team of doctors. The petitioner has appeared before the Medical Board on 1.9.2017 and the Medical Board that has been constituted by the order of this Court expressed the opinion that the termination of pregnancy should be carried out. That apart, it has also been opined that termination of pregnancy at this stage or delivery at term will have equal risks to the mother. The Board has also expressed the view that the baby born will be preterm and will have its own complications and would require Neonatal Intensive Care Unit (N.I.C.U.) admission.

...

Considering the age of the petitioner, the trauma she has suffered because of the sexual abuse and the agony she is going through at present and above all the report of the Medical Board constituted by this Court, we think it appropriate that termination of pregnancy should be allowed.

In view of the aforesaid premise, we direct the petitioner to remain present at the Sir J.J. Group of Hospitals, Mumbai in the evening of 7.9.2017 so that the termination of pregnancy can be carried out preferably on 8.9.2017. Mr. Nishant R. Katneshwarkar shall apprise the Dean of Sir J.J. Group of Hospitals, Mumbai so that he/she can make necessary arrangements for termination of the pregnancy.

...

The writ petition is accordingly disposed of. There shall be no order as to costs.”

## IN THE SUPREME COURT OF INDIA

**Chanchala Kumari v. Union of India****WP (C) No. 871 of 2017 (Order dated September 21, 2017)****Dipak Misra, C.J., and Amitava Roy and A.M. Khanwilkar, JJ.**

***This writ petition was filed to seek permission to terminate the pregnancy of a minor girl, who had conceived as a result of rape and had crossed the 20-week limit for termination of pregnancy prescribed under Section 3 of the MTP Act***

**Misra, C.J., and Roy and Khanwilkar, JJ.:** “Espousing the cause of the daughter, a minor girl, aged about 13 years, a victim of rape, the mother has preferred this writ petition seeking medical termination of her pregnancy. When the matter was listed before this Court on 15<sup>th</sup> September, 2017, the Medical Board was directed to be constituted at AIIMS, New Delhi comprising of certain doctors as per the names suggested by Mr. Ranjit Kumar, learned Solicitor General after obtaining instructions. The initial report was not specific and thereafter this Court on 18<sup>th</sup> September, 2017 passed the following order:-

“Let the matter be listed on Thursday, 21<sup>st</sup> September, 2017 on which day the Medical Board, consisting of Head of Departments, Obstetric and Gynecology, Paediatrics, Psychiatry, Radiology and Neurology from All India Institute of Medical Sciences (AIIMS), New Delhi shall give its opinion with regard to medical termination of pregnancy. When we say medical termination of pregnancy we mean to convey all the factors including the factor of life of the fetus.”



The competent authority of AIIMS, New Delhi, regard being had to the fact situation has constituted the Medical Board of 11 doctors. The report submitted by the Medical Board today reads as follows:-

“The case of Ms. 'X' was re-examined by the board members after which the board opines as follows:

Ms. 'X' is 24 weeks pregnant and termination of pregnancy is feasible. However, the ultrasound report shows 'low lying placenta', attempt to terminate pregnancy carries the risk of severe bleeding in which case a caesarian section will be required.”

On a perusal of the report, we find that the termination of pregnancy is feasible. In view of the aforesaid, the termination of pregnancy is hereby allowed. The victim being accompanied by her mother shall report at AIIMS, New Delhi on Friday, 22<sup>nd</sup> September, 2017 at 9.00 a.m. and thereafter the competent authority of AIIMS shall do the needful in the matter ensuring that all safety measures are taken. The Institute shall preserve the terminus fetus. Needless to say all expenses shall be borne by the AIIMS, New Delhi.

...”

## IN THE SUPREME COURT OF INDIA

**Anusha Ravindra v. Union of India**

**W.P. (C) 934/2017 (Order dated October 13, 2017)**

**Dipak Misra, C.J., A.M. Khanwilkar and D.Y. Chandrachud, JJ.**

***In this writ petition, the petitioner sought medico-legal guidelines for urgent and safe termination of pregnancy under safe medical facilities; and constitution of a committee for framing of appropriate medico-legal guidelines for setting up a permanent mechanism for expedient termination of pregnancies beyond 20 weeks in the cases involving rape survivors and foetal impairments. The petitioner also sought a direction to the legislature to accordingly amend Section 3(2) of the MTP Act. The Court considered whether to admit the petition and which reliefs, if any, to address.***

**Misra, C.J., and Khanwilkar and Chandrachud, JJ.:** “In this writ petition, the petitioner has prayed for the following reliefs:-

- “a) Frame and issue urgent appropriate medico legal guidelines for urgent and safe termination of pregnancy under safe medical facilities;
- b) Constitute a committee for framing of appropriate medico legal guidelines for setting up a permanent mechanism for expedient termination of pregnancies beyond 20 weeks in the exceptional cases particularly involving rape survivors and women and abnormal foetus's under safe medical facilities; with adequate inputs from an association of professionals & experts;
- c) Issue urgent appropriate writ, order and/or direction to the respondents to urgently suitably amend Section 3 of the Medical Termination of Pregnancy Act, 1971, so as to permit termination of pregnancies of more than 20 weeks for expedient termination of pregnancies beyond 20 weeks in the cases particularly involving rape survivors and women with abnormal foetus's under safe medical facilities.”

On a perusal of the reliefs sought, we find that as far as the prayer (c) is concerned, that is in the legislative realm, hence we are not inclined to address the said prayer.

As far as the prayers (a) and (b) are concerned, we are of the prima facie view that they have become necessary to be addressed.

Issue notice, fixing a returnable date within four weeks.”

## IN THE HIGH COURT OF HIMACHAL PRADESH

**Geeta Devi v. State of Himachal Pradesh & Ors.**

**2017 SCC OnLine HP 1574**

**Dharam Chand Chaudhary and Vivek Singh Thakur, JJ.**

***The petitioner, a woman who was 32 weeks pregnant, invoked the writ jurisdiction of the High Court for medical termination of her pregnancy. She was diagnosed with mild to moderate mental retardation and atrial septal defect (hole in her heart). According to the Medical Board, the foetus had an abnormal head growth and the possibility of its survival outside the womb was low. Even if it survived, once born the child could suffer from severe cognitive and motor impairments. The Board also opined that there was danger to the physical and mental health of the petitioner. The Himachal Pradesh High Court considered the issue of whether permission for medical termination of pregnancy should be granted in light of these facts.***

**Chaudhary, J.:** “The petitioner aged 19 years, having mild to moderate mental retardation, and an unfortunate mother has approached this Court for seeking a direction to the Medical Superintendent, Kamla Nehru Hospital for Mother and Child, Shimla to arrange for abortion of a foetus in her womb on the grounds inter-alia that it is risky for her to complete the normal period of pregnancy and deliver child on the due date.

2. On very first day of hearing i.e., 6.10.2017, following order came to be passed in this matter:

“2. In the meanwhile, we direct respondent No.2 to have the petitioner (hereinafter referred as to ‘X’) medically examined from a Medical Board comprising of at least five doctors, to be headed by Head of the Department of Gynecology of any of the State Level Hospitals in the State of Himachal Pradesh. Needless to add, respondent No.2 shall consider directions issued by the Hon’ble Supreme Court from time to time and more specially order, dated 7th February, 2017, passed in Writ Petition (Civil) No. 81 of 2017, titled as Mrs. X and Ors. Passed in Civil Appeal No. 10463 of 2017, titled as Ms. Z Vs. The State of Bihar and Ors. Needful shall be done within a period of one week.

3. We clarify that the Medical Board shall consider the medical health and condition of the foetus, as also the mother, more so, in the light of the provisions of the Medical Termination of Pregnancy Act, 1971.

4. We are informed that ‘X’ is physically challenged and as such, perhaps she may not be able to travel alone to the place of sitting of the Medical Board. In these circumstances, we direct respondent No.2 to ensure that she be conveniently and comfortably brought to the place of her examination in an ambulance and taken back to the place of her residence in the company of a lady medical attendant.

5. We also direct Member Secretary, H.P. State Legal Services Authority to follow up with ‘X’ for ensuring compliance of the order. Registrar General is directed to communicate the order to the Member Secretary, H.P. State Legal Services Authority. List on 13th October, 2017.”

3. Therefore, while issuing notice to the respondents, a direction was given for conducting medical examination of the petitioner by a Medical Board, left open to be constituted by the 2nd respondent. Consequently, the Medical Board comprising... six doctors, expert in their respective field came to be constituted...

...

6. The examination of the petitioner by the Medical Board comprising six doctors expert in their respective field amply demonstrates that the petitioner a mild and moderately mentally retarded mother is carrying the pregnancy of about 32 weeks. The report of ultrasound reveals that a single live intra-uterine foetus having abnormal head growth is in her womb. The foetal head is enlarged and still growing due to fluid accumulation. Also that, in case of vaginal delivery, destructive operation upon the foetal head may be required and in that event life of the foetus may also jeopardize. The termination of pregnancy at this stage may need major surgical procedure with the consequences such as, bleeding, sepsis and anesthesia hazards. In the event of pregnancy is to be continued the foetus may have severe cognitive and motor impairments even after surgical procedure also. As a matter of fact, the opinion of the Medical Board reads as follows:

**Opinion of the Medical Board dated 16.10.2017**

...

**1. Risk to Child**

- a) Because of abnormal foetal head which is enlarged and still growing due to fluid accumulation which has led to severe thinning of brain which may result in mental retardation.
- b) The possibility of this child's survival outside the womb of the mother is low.
- c) Even if the child survives, the child will require surgical intervention and even after surgical intervention there may be severe mental retardation to the child.

**2. Risk to Mother:**

- a) As detailed in the previous medical opinion of the board the mother is having mild to moderate mental retardation.
- b) Normal vaginal delivery is not possible in this case due to short stature.
- c) Only option is surgical intervention. More the pregnancy in this case is going to advance, head size will increase further and there will be more complications in the surgery and thus more risk to the mother as well.
- d) In spite of surgical approach to deliver the baby the head of the baby may be required to be decompressed by taking out fluid which further limits the chances of survival.
- e) During the investigations of the mother on 13.10.2017, she has been found suffering with suspected Atrial Septal Defect, which is hole in the heart which may further lead to the complications of surgery.

...

**7.** It is thus seen that the mother, petitioner herein having mild to moderate mental retardation and short stature, the only available option as per the medical opinion is left with i.e., to go for premature delivery with surgical intervention because to allow the pregnancy to continue up to its normal tenure, the head size of the foetus will increase further and in that event the surgery is going to become more complicated, besides causing more risk to her life. In that event even the head of the baby (foetus) may also necessitate decompression by taking out fluid out of it which may also limit the chances of survival of the baby. The petitioner herein is also found to be suffering from suspected Atrial Septal Defect i.e. hole in the heart, which may lead to further complications at the time of surgery.

**8.** Not only this but as per medical opinion, the enlarged head of foetus is still growing further due to fluid accumulation which in the opinion of the Board may lead to severe thinning of brain and ultimately result in mental retardation. The possibility of survival of the baby outside the womb of the mother would also be low. Not only this but even if the baby survives, may require surgical intervention and despite that also, the baby may suffer with severe mental retardation. The report submitted by the Medical Board is, therefore, exhaustive one and self speaking. On perusal of the report, we are fully satisfied that allowing the pregnancy to complete its normal tenure and delivery of foetus/baby on due date is dangerous not only to the life of the petitioner but the foetus/baby may also not survive. The examination of the petitioner, general, medical, radiological and psychiatric, therefore, amply demonstrates that to allow the pregnancy to continue is not in the interest of the petitioner nor in that of foetus in her womb. The anaesthetic and obstetric evaluation also reveals that condition of the foetus is not compatible with extra uterine life. In other words, the foetus may not be able to survive outside the uterus, besides causing danger to the life of the petitioner, if she is made to wait for the delivery of baby on due date. The continuation of pregnancy, therefore, endangers the physical and mental health of the petitioner. Therefore, we find the present a fit case where the risk of termination of her pregnancy is within the acceptable limits. In a similar case titled ***Meera Santosh Pal and Others V. Union of India and Others, Writ Petition (Civil) No. 17 of 2017, decided on 16th January, 2017***, having similar set of facts and circumstances, the Apex Court has held as follows:

"This Court, as at present being advised, would not enter into the medico-legal aspect of the identity of the foetus but consider it appropriate to decide the matter from the standpoint of the right of petitioner no.1 to preserve her life in view of the foreseeable danger to it, in case she allows the current pregnancy to run its full course. The medical evidence clearly suggests that there is no point in allowing the pregnancy to run its full course since the foetus would not be able to survive outside the uterus without a skull. In *Suchita Srivastava and Anr. vs. Chandigarh Administration* [(2009) 9 SCC 1], a bench of three Judges held "a woman's right to make reproductive choices is also a

dimension of 'personal liberty' as understood under Article 21 of the Constitution". The Court there dealt with the importance of the consent of the pregnant woman as an essential requirement for proceeding with the termination of pregnancy. The Court observed as follows:-

"22. There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Further more, women are also free to choose birth control methods such as undergoing sterilization procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children....."

The crucial consideration in the present case is whether the right to bodily integrity calls for a permission to allow her to terminate her pregnancy. The report of the Medical Board clearly warrants the inference that the continuance of the pregnancy involves the risk to the life of the pregnant woman and a possible grave injury to her physical or mental health as required by Section 3 (2)(i) of the Medical Termination of Pregnancy Act, 1971. Though, the pregnancy is into the 24 week, having regard to the danger to the life and the certain inability of the foetus to survive extra uterine life, we consider it appropriate to permit the petitioner to terminate the pregnancy. The overriding consideration is that she has a right to take all such steps as necessary to preserve her own life against the avoidable danger to it.

In these circumstances given the danger to her life, there is no doubt that she has a right to protect and preserve her life and particularly since she has made an informed choice. The exercise of her right seems to be within the limits of reproductive autonomy..."

9. It is seen that points in issue in the present writ petition are squarely covered by the judgment *ibid* in favour of the petitioner because here also as per the report submitted by the Medical Board, continuance of pregnancy involves risk to the life of the petitioner and in case she is not permitted to terminate the pregnancy, likely to suffer grave injury, not only to her physical, but mental health also. The relief sought in this writ petition, therefore, is also covered by Section 3(2)(i) of the Medical Termination of Pregnancy Act, 1971. True it is that the pregnancy is at an advance stage i.e. 32 weeks, however, having regard to the danger to the life of the petitioner and expert opinion that the foetus may not survive to extra uterine life, we deem it appropriate to grant permission to the petitioner to terminate the pregnancy. Above all, in view of the ratio of the judgment of the Apex Court in **Meera Santosh Pal's** case *supra*, the petitioner has every right to take all steps necessary to preserve her own life against the avoidable danger to it. It is also necessary to protect and preserve her life...

10. In view of what has been said hereinabove, we allow the present writ petition and dispose of the same with the following directions:-

i) The 5th respondent i.e. Medical Superintendent, Kamla Nehru Hospital, Shimla is directed to arrange for termination of the pregnancy of petitioner by the expert Gynaecologist(s) under the supervision of the Medical Board constituted pursuant to the orders passed by this Court at the earliest possible and without any further loss of time.

ii) Since in the opinion of the Medical Board, the petitioner is mild to moderate mentally retarded mother, therefore, in addition to her own affidavit in support of the writ petition, consent of her father or mother, as the case may be, be obtained before she is subjected to surgical intervention (caesarean) enabling her to deliver the baby prematurely.

iii) The DNA of the newly born baby be preserved by the team of doctors for being used during the course of investigation, inquiry and trial in criminal case stated to be registered in Police Station, Banjar, District Kullu, H.P. under Sections 376(2) (L) of the Indian Penal Code and also in other civil consequences which may follow after premature delivery and survival of the newly born...

..."

## IN THE HIGH COURT OF GAUHATI

Bhatou Boro v. State of Assam

(2018) 2 Gau LR 577

Hrishikesh Roy, J.

***This writ petition was filed seeking permission to terminate the pregnancy of a minor girl, aged 11 years, who became pregnant as a result of rape. The High Court referred to the decisions of the Supreme Court, where it allowed termination of pregnancy exceeding 20 weeks in cases involving a threat to the woman's life or grave injury to her physical or mental health. It directed the Medical Board to re-examine the minor to determine whether termination of her pregnancy was feasible, independent of the limitations under the MTP Act.***

Roy, J.: "...

2. The matter pertains to a minor girl of around 11 years, who is carrying an unwanted pregnancy. The victim was sexually assaulted over a period of time by an elderly neighbor and the family recently learnt of the victim's plight.

3. After lodging the FIR on 15.9.2017 (Annexure-1), leading to registration of the Khetri P.S. Case No.106/2017, under Section 376 IPC, read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POSCO Act'), the father of the victim approached the Gauhati Medical College & Hospital (GMCH) authorities for termination of pregnancy of the minor but the Doctors did not accede to the said request. Therefore, this petition is filed with prayer for constitution of a Medical Board, to examine the feasibility of terminating the pregnancy, of the minor victim.

4. Following the Court's direction issued on 25.10.2017, for constitution of the Medical Board by the Superintendent of the Gauhati Medical College & Hospital (GMCH), the victim visited the Hospital and the Doctors at the GMCH examined her on 28.10.2017. The report under the signature of the Chairman of the Medical Board, produced by Mr. B. Gogoi, reflects that the ultrasound test conducted on 26.10.2017, revealed that the girl was undergoing 26 weeks + 1 day of gestation period. Therefore, the Medical Board opined that under the existing norms, the patient is unfit to undergo medical termination of pregnancy.

5. The above opinion of the Medical Board is with reference to the legal restriction on medical termination of pregnancy, imposed by the Medical Termination Of Pregnancy Act, 1971 (hereinafter referred to as 'the MTP Act'). But the Board did not state whether it is medically feasible, to attempt termination of pregnancy of the child victim. In other words, if the Doctors were at liberty to independently decide without being impeded by the MTP Act, whether the procedure for termination of pregnancy can be attempted. This aspect is being considered by the Court, as the petitioner, who is the father of the victim, has indicated that the victim child does not wish to carry the pregnancy, to its full term.

6. The MTP Act was substantially structured on the Abortion Act of 1967, which was the law in England. The legislature intended to provide only a qualified right to abortion and the Indian Law does not recognize termination of pregnancy, as a normal recourse, for expecting mother. In *Suchita Srivastava vs. Chandigarh Administration*, reported in the (2009) 9 SCC 1, the Supreme Court declared that a woman's right to make reproductive choices is also a dimension of "personal liberty", under Article 21 of the Constitution of India. Reading the provisions of the MTP Act, the Court held that in case of pregnant woman, there is also "compelling State interest", in protecting the life of the prospective child. Hence, it was observed that the MTP Act should be viewed as reasonable restriction placed by law on the exercise of reproductive choices.

...

8. The perusal of the above provisions of the MTP Act, makes it clear that normally, pregnancy can be terminated only when a Medical practitioner is satisfied that continuation of the pregnancy, involve risk to the life of the pregnant woman or a grave injury to her physical or mental health. Legal presumption of grave injury to the mental health to the pregnant woman must be drawn, under the explanation (I) of Section 3(2), which says that if pregnancy is the result of rape, grave injury to the mental health is the logical legal presumption.

9. In the recent judgment in *Meera Santosh Pal vs. Union of India*, reported in (2017) 3 SCC 462, the Supreme Court, while considering the case of a pregnant lady in the 24th week, reflected on the right of the mother to protect and preserve her own life and allowed her to undergo medical termination of pregnancy, well beyond the 20 weeks bar, stipulated by the MTP Act.

10. In a more recent order, delivered on 6.9.2017, in the case of *Murugan Nayakkar vs. Union of India* (WP(C) No.749/2017), the Supreme Court noted that the termination at a mature stage of pregnancy, will have equal risk for the mother and the child. However, considering the age of the child mother and the trauma, she is suffering as a victim of sexual abuse and keeping in mind the report of the Medical Board, the Court permitted termination of pregnancy, for the young victim.

11. In another matter, the Supreme Court, on February 7, 2017, in the case of *X and others vs. Union of India*, reported in (2017) 3 SCC 458, after referring the earlier decision in *Suchita Srivastava* (Supra) and *Meera Santosh Pal* (Supra), while noting that continuation of pregnancy involves risk to the life of the petitioner and possible grave injury to her physical or mental health, allowed termination of pregnancy, even after 24 weeks of gestation.

12. The key aspect which needs to be borne in mind in the instant case, filed by the victim's father is that the sexually abused pregnant girl is aged around 11 years only. Naturally, this is an unwanted pregnancy and therefore, the victim approached the GMCH, for abortion but the same was refused on account of the MTP Act. The last week's opinion given by the Medical Board is with reference to the existing norms under the MTP Act and Rules. But it is obvious that the Medical Board had not taken into account the anguish and trauma of the child victim of sexual abuse and her sufferings in carrying the unwanted pregnancy. The impact on the mental health of the young victim presumed in law, under explanation (I) of Section 3(II) of the MTP Act, have also not been taken into account, by the Medical Board.

13. Considering the above, while issuing returnable notice, the Medical Board of the GMCH is directed to immediately evaluate the feasibility of termination of pregnancy of the child mother, focusing on her interest, without being shackled by the MTP Act. The continuation of pregnancy for the child mother has certainly compromised her mental health and therefore, it should be assessed by the Medical Board if the risk of termination of pregnancy is within the acceptable limits, with institutional backup of the GMCH. In that event, with the consent of the father of the minor victim, the appropriate procedure should be attempted in the present case. If termination of pregnancy can reasonably be attempted, the Medical Board is at liberty and should take an appropriate decision, after re-evaluating the patient. If medically feasible, the necessary steps should then be taken, to relieve the child mother of the anguish and trauma, on account of the unwanted pregnancy. It is ordered accordingly.

..."

## IN THE HIGH COURT OF BOMBAY

**Priti Mahendra Singh Rawal v. Union of India & Ors.**

**Writ Petition No. 11940 of 2017 (Order dated November 6, 2017)**

**Shantanu Kemkar and G. S. Kulkarni, JJ.**

***The petitioner, a woman who was 26 weeks pregnant, invoked the writ jurisdiction of the High Court for medical termination of pregnancy as she had crossed the 20-week limit prescribed under Section 3(2) of the MTP Act. Her foetus was diagnosed with serious neurological and skeletal impairments. The Medical Board opined that the impairments caused high chances of mortality and morbidity in the child, necessitating multiple surgeries. It added that there were high chances of meningitis, and physical and intellectual disabilities. The Bombay High Court considered whether permission for medical termination of pregnancy should be granted in light of these facts and whether the criteria of "substantial risk of serious physical handicap" in the foetus under Section 3(2)(ii) of the MTP Act was met.***

**Kemkar and Kulkarni, JJ.:** "Petitioner Priti Mahendra Singh Rawal has approached this Court under Article 226 of the Constitution of India, seeking direction to the first respondent to produce a report of the appropriate committee which may be constituted by this Court for her examination and submitting its report as to whether the petitioner can be allowed to get the pregnancy terminated.

2. On 3 November 2017 this Court while issuing notices to the respondents, constituted a committee of experts from Sir.J.J.Groups of Hospitals, Mumbai. As per the Medical Board's report as constituted by this Court, the petitioner has been medically examined by the Committee. The Committee has submitted its opinion. A detailed opinions of various experts are filed alongwith the said opinion of the dated 4 November 2017. The Committee which has examined the petitioner opined thus:

“OPINION OF THE COMMITTEEDATE-04/11/2017

UPON EXAMINATION OF THE PATIENT PRITI AND AFTER CAREFULLY STUDYING THE SONOGRAPHY REPORTS AND FOETAL 2D ECHO REPORTS, IT IS CONFIRMED THAT THERE ARE MULTIPLE SERIOUS NEUROLOGICAL AND SKELETAL ABNORMALITIES IN THE FOETUS. THERE IS ARNOLD CHIARI MALFORMATION WITH HYDROCEPHALUS WITH LARGE LOWER THORACIC AND LUMBAR POSTERIOR SPINAL DEFECT ASSOCIATED WITH A LARGE MENINGOMYELOCELE. THE LOWER LIMB SHOWS NO MOVEMENT ASSOCIATED WITH ABNORMAL CONTOUR OF THE FOOT AND AN ELONGATED URINARY BLADDER. THESE APPEARANCES ARE SUGGESTIVE OF NEUROGENIC ETIOLOGY. THESE ABNORMALITIES HAVE HIGH CHANCES OF MORBIDITY & MORTALITY IN THE NEWBORN. IT ALSO REQUIRES MULTIPLE SURGERIES. THERE ARE HIGH CHANCES OF MENINGITIS, MENTAL RETARDATION, PARALYSIS OF LOWER LIMBS AND LOSS OF URINE AND BOWEL CONTROL THERE IS NO MAJOR CARDIAC ABNORMALITY.

THE WOMAN HAS BEEN EXPLAINED THE OUTCOME OF THIS PREGNANCY IN THE LANGUAGE SHE UNDERSTANDS. SHE IS MENTALLY SOUND & ABLE TO TAKE HER OWN DECISION ABOUT MEDICAL TERMINATION OF PREGNANCY.

THE CONDITION OF THE FOETUS FULFILLS THE CRITERIA OF “SUBSTANTIAL RISK OF SERIOUS PHYSICAL HANDICAP” IN THE FOETUS.

THE PREGNANT WOMAN HAS VOLUNTARILY EXPRESSED HER DESIRE TO TERMINATE THE PREGNANCY AND IS WELL INFORMED ABOUT THE NATURE OF THE FOETUS AND ITS OUTCOME.

THE PREGNANCY IS ADVANCED TO 25 WEEKS 6 DAYS AND IS BEYOND 20 WEEKS CUT OFF OF THE MEDICAL TERMINATION ACT. HENCE, SHE HAS APPROACHED HON. HIGH COURT, BOMBAY FOR TERMINATION OF PREGNANCY.

AT THIS STAGE OF PREGNANCY THE RISK OF TERMINATION REMAINS THE SAME AS THE NATURAL LABOUR AT TERMS.

THUS IF THE COURT PERMITS THE PREGNANCY CAN BE TERMINATED AS DESIRED BY THE WOMAN...”

**3.** We have gone through the aforesaid opinion as also the opinion of various other experts including Paediatrics Surgeon, Professor and HOD of Department of Paediatrics, Professor and HOD of Cardiovascular Surgery, Associate Professor and HOD of Department of Psychiatry. ...The condition of the foetus fulfills the criteria of “substantial risk of serious physical handicap” in the foetus. It is also clear that the petitioner has voluntarily expressed her desire to terminate the pregnancy and is well informed about the nature of the foetus and its outcome.

**4.** Having regard to the aforesaid, it is very difficult for us to refuse the permission to the petitioner to undergo medical termination of the pregnancy. It is certain that if the petitioner's foetus is allowed to born, there is risk that it would suffer from lifelong serious physical handicap, which cannot be avoided. It appears that the baby will certainly not grow any further.

**5.** In view of the above peculiar situation and having due regard to the fundamental rights conferred on the petitioner under Article 21 of the Constitution of India to live life of dignity, it will be appropriate and in the interest of justice to permit the petitioner to undergo the medical termination of pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971. Such fundamental right as conferred on the petitioner would not allow her to lead and live a life of misery.”

## IN THE HIGH COURT OF MADHYA PRADESH

**Sundarlal v. State of M.P & Ors.****AIR 2018 (NOC 589) 205****Sujoy Paul, J.**

***This writ petition was filed by a father seeking termination of his minor daughter's pregnancy, who had conceived as a result of rape. The High Court considered whether, and under what circumstances, termination of a pregnancy should be permitted for pregnancies that result from rape.***

**Paul, J.:** "In this petition filed under Article 226 of the Constitution of India, the petitioner has prayed for a direction to the respondents for terminating the pregnancy of his minor daughter who is allegedly a rape victim. In addition, petitioner has prayed for grant of suitable compensation.

...

**3.** The petitioner contended that the victim is a minor. The petitioner being guardian has given his consent for terminating the pregnancy. If such pregnancy is forced upon the victim, it will violate her right of "personal liberty" as enshrined under Article 21 of the Constitution of India. Mr. Chaturvedi, learned counsel for the petitioner in support of this contention relied on Section 3 of the Medical Termination of Pregnancy Act, 1971 (the Act of 1971) and the judgment of Supreme Court reported in (2015) 8 SCC 721, [*Chandrakant Jayantilal Suthar v. State of Gujarat*].

**4.** *Per-contra*, Mr. Yadav, learned Deputy A.G. produced the documents dated 04.12.2017, 05.12.2017 and the consent letter of petitioner whereby he has given consent for examining the victim relating to pregnancy. By letter dated 04.12.2017 the SHO, P.S. Mundi, District Khandwa requested the Gynaecologist, District Hospital Khandwa to examine and give report on following points: (i) the duration of pregnancy of the victim; (ii) whether the victim's pregnancy can be terminated; and (iii) any other opinion which is justifiable. In the bottom of this letter, the Gynaecologist, Dr. Laxmi (the complete name of doctor is not legible in the document) has given her opinion: viz (i) that the victim is having pregnancy of a period of five months; (ii) upto five months (20 weeks), the pregnancy can be terminated; & (iii) NIL.

...

**11.** A careful reading of Section 3 of the Act of 1971 makes it clear that where length of pregnancy does not exceed 20 weeks and not less than two registered medical practitioners have formed an opinion in good faith that the continuance of pregnancy would involve a risk to the life of pregnant woman or of grave injury to her physical or mental health, the pregnancy can be terminated by a registered medical practitioner. This act of medical practitioner, if aforesaid conditions are satisfied, will not attract the penal provisions mentioned in Indian Penal Code. In other words, such registered medical practitioner shall not be guilty of any offence under the IPC or under any other law for the time being enforce if conditions mentioned in Section 3 or Section 5 of the Act are satisfied.

**12.** In Explanation I, the law makers made it clear that where pregnancy is alleged by victim because of rape, a presumption can be drawn that such pregnancy constitute a grave injury to the mental health of pregnant woman. In the present case, this is not in dispute that victim is a minor and petitioner is praying for termination of pregnancy because her daughter is a rape victim. This court in *Hallo Bi* (supra) opined that we cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the victim is suffering daily, will certainly cause a grave injury to her mental health. Not only this, the child will also suffer mental anguish in case the lady gives birth to a child.

**13.** In the present case, the victim was not subjected to medical examination by two or more registered medical practitioners which is a statutory requirement as per Section 3(2)(b) of the Act of 1971. In absence of fulfilling this statutory requirement, permission cannot be granted for terminating the pregnancy.

**14.** The Apex court in 2009 (9) SCC (*Suchita Srivastava v. Chandigarh Administration*) opined that Section 3(4)(a) and 5(1) of the Act of 1971 creates exceptions to the rule of pregnant woman's consent, namely, when pregnant woman is below 18 years. Thus, in the present case, consent of victim is not required. More so when petitioner/guardian is willing to furnish such consent. In the said judgment, it was further held that the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority. Since none of the other statutory



conditions have been met in this case, it is amply clear that we cannot permit a dilution of the requirement of consent for proceeding with a termination of pregnancy. We have also reason that proceeding with an abortion at such a late stage (19-20 weeks of gestation period) poses significant risks to the physical health of the victim.

15. The judgment of *Suchita Srivastava* (supra) was consistently followed by Supreme Court. In 2017 (3) SC 462 (*Meera Santosh Pal v. Union of India*), the Apex court followed the said principles. In the case of *Meera Santosh Pal* (supra), the Supreme Court permitted to woman to undergo medical examination under the Act of 1971 and directed the doctors of the hospital to take appropriate action for termination of pregnancy of petitioner No. 1. In (2017) 3 SCC 458 (*Xv. Union of India*), the Apex Court reiterated the principles laid down in *Suchita Srivastava*(supra) and held that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India.

16. In the present case, as noticed, the victim was not medically examined by two or more registered medical practitioners. Thus, conditions mentioned in Section 3 are not fulfilled. At the same time, it cannot be forgotten that the singular opinion of gynecologist shows that pregnancy is about 20 weeks. Thus, there is a great urgency in this matter. This court cannot shut its eyes from the statutory limit for terminating a pregnancy [see para 45 of the judgment of *Suchita Shrivastava* (supra)].

17. Apart from this, Section 5 permits termination of pregnancy in relation to length of pregnancy mentioned in sub-section (2) of Section 3 of the Act of 1971 if as per the medical opinion termination of such pregnancy is necessary to save the life of pregnant woman. As noticed, these aspects require medical examination by the medical practitioner.

18. Considering the seriousness and urgency of this matter, this petition is dispose of with following directions:

- (i) The victim is a minor and; therefore, if petitioner gives consent for terminating the pregnancy of victim, there shall be no need to obtain the willingness of the victim;
- (ii) The victim/guardian has a valuable right to take a decision regarding termination of pregnancy and such right is flowing from Article 21 of the Constitution;
- (iii) A victim of rape cannot be compelled to give birth to a child of rapist. Thus, if conditions of the Act of 1971 are fulfilled, the pregnancy of victim can be terminated;
- (iv) The respondents shall constitute a Committee of three registered medical practitioners as per the Act of 1971 and such Committee/practitioners shall form opinion in good faith relating to termination of pregnancy of the victim. Needless to mention that Committee has to form its opinion as per the mandate of Act of 1971. The Committee shall be constituted within 24 hours from the date of receipt of this order and shall examine the victim within 24 hours therefrom. Needless to emphasis that in the event of difference of opinion amongst medical practitioners, the majority view will prevail;
- (v) If the Committee comes to the conclusion that pregnancy of the victim can be terminated in consonance with Section 3 or Section 5 of the pregnancy as per law forthwith. Needless to emphasize that victim shall be provided with all medical assistance and care after pregnancy is terminated. She will be provided with medical assistance by the respondent-State;
- (vi) The respondents are directed that in the event pregnancy is terminated, they will keep DNA sample of the foetus and shall also keep the same in a sealed cover as per procedure prescribed;
- (vii) Since counsel for the petitioner has not pressed the relief regarding compensation, this question is left open and liberty is reserved to the petitioner to file appropriate proceedings in this regard;
- (viii) At the cost of repetition, in my opinion, there is a great urgency in this matter, considering the duration of pregnancy. Thus, it shall be the duty of the respondents to ensure strict compliance of this order within stipulated time;
- (ix) Respondent No. 2 and 3 shall personally monitor and ensure that this order has been complied with.

...

19. With the aforesaid directions, the **petition is disposed of.**"

## IN THE HIGH COURT OF BOMBAY AT AURANGABAD

**“X” (since minor through her mother) v. Union of India****2017 SCC OnLine Bom 9334****R.M. Borde and Vibha Kankanwadi, JJ.**

***A criminal case was registered for rape of a minor girl, who was “deaf-mute” and had “severe mentally retardation”. Upon her medical examination, she was found to be around 18-19 weeks pregnant. As the lower court denied permission to terminate her pregnancy, this writ petition was filed by the girl's mother before the High Court. The Court examined whether termination of the girl's pregnancy, which was then 22 weeks, should be allowed under Section 5 of the MTP Act.***

Kankanwadi, J.: “...

3. The guardian of an unfortunate deaf-dumb-mentally challenged victim, who has already suffered physical abuse and mental torture has approached this Court seeking direction in the nature of writ of mandamus directing respondent no. 3 to carry out termination of unwanted pregnancy which is result of physical abuse thrust against the victim.

4. The guardian-mother of the victim (petitioner) contends that her daughter is the victim in Crime No. 120/17 registered with Dhadgaon Police Station, Dhadgaon, District Nandurbar, which has been registered on 07.11.2017. After the medical examination of the victim was conducted on 02.11.2017 in a hospital at Akkalkuwa, it is found that she is pregnant and length of the pregnancy is 18 to 19 weeks. Thereafter, she was taken to Nandurbar Hospital on 05.11.2017 for further treatment. It was found that some unknown person had taken disadvantage of the physical situation of the victim, had committed rape on her. The victim is deaf-dumb and mentally retarded. Brother of the victim had lodged report against unknown person for the said crime. He had also filed application on 12.11.2017 for termination of pregnancy to respondent No. 4. However, respondent No. 4 told that since the victim is deaf-dumb-mentally challenged, he will not be able to perform the operation. In the mean time, victim was referred to Medical Superintendent, S. B. H. G. M. C. & Hospital, Dhule for her mental assessment. It was diagnosed with “Severe Mental Retardation”. An application was then preferred before Sessions Judge, Shahada for permission for termination of pregnancy. Final report was given on 28.11.2017. The said application was rejected on 04.12.2017. Hence, this petition.

5. Taking into consideration the contentions raised in the petition, by order dated 07.12.2017, we had directed and referred the victim for medical examination before the Board constituted at Government Medical College & Hospital, Aurangabad. The medical examination was directed in order to ascertain exact (sic) psychological and physical condition of the victim.

...

7. The Committee has recorded following findings in the report tendered to this Court :

1. From general examination she has no active medical complaints.
2. On Obstetrics examination her vital parameters are within normal limits With approximately 22 weeks of pregnancy.
3. Ultrasonographic examination suggestive of single live intrauterine foetus of approximate 22 weeks, Nuchal thickness 7mm, Unilateral pelvi ureteric Junction obstruction.
4. ENT examination, survivor is congenitally deaf and mute.
5. On psychiatric examination, survivor clinically seems to be of severe intellectual disability.
6. On Paediatrics examination, survivor has gross development delay with Down Syndrome.

8. The conclusions of the Committee are as follows :

1. Current pregnancy, on clinical and ultrasonographical examination is around 22 weeks by gestation. With Nuchal thickness 7mm, unilateral pelvi ureteric junction obstruction
2. Survivor clinically seems to be of severe intellectual disability.
3. Risk of termination of pregnancy is within normal acceptable limits.

9. The Medical Termination of Pregnancy Act, 1971 provides for termination of certain pregnancy by the registered Medical Practitioner...

**10.** Although section 3 of the Act provides the limit of 12 weeks for medically terminating pregnancy by a medical practitioner and, where the length of pregnancy exceeds 12 weeks but does not exceed 20 weeks and if, not less than two medical practitioners are of opinion, formed in good faith, the continuance of pregnancy would involve a risk to the life of the pregnant woman or grave injury to her physical or mental health or that 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, it would be permissible to terminate the pregnancy. It must be noted that section 5 of the Act is not controlled by the limitation in respect of duration of pregnancy contained in sections 3 and 4 of the Act. If in the opinion of medical experts, arrived at in good faith, the termination of pregnancy is immediately necessary to save the life of the pregnant woman, such a pregnancy can be terminated. It also must be noted that Explanation 1 to section 3 records that where the pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy can be presumed to constitute a grave injury to the mental health of the pregnant woman. Sub-section (1)(b)(i) of section 3 refers to the risk involved to the pregnant woman which includes even injury in respect of mental health. These are the situations in respect of termination of pregnancy of a woman who is not suffering from any physical abnormalities. There shall not be reason to doubt that since pregnancy in the instant matter is as a result of offence of rape, it causes a huge mental trauma and such inference is in consonance with explanation 1 to section 3(1) of the Act of 1971.

**11.** Honourable Supreme Court in the case of *Suchita Srivastava Vs. Chandigarh Administration* reported in 2009 (9) SCC 1, has observed that there is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choice can be exercised to procreate as well as to abstain from procreating. In the instant matter, when the victim was before the Medical Board, she had communicated (It appears that while indicating the psychiatric examination), that she has no other option than to commit suicide if she is forced to continue pregnancy. It must be noted that the pregnancy carried by petitioner is as a result of physical abuse thrust against her and that she has a choice whether to continue with such pregnancy which is result of offence against her person. The freedom of making choice by a woman which is integral part of personal liberty cannot be taken away. It shall also be taken into consideration that besides physical injury, the legislature has widened the scope of term injury by including injury to mental health of a pregnant woman. If continuation of pregnancy is harmful to mental health of a pregnant woman, then it shall be construed as a good legal ground for permitting her to terminate pregnancy and, since in the instant matter, pregnancy is alleged to be as a result of physical abuse, in view of section 5 of the Act of 1971, the choice of the victim of rape of terminating unwanted pregnancy needs to be respected. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected.

**12.** In the matter of *Appellant "X" v. Union of India* reported in (2016) 14 SCC 382: AIR 2016 SC 3525, the Honourable Apex Court considering the provisions of section 5 of the Act of 1971, permitted termination of pregnancy of duration of 23 to 24 weeks. It is observed in the judgment that section 3 leaves no room for doubt that it is not permissible to terminate pregnancy after 20 weeks however, section 5 of the Act lays down exception to section 3. It is further observed that termination of pregnancy which is necessary to save life of a pregnant woman is permissible. The Honourable Apex Court in the matter of *Appellant X v. Union of India* reported in (2017) 3 SCC 458: AIR 2017 SC 1055, granted permission for termination of pregnancy of duration of 24 weeks since it was noticed that the foetus could not survive.

**13.** The crucial question here is whether permission can be granted to terminate the pregnancy of 22 weeks in this case. The victim in this case is deaf, dumb and mentally retarded; therefore, she is unable to make a choice on her own whether to terminate the pregnancy or to continue with it. She has no such intellectual capacity, therefore, her guardian should be given that right to make choice. This case is also required to be considered from the physical point of view of the victim. Victim is deaf, dumb and mentally retarded. She is unable to take any decision. In fact, she is not even aware that she has been raped and she is pregnant. It has been stated by her guardian and brother that she is not even able to take care of herself. Question therefore arises under such circumstance as to how she would take care of child to be borne? It has been stated in the medical certificate that "On Paediatrics examination, survivor has gross development delay with Down Syndrome". If we consider "Down Syndrome", it means "is a genetic disorder caused by the presence of all or part of a third copy of chromosome (sic)". It is typically associated with physical growth delays, characteristic facial features and mild to moderate intellectual disability. The medical literature would show that there is no cure to the "down syndrome". No doubt, a person with down syndrome may lead a normal life, but in the present case, when the victim is unable to take care of herself, there is every possibility that she will not be able to take care of the foetus. Though the certificate states that the risk of termination of pregnancy is within normal acceptable limits; it would be hazardous to ask her to bear the pregnancy. It is not only dangerous to her, but dangerous to the unborn child also. Apart from danger to the life of the petitioner, this Court has to take note of the psychological trauma the petitioner is undergoing as a result

of carrying unwanted pregnancy. The pregnancy of the petitioner is definitely unwanted for her and it is violative of her personal liberty. Since she is unable to take decision due to intellectual disability, her guardian is taking the said decision, which is in the best interest of the victim and her survival. In the circumstances, we do not notice any impediment in permitting petitioner to terminate unwanted pregnancy.

...

## IN THE HIGH COURT OF ORISSA

**Dr. Binod Bihari Naik v. State of Orissa**

**2018 Cri LJ 2676**

**S.K. Sahoo, J.**

***This application under Section 482 of the Code of Criminal Procedure, 1973 was filed for quashing of criminal proceedings against the applicant doctor who was accused of causing abortion of a woman's 24 weeks pregnancy without her consent. The applicant had previously approached the magistrate's court arguing that the case was not maintainable as the termination of her pregnancy was carried out by him in due discharge of his official duty.***

Sahoo, J.: "...

3. In this application under section 482 of Cr.P.C., the petitioner Dr. Binod Bihari Naik has challenged the impugned order dated 06.09.2003 of the learned S.D.J.M., Kuchinda passed in G.R. Case No. 281 of 2002 in taking cognizance of offences under sections 493/503/313/34 of the Indian Penal Code and issuance of process against him. The said case arises out of Kuchinda P.S. Case No. 85 of 2002.

...

7. The prosecution case, as per the first information report lodged by the victim on 16.08.2002 before the officer in charge, Kuchinda police station is that she was aged about twenty years and the co-accused Lochan Pujhari kept physical relationship with her on the assurance of marriage for which she became pregnant. It is further stated that she was taken to a doctor by the co-accused Lochan Pujhari, his elder brother Gobinda, his mother and brother-in-law as per their previous plan giving false impression to her for formal check up of the child in the womb. The co-accused persons talked with the doctor and left the victim with the doctor who administered some medicines to her for which she became senseless and after one hour when she got back her senses, she found that her six months pregnancy had been terminated. She was told by the co-accused persons not to disclose about the same before anybody and threatened with dire consequence.

8. On the basis of such first information report, Kuchinda P.S. Case No. 85 of 2002 was registered on 16.08.2002 under sections 493/506/313/34 of the Indian Penal Code and section 3 of the SC & ST (PA) Act and after completion of investigation, charge sheet was submitted on 24.08.2003 against the petitioner as well as the co-accused persons under sections 493/506/313/34 of the Indian Penal Code and section 3 of the SC & ST (PA) Act.

9. Mr. J.R. Dash, learned counsel appearing for the petitioner fairly submitted that the provision under section 197 of Cr.P.C. would not be applicable in the case as the allegation against the petitioner is that in a private clinic, he aborted the pregnancy of the victim and therefore, it cannot be said that the act was done in due discharge of his official duty as a public servant. However it is contended by the learned counsel for the petitioner that the victim was brought to the clinics of the petitioner where she was accompanied by others including her lover and with the consent of the victim, the pregnancy was terminated and therefore, the ingredients of the offence under section 313 of the Indian Penal Code are not attracted.

10. Mr. Prem Kumar Patnaik, learned Additional Government Advocate for the State on the other hand submitted that even though the other offences like under sections 493 and 506 of the Indian Penal Code are not attracted against the petitioner but the statement of the victim and other materials clearly reveal that at the relevant point of time, the victim was pregnant for six months and the victim has categorically stated that she was administered with some medicines for which she became senseless and by the time she got back her senses after one hour, the termination had already been completed and therefore, there is no material on record that the victim consented for causing the miscarriage and therefore, the ingredients of the offence under section 313 of the Indian Penal Code is clearly applicable against the petitioner.

11. On perusal of the available materials on record, certain factual aspects are not disputed i.e. (i) the victim was pregnant for six months (ii) the termination of pregnancy was done in a private clinic situated at Majhipali by the petitioner.

12. Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereafter 'MTP Act') reads as follows:—...

...

16. Thus in view of sub-section (2) of section 3 of the MTP Act, there can be no termination of pregnancy if the length of the pregnancy had exceeded twenty weeks. The only exception is found in section 5 of the MTP Act under which the pregnancy can be terminated immediately to save the life of the pregnant woman at any stage of pregnancy, if the opinion of the registered medical practitioner is formed in good faith. Section 5 of the MTP Act strictly restricts to the cases where the life of the pregnant woman would be in danger in case the pregnancy is not terminated and does not refer to any other circumstances. Undoubtedly, the opinion in that regard has to be formed by a registered medical practitioner and such opinion should be in good faith. The expression "good faith" discloses that the opinion has to be based on the necessary examination required to form such an opinion.

17. In this case, not only the pregnancy period of the victim was six months and therefore has exceeded twenty weeks but also there is absolutely no material that to save the life of the victim, the termination of pregnancy was necessary. The victim has categorically stated that she was taken to the private clinics situated at Majhipali by the family members of co-accused Lochan Pujhari by giving an impression of formal check up of the child in the womb where the doctor gave some medicines to her for which she became senseless and after one hour, when she regained her senses, she came to know that there has been termination of her pregnancy. When she confronted about such termination to the co-accused persons, they told her not to disclose the incident before anybody and threatened her with dire consequence. Therefore, it is apparent from the statement of the victim that her consent had not been taken before termination of pregnancy.

18. It is prima facie clear from the available materials on record that neither the procedure as laid down under sections 3, 4 and 5 of the MTP Act have been followed nor the consent of the victim has been taken for termination of her six months pregnancy. Therefore, when there is no material that the miscarriage was done in good faith for the purpose of saving the life of the victim and the victim's consent for such miscarriage has not been obtained but it was done in a clandestine manner making the victim senseless by administering some medicine, I am of the view that the prima facie ingredients of the offence under section 313 of the Indian Penal Code is made out so far as the petitioner is concerned.

19. Therefore, I am not inclined to invoke my inherent power to interfere with the impugned order. Accordingly, the CrI.M.C. application being devoid of merits, stands dismissed.

..."

## IN THE HIGH COURT OF BOMBAY

**Shaikh Ayesha Khatoon v. Union of India**

**2018 SCC OnLine Bom 11**

**R.M. Borde and R.G. Ketkar, JJ.**

***A woman who was 27 weeks pregnant invoked the writ jurisdiction of the High Court for medical termination of pregnancy. The Court set up a Medical Board which opined that there were severe foetal impairments, including cardiac, bowel and neurological issues. The Medical Board also found that if born, the child would face substantial risk of severe physical disability, and low chances of independent neo-natal survival. The High Court considered whether the contingencies prescribed under Section 3(2)(b) of the MTP Act can be read into Section 5 (1) to allow medical termination of pregnancy of a woman post the 20-week cut off.***

**Borde, J.:** "...

2. The petitioner is a lady undergoing 27th week of pregnancy and is praying for issuance of a direction to the respondents to allow her to undergo medical termination of pregnancy at medical facility of her choice and at her expenses. It is the contention of the petitioner that on Sonographical examination of the foetus it was revealed that it (foetus) suffers from several foetal anomalies including a congenital malformation. The report of Sonography dated 18.12.2017 is annexed at Exhibit 'A' to the petition. The Sonologist on examination reported several foetal anomalies as recorded below:

(a) Inencephaly

(b) Cerebellar hypoplasia

- (c) Hydranencephaly
- (d) Laryngeal Atresia
- (e) Atrium - Venticular septal defect
- (f) Double outlet single ventricle
- (g) Stomach not visible

3. It is reported that above congenital malformations increased the likelihood of an underlying genetic abnormality which could be ruled out with invasive testing and micro array. It is further reported that considering the number and severity of the malformations; chances of independent intact neonatal survival appear less. In view of the report of the Sonologist, the petitioner has approached this Court seeking relief, as sought above. The petitioner has also requested to refer her for further examination to Medical Committee in order to confirm the diagnosis of the Sonologist and to assist the Court in arriving at a decision as regards the request made by the petitioner in the instant Petition.

4. Considering this, the learned Vacation Bench while directing issuance of notice to the respondents on 2.1.2018 directed respondent No. 2 State of Maharashtra to get the petitioner examined by the Medical Board of Sir J.J. Groups of Hospitals, Mumbai consisting of Dean of the hospital, Head of Department (Gynecology), Professor and Head of Department of Pediatric/Cardiac Surgeon, Professor and Head of Department of Radiology and Psychiatry and any other expert in the field.

5. The petitioner appeared before the Committee and she was medically and radiologically examined on 3.1.2018. The USG impressions recorded in the report are thus:

<u>USG Impressions</u>	Single live intrauterine gestation of mean gestational age 26 weeks and 5 days with gross polyhydramnios and multiple severe - cranial, complex cardiac and bowel anomalies as described above. Suggest cardiology opinion for the cardiac anomaly and genetic work up for underlying chromosomal anomalies as multiple foetal abnormalities are seen.
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...

7. The Committee has recorded its opinion as narrated below:

#### **“COMMITTEE OPINION**

UPON EXAMINATION & AFTER CAREFUL STUDY OF MULTIPLE SONOGRAPHY REPORTS, IT IS CONFIRMED THAT THE FOETUS SUFFERS FROM SERIOUS NEUROLOGICAL, CARDIAC & BOWEL ABNORMALITIES WITH A VERY HIGH CHANCE OF MORBIDITY & MORTALITY.

THE WOMAN WAS BEEN EXPLAINED ABOUT THE OUTCOME IN THE LANGUAGE SHE UNDERSTANDS.

THE CONDITION OF THE FOETUS FULFILLS THE CRITERIA OF **“SUBSTANTIAL RISK OF SERIOUS PHYSICAL HANDICAP”** IN THE FOETUS.

THE PREGNANT WOMAN HAS VOLUNTARILY EXPRESSED HER DESIRE TO TERMINATE THE PREGNANCY AND IS WELL INFORMED ABOUT THE NATURE OF THE CONDITION OF FOETUS AND ITS OUTCOME. SHE IS EXTREMELY ANGUISHED WITH THE CONDITION OF THE FOETUS INUTERO.

THE PREGNANCY HAS ADVANCED TO 27 WEEKS AND IS BEYOND 20 WEEKS CUT OF THE MEDICAL TERMINATION OF PREGNANCY ACT. HENCE SHE HAS APPROACHED HONOURABLE COURT FOR TERMINATION OF PREGNANCY.

AT THIS STAGE OF A PREGNANCY, THE RISK OF TERMINATION REMAINS THE SAME AS THAT OF NATURAL LABOUR AT TERM.

THUS IF THE COURT PERMITS THE PREGNANCY CAN BE TERMINATED AS DESIRED BY THE WOMAN.”

8. There is a little doubt that there are foetal anomalies reported and the chances of survival of the foetus appear less and there is a substantial risk of severe physical handicap. The learned Counsel appearing on behalf of the petitioner, therefore, urges that this a fit case for according permission to the petitioner to undergo medical termination at the center of her choice.

...

**11.** ...It is the contention of the petitioner that firstly the trauma that the petitioner is likely to suffer is life threatening and it shall be construed that exercise of a choice in the event there are foetal abnormalities found and the chances of survives of the baby, if allowed to take birth, are minimum, is a matter to be considered within the parameters of Section 5 of the Act of 1971. Apart from this, the petitioner contends that the provisions of sub-section (2) including clauses (i) & (ii) of sub-section (2)(b) of Section 3 are required to be read in Section 5 except the outer limit of twenty weeks that has been provided in sub-section (2)(b) of Section 3 of the Act of 1971.

**12.** The petitioner thus contends that if 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, it will be open for the Court to accord permission to terminate the pregnancy by taking recourse to Section 5 of the Act of 1971. It is further contended that the concluding portion of Section 5 prescribing the limitation in permitting such a choice or issuing direction in respect of termination of the pregnancy only in the event to save the life of the pregnant woman shall have to be interpreted harmoniously and looking to the object of the provision. It also needs to be considered that a pregnant woman has a right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. In this context reliance can be placed on the observations of Hon'ble Supreme Court in the matter of *Suchita Srivastava v. Chandigarh Administration* reported in (2009) 9 SCC 1. In paragraph-11 of said judgment, it is observed by the Hon'ble Supreme Court as narrated below:

"11. A plain reading of the above-quoted provision makes it clear that Indian law allows for abortion only if the specified conditions are met. When the MTP Act was first enacted in 1971 it was largely modelled on the Abortion Act of 1967 which had been passed in the United Kingdom. The legislative intent was to provide a qualified 'right to abortion' and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers. There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices."

**13.** It is further observed that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a '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 per Section 3(2)(b)(i) of the Act of 1971] or when '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' [as per Section 3(2)(b)(ii) of the Act of 1971]. It is true that Clauses (i) & (ii) of subsection 2(b) of Section 3 are attracted in the case where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks. However, as has been recorded above Section 5 permits termination of pregnancy by a registered medical practitioner in case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman. It shall also have to be construed that Section 5 brings within its ambit the provisions of Section 4 and so much of the provisions of sub-section (2) of Section 3 of the Act of 1971 except the limitation in respect of length of the pregnancy of 20 weeks as provided in sub-section (2)(b) of Section 3 of the Act of 1971. It would thus be logical to conclude that the contingencies referred in Clauses (i) & (ii) of sub-section (2)(b) of Section 3 will have to be read in Section 5 of the Act of 1971 and it would be relevant to consider the threat perception and substantial risk involved if the child were to born, it would suffer from such physical or mental abnormalities as to be seriously handicapped. The contingencies laid down in Clauses (i) & (ii) of sub-section (2)(b) of Section 3 shall therefore equally apply to the request of a pregnant woman seeking permission to terminate the pregnancy beyond 20 weeks and accordingly Section 5(1) will have to be construed, to meet the object and purpose of enactment and to promote cause of justice.

14. As has been recorded above, the freedom of a pregnant woman of making choice of reproduction which is integral part of “personal liberty”, whether to continue with the pregnancy or otherwise cannot be taken away. It shall also be taken into consideration that besides physical injury, the legislature has widened the scope of the termination of pregnancy by including “a injury” to mental health of the pregnant woman. Thus, if continuance of pregnancy is harmful to the mental health of a pregnant woman, then that is a good and legal ground to allow termination of pregnancy if all the conditions incorporated in legal provision are met. In the instant matter the petitioner claims that it would be injurious to her mental health to continue with the pregnancy since there are severe foetal abnormalities noticed and it would also be violative of her “personal liberty” to deny her the choice to terminate the pregnancy. The provisions of Section 5 of the Act of 1971 shall have to be interpreted in the manner for advancing the cause of justice. In this context it would be appropriate to refer to the judgment of Division Bench of this Court in the matter of *High Court on its own motion v. the State of Maharashtra*, reported in 2017 Cri L.J. 218. In paragraph-13 of the judgment, it is observed thus:

“13. A woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. To be pregnant is a natural phenomenon for which woman and man both are responsible. Wanted pregnancy is shared equally, however, when it is an accident or unwanted, then the man may not be there to share the burden but it may only be the woman on whom the burden falls. Under such circumstances, a question arises why only a woman should suffer. There are social, financial and other aspects immediately attached to the pregnancy of the woman and if pregnancy is unwanted, it can have serious repercussions. It undoubtedly affects her mental health. The law makers have taken care of helpless plight of a woman and have enacted Section 3(2)(b) (i) by incorporating the words “grave injury to her mental health”. It is mandatory on the registered medical practitioner while forming opinion of necessity of termination of pregnancy to take into account whether it is injurious to her physical or mental health. While doing so, the woman's actual or reasonable foreseeable environment may be taken into account.”

...

15. While interpreting the provisions of Section 5 of the Act of 1971, it must be borne in mind the principle that the section must be construed as a whole whether or not one part is a saving clause and similarly **elementary rule of construction of section is made of all the parts together** and that **it is not permissible to omit any part of it; the whole section must be read together**...The words of Statute are first understood in their natural, ordinary and popular sense and phrases and sentences are construed according to their grammatical meaning unless there be something in the context, or in the object of the statute in which they occur or in the circumstances in which they are used, to show that they were used in special sense different from their ordinary grammatical meaning. The basic principle that while interpreting the provisions of a Statute one can neither add nor subtract even a single word, has to be kept in mind. A section is to be interpreted by reading all of its parts together, and it is not permissible to omit any part thereof. The Court cannot proceed with the assumption that the legislature, while enacting the Statute has committed a mistake; it must proceed on the footing that the legislature intended what it has said; even if there is some defect in the phraseology used by it in framing the statute, it is not open to the Court to add and amend, or by construction, make up for the deficiencies, which has been left in the Act. **The Court can only iron out the creases but while doing so, it must not alter the fabric, of which an Act is woven.** The Court, while interpreting statutory provisions, cannot add words to a Statute, or read words into it which are not part of it, especially when a literal reading of the same produces an intelligible result. [Vide *Nalinakhya Bysack v. Shyam Sunder Halder*, AIR 1953 SC 148; *Sri. Ram Narain Medhi v. State of Bombay*, AIR 1959 SC 459; *M. Pentiah v. Muddala Veeramallappa*, AIR 1961 SC 1107; *The Balasinor Nagrik Co-operative Bank Ltd. v. Babubhai Shankerlal Pandya*, (1987) 1 SCC 606 : AIR 1987 SC 849; and *Dadi Jagannadham v. Jammulu Ramulu*, (2001) 7 SCC 71].

...

22. In the instant matter, on reading of Section 5 of the Act of 1971, it does transpire that the contingencies and the parameters laid down in clauses (i) & (ii) of sub-section (2)(b) of Section 3 shall have to be read in Section 5 except the bar of limitation as provided in Section 3(2)(b) of the Act of 1971. It would not be appropriate to over look the contingencies laid down in clauses (i) & (ii) of sub-section (2)(b) of Section 3 while considering the request of a pregnant woman for termination of the pregnancy if the conditions laid down in clauses (i) & (ii) of sub-section (2)(b) of Section 3 are satisfied it would provide a good ground for exercise of jurisdiction under Section 5 of the Act of 1971.



**23.** The Ministry of Health and Family Welfare, Government of Maharashtra has prepared the MTP (Amendment) Bill and the notification in that regard was published on 29.10.2014. The State Government has proposed amendment to Section 3 of the Act of 1973 and clause (C) is proposed to be added which reads thus:

“(C) the provisions of sub-section (2) of section 3 as relate to the length of the pregnancy shall not apply to the termination of a pregnancy by a registered health care provider where the termination of such pregnancy is necessitated by the diagnosis of any of the substantial foetal abnormalities as may be prescribed.”

**24.** Considering the above proposed amendment, according to us, the interpretation which we have put to Section 5 of the Act of 1971 appears to be a logical and same is in consonance with the proposed changes as suggested by the State in the MTP (Amendment) Bill notified on 29.10.2014.

**26.** For the reasons recorded above, the Writ Petition is allowed. The petitioner is permitted to undergo medical termination of pregnancy at a medical facility of her choice. The petitioner undertakes to report to the approved center for carrying out the procedure of medical termination of pregnancy within two days from today.

...”

## Endnotes

- 1 See Statement of Objects and Reasons, MTP Act, 1971; Statement of Objects and Reasons, MTP Amendment Act 2002.
- 2 (1994) 3 SCC 430.
- 3 AIR 2006 Raj 166.
- 4 (2009) 9 SCC 1.
- 5 This position has been reiterated by a 9 judge bench of the Supreme Court in *Puttaswamy v. Union of India*, (2017) 10 SCC 1 (See Chapter 1, “Introduction: Constitutional and Human Rights Framework for Reproductive Justice in India”).
- 6 2017 Cri LJ 218.
- 7 See *Jankiben Ronakbhai Patel v. State of Gujarat & Anr.*, Gujarat Special Criminal Application No.1786 of 2013; *D. Rajeswari vs. State of T.N & Ors.*, 1996 Cri. L.J. 3795 Mad; *K M. Mahima v. State & Ors.*, 106 (2003) DLT 143; *Janak Ramsang Kanzariya (Minor) thro' Manjuben Ramsang Kanza v. State of Gujarat & Anr.*, Gujarat Special Criminal Application No. 707 of 2010 / 2011 Cri LJ 1306; *Hallo Bi v. State of MP, Madhya Pradesh Writ Petition No. 408 of 2013*; (Minor) *Priyanka Girishkumar Patel thro' Father Girishkumar v. Principal Secretary & Ors.*, Gujarat Special Civil Application No. 93 of 2013; *X v State (NCT of Delhi)*, Delhi Writ Petition (Criminal) No. 449 of 2013; *Bashir Khan v. State of Punjab*, AIR 2014 P&H 150; *Vijender v. State of Haryana, Punjab & Haryana Civil Writ Petition No. 20783 of 2014*; *Aastanaben Sattarabhai Jumabhai v. State of Gujarat, Gujarat R.SCR.A 1084/2016*; *Poojaben Vershibhai Charla (Minor) Thro' Vershibhai @ Varsingh Govindbhai Charla v. State of Gujarat & Ors.*, Gujarat Special Criminal Application (Direction) No. 1681 of 2016; *Sundarlal v. The State of M.P & Ors.*, Madhya Pradesh W.P. No. 20961/2017.
- 8 2013 SCC OnLine Del 6473.
- 9 AIR 2014 P&H 150.
- 10 CWP No 2007 of 2015, decided on Feb. 9, 2015 (High Court of Punjab and Haryana).
- 11 2013 Cri LJ 2868 (M.P.).
- 12 Many such cases are filed directly in the Supreme Court under Article 32 of the Indian Constitution. In *Sonali Kiran Gaikwad v. Union of India*, W.P. (C) 928/2017 (Order dated Oct. 9, 2017) (Supreme Court) the Supreme Court stated that “future such cases can be filed in the respective High Courts having territorial jurisdiction.”
- 13 In August, 2017, the Secretary, Health and Family Welfare issued a letter to all States and Union Territories *vide* D.O. No. M. 12015/58/2017-MCH requesting them to establish permanent Medical Board/s in each State/ Union Territory to examine such post-20 weeks abortion cases as the courts may refer to them.
- 14 (2017) 3 SCC 462.
- 15 2017 Cri LJ 218.
- 16 World Health Organization, WHO launches new guideline to help health-care workers ensure safe medical abortion care (2019), *available at* <https://www.who.int/reproductivehealth/guideline-medical-abortion-care/en/>.
- 17 2009 SCC OnLine Raj 3468.
- 18 2015 SCC OnLine P&H 7425.
- 19 W.P. (C) 565 / 2017 (Order dated July 28, 2017) (Supreme Court).
- 20 W.P. (C) 749 / 2017 (Order dated Sept. 6, 2017) (Supreme Court). See also *Gausiya Gulam Pathan v. Union of India*, W.P. 13228/2017 (Order dated Dec. 5, 2017) (Bombay High Court) (permitting termination of a 25-week pregnancy of a 13 years old girl, in line with the decision of the Supreme Court in *Murugan Nayakkar*).
- 21 W.P. (C) 871 / 2017 (Order dated Sept. 21, 2017) (Supreme Court).
- 22 (2017) 3 SCC 462.
- 23 (2017) 3 SCC 458.
- 24 See also *Sonali Kiran Gaikwad v. Union of India*, W.P. (C) 928/2017 (Order dated Oct. 9, 2017) (Supreme Court).
- 25 2017 SCC OnLine SC 1150.
- 26 (2016) 14 SCC 382.
- 27 See also *Mrs. A v. Union of India*, W.P. (Civil) No. 728/2017 (Order dated Aug. 31, 2017) (Supreme Court).
- 28 2018 SCC OnLine Bom 11.
- 29 See also *Siddamma Golsar v. Union of India*, W.P. No 766/2017 (Bombay High Court) (permitting abortion post- 20 weeks relying on *Shaikh Ayesha Khatoon*).
- 30 2017 SCC OnLine SC 897.
- 31 Writ Petition (Civil) No. 551 of 2017 (Order dated July 28, 2017) (Supreme Court).
- 32 Writ Petition No. 11940 of 2017 (Order dated Nov. 6, 2017) (Bombay High Court).
- 33 2017 SCC OnLine HP 1574.
- 34 (2018) 12 SCC 57.
- 35 (2018) 11 SCC 606.
- 36 (2017) 13 SCC 436.
- 37 (2008) 110 Bom LR 3293.
- 38 *Nikhil D. Datar v. Union of India*, C.A. No. 7702 / 2014 (Supreme Court).
- 39 2015 AIR CC 3387.
- 40 (2016) 2 GLH 662.
- 41 (2015) 8 SCC 721.
- 42 (2016) 4 KLT 745.
- 43 AIR 2014 P&H 150.
- 44 CWP No 2007 of 2015, decided on Feb. 9, 2015 (High Court of Punjab and Haryana).
- 45 W.P. (C) 934 / 2017 (Order dated Oct. 13, 2017) (Supreme Court).
- 46 (2009) 9 SCC 1.
- 47 (2016) 3 RCR (Cri) 362.
- 48 2016 SCC OnLine Guj 662.
- 49 2017 Cri LJ (NOC 719) 225.
- 50 2016 SCC OnLine P&H 18369.
- 51 2017 SCC OnLine Bom 9334.
- 52 (2018) 2 Gau LR 577.
- 53 (1994) 2 MWN (Cri) 333.
- 54 (2016) 6 CTC 90.
- 55 AIR 2018 (NOC 589) 205.
- 56 (2009) 9 SCC 1.
- 57 For a detailed discussion on MTP for disabled women, see Chapter 7, “Disability and Reproductive Rights”.
- 58 *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.
- 59 Civil Appeal No. 4704 of 2013 (Order dated Oct. 27, 2017) (Supreme Court).
- 60 ILR (2012) 2 P&H 446.
- 61 2011 SCC OnLine Guj 5577.
- 62 For a detailed discussion on spousal consent for MTP, see Chapter 9, “Sexuality and Reproductive Decision-Making in Matrimonial Laws”.
- 63 2018 Cri LJ 2676.
- 64 2013 SCC OnLine Del 2068.
- 65 2013 SCC OnLine Bom 1014.
- 66 AIR 2000 SC 1436.
- 67 2010 SCC OnLine Del 4125.
- 68 U.N. Office of the High Commissioner for Human Rights, “Status of Ratification Interactive Dashboard—India,” <http://indicators.ohchr.org/>.
- 69 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained in U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001), Arts. 3-4.*
- 70 *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.



# CHAPTER SIX

# ADOLESCENT REPRODUCTIVE RIGHTS AND CRIMINAL LAWS

From 1940 until 2012, the age of consent for sexual activity for women in criminal law was 16 years. Sexual intercourse with a woman under the age of 16 was considered to be rape, except if the intercourse was with her husband, where the age was set at 15 years. The law did not have a comprehensive framework to address non-penile-vaginal penetrative acts, and non-penetrative acts involving minors, and did not have any age of consent for sexual activity for boys. To address gaps in the criminal law framework for redressing child sexual abuse, the Protection of Children from Sexual Offences Act (POCSO Act) was enacted in 2012. It defined a child as a person under the age of 18 years. Any sexual activity with a person (of any gender) under the age of 18, including penetrative and non-penetrative acts, has been made an offence under the Act. The consent of the minor under the law is immaterial. This implies that all adolescent sexual activities, including those that are consensual, are criminalized.<sup>1</sup>

Questions arise whether criminalization of consensual adolescent sexual activities, have an adverse bearing on reproductive and sexual health rights of adolescents. This concern is further exacerbated due to Sections 19 and 21 of the POCSO Act, which require that a person, including a health-care provider, who knows or has reason to believe that an offence under the POCSO Act has been or is likely to be committed has to report the same to the police.<sup>2</sup> It is in this context of reproductive and sexual health rights of adolescents<sup>3</sup> that the following three issues are discussed in this chapter:

- Criminalization of Consensual Sexual Acts Between Minors
- Marital Sex
- Mandatory Reporting Under the POCSO Act and the Criminal Procedure Code

## Criminalization of Consensual Sexual Acts Between Minors

As discussed above, the POCSO Act defines a “child” as a person under the age of 18 years and criminalizes all sexual activity (penetrative and non-penetrative) with minors, even if both the parties are minors or within the same age group and the acts are consensual. The mandatory minimum punishment for penetrative sexual assault under the POCSO Act is 10 years. Under the Indian Penal Code (IPC), the minimum mandatory sentence prescribed is 10 years if the girl is under 18 and 20 years if the girl is under 16 years.<sup>4</sup> The Madras High Court in **Sabari v. Inspector of Police**<sup>5</sup> noted the blanket criminalization of consensual underage sexual acts. It suggested that the POCSO Act be amended to reduce the age of consent from 18 years to 16 years. It also recommended introduction of an age-proximity clause, wherein if the parties were in the same age group, they would be treated differently. In this context, it is appropriate to note that the Justice Verma Committee on Amendments to Criminal Law, had in fact recommended that the age of consent under the IPC be fixed at 16, and that the POCSO Act be accordingly amended.<sup>6</sup>

## Marital Sex

Any sexual act with a woman under 18 is considered rape under the IPC. However, Exception 2 to Section 375, which provides an exemption from criminal liability for rape within marriage, effectively lowered the age to 15 for married girls. This meant that, on the one hand, women and girls above the age of 15 could not file a claim of rape against their husbands, as consent was presumed within marriage, but on the other, any sexual act with an unmarried girl under 18 would amount to rape, regardless of whether it was consensual. The POCSO Act, on the other hand, did not provide for such an exception for marital relationships.

This issue of rape within child marriages, and the contradiction between the IPC and the POCSO Act, was dealt with by the Supreme Court in **Independent Thought v. Union of India**.<sup>7</sup> The Supreme Court held that the distinction between married and unmarried girls was unnecessary and artificial. It had no rational nexus with any objective sought to be achieved. Given the link between child marriage, forced or coerced sex, and maternal deaths and injuries, the Supreme Court found Exception 2 to be contrary to Article 21 of the Indian Constitution and contrary to the bodily integrity of the girl and her right to reproductive choice. Therefore, it read down Exception 2 to Section 375 to mean that intercourse with one's wife who is below 18 years of age is rape. The Court rejected the defence of child marriage as part of culture and

tradition, particularly given growing awareness of the associated risks and harms. It noted that traditions and conventions should change with time. Hence, after the judgment of the Supreme Court in *Independent Thought*, the age of consent for sexual intercourse both within and outside marriage stands at 18 years. However, a husband cannot be held guilty of raping his wife if she is over 18 years old. Thus, the case recognizes that marital rape is a violation of a girl's sexual autonomy, and also her reproductive choice, since the decision to procreate or not is taken away from her.

## Mandatory Reporting Under the POCSO Act and the Criminal Procedure Code

Section 19(1) of the POCSO Act requires a person who has knowledge or has an apprehension that an offence punishable under the Act has been committed or is likely to be committed to report the same to the police. Failure to report the commission of an offence is a punishable offence under Section 21 of the POCSO Act. Similarly, Section 357C of the Code of Criminal Procedure, 1973 (Cr.P.C.), imposes a duty on hospitals to provide immediate medical treatment to victims of acid attacks and rape (Sections 326A, 376, 376A, 376B, 376C, 376D, 376E, IPC).<sup>8</sup> It further mandates that after providing such treatment the hospital should immediately report the incident to the police. Punishment for failing to report is provided in Section 166 B of the IPC.

The Supreme Court in *Shankar Kisanrao Khade v. State of Maharashtra*,<sup>9</sup> a case involving the rape and murder of a minor girl, noted with disappointment that the eyewitness to the offence failed to report the offence to the police. It noted that failure to report a crime against minors is a serious offence under the POCSO Act and persons failing to report are liable to punishment under Section 21 of the Act.<sup>10</sup>

The interpretation of Sections 19 and 21 came up before the Chhattisgarh High Court in *Kamal Prasad Patade v. State of Chhattisgarh*.<sup>11</sup> A chargesheet had been filed against the headmaster of a school for not reporting an offence of penetrative sexual assault committed against a student by an employee of the school. The grandmother of the child had informed the petitioner around two and a half hours before she filed an FIR against the employee. The High Court held that a prosecution under Section 21 cannot be initiated unless the main offence, which was not reported (here the penetrative sexual assault), is proved before a criminal court. Hence, it mandated that conviction of the original offender under the POCSO Act is a prerequisite for initiation of action against a person for not reporting the act, once it comes to his/her knowledge. It also held that if the information regarding the commission of the act reaches the police through other sources, then prosecution under Section 21 cannot be initiated against another person for not reporting the act. The court's reasoning was that Section 19 is in the nature of providing information to the police, and failure to report is not intended to be punitive. Further, on the basis of the facts of the case, the court held that two hours was not sufficient time for the headmaster to have made enquiries in the school before informing the police. It advised prosecution agencies to be circumspect before initiating prosecutions under Section 21.

In *Dr. Sr. Tessy Jose v. State of Kerala*,<sup>12</sup> the Supreme Court quashed the prosecution under Section 21 of the POCSO Act, of two doctors and a hospital administrator. A girl, whose age was noted as 18 when she was admitted in the hospital, was brought to the hospital with a complaint of stomach ache and was discovered to be in an advanced stage of pregnancy. She went into labour right after she was admitted, and a baby was delivered by the gynaecologist who attended to her. The newborn child was attended to by a paediatrician, who was prosecuted, as also a hospital administrator. The prosecution argued that since the girl had informed the hospital and the doctors that she was 18 years old, they should have reported the case to the police, since at the time of conception, the girl would have been under 18, and a victim of an offence under POCSO Act. The Court, interpreting the term "knowledge" in Section 19 of the Act ruled that "knowledge" does not imply that the person has to investigate and gather knowledge about commission of the offence. In the context of the present case, since neither the victim, nor her mother, had informed the doctor that the girl had been raped, the Court held that there was no obligation on the doctor to investigate and find out the girl's age at the time of conception of the child.

While the objective of the above mandatory reporting provisions may be laudable, the requirement of mandatory reporting under the provisions of POCSO Act and Cr.P.C. may have a detrimental impact on reproductive and sexual health of young women. Since Section 19 requires reporting if there is an apprehension of an offence under the Act being committed, access to contraceptive services for young girls may be impacted. This has a detrimental effect on the sexual and reproductive health rights of young women. It may lead to young women resorting to unsafe abortions, thus endangering their lives. Further, mandatory reporting provisions are in conflict with confidentiality requirements in the Rules under the Medical Termination of Pregnancy Act, 1971.

## Related Human Rights Standards and Jurisprudence

Below is a selection of human rights standards and jurisprudence relating to state obligations to ensure adolescents' sexual and reproductive health and rights, including through recognition of the evolving capacity of adolescents to make independent, informed decisions about their sexual and reproductive health while respecting the principle of best interest of the child.

The Government of India has committed itself to comply with obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child, and the International Covenant on Civil and Political Rights (ICCPR).<sup>13</sup> Under international law, all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.<sup>14</sup> The Supreme Court has held that in light of the obligation to “foster respect for international law” in Article 51 (c) of the Indian Constitution “[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”<sup>15</sup>

### INTERNATIONAL TREATY STANDARDS

#### TREATIES

- **Convention on Rights of the Child, Articles 3, 5, 24, 34, 39** (protecting children's right to health and to be free from coercion into “any unlawful sexual activity,” and to support the recovery of child survivors of exploitation or abuse; all rights are to be interpreted through the lens of the best interest of the child, with respect for their evolving capacities).
- **CEDAW, Articles 2, 12, 16** (outlining women's right to non-discrimination, health, and equality within marriage, and to determine the number and spacing of their children).

#### SELECTED GENERAL COMMENTS

- **Committee on the Rights of the Child (CRC), *General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence***, U.N. Doc. CRC/C/GC/20 (2016), paras. 39–40, 46 (recommending that legislation recognize the evolving capacities of adolescents to make their own health-care decisions, including “a legal presumption that adolescents are competent to seek and have access to preventive or time-sensitive sexual and reproductive health commodities and services”; reminding states parties that 18 years should be the minimum age for marriage for boys and girls; raising concerns about violations of adolescents' right to privacy in respect of confidential medical advice; and outlining that states “should avoid criminalizing adolescents of similar ages for factually consensual and nonexploitative sexual activity”).
- **CRC, *General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (Article 24)***, U.N. Doc. CRC/C/GC/15 (2013), paras. 24, 31, 56, 69 (outlining that children have the right to control their own health, including by accessing confidential counselling and advice without parental or guardian consent and making independent choices about their sexual and reproductive health, in keeping with their evolving capacities; and instructing states parties that they should ensure “confidential, universal access to goods and services for both married and unmarried female and male adolescents”).
- **CRC, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child***, U.N. Doc. CRC/GC/2003/4 (2003), paras. 5, 7, 12(b), 22, 24, 26–29, 36–37 (articulating obligation to ensure health-care providers maintain confidentiality about medical information, which can be disclosed only with the consent of the adolescent or in the same situations that apply to the violation of an adult's confidentiality; stipulating adolescents' rights to health information, privacy, and confidentiality, and to give their independent and informed consent, particularly regarding sexual and reproductive health matters; and urging states to address cultural and other taboos surrounding adolescent sexuality).
- **Committee on the Elimination of Discrimination against Women (CEDAW Committee) & CRC, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices***, U.N. Doc. CEDAW/C/GC/31-CRC/C/GC/18 (2014), para. 55(j) (outlining that mandatory reporting requirements should ensure the protection of the privacy and confidentiality of children and women in situations of abuse).

- **CEDAW Committee, *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19***, U.N. Doc. CEDAW/C/GC/35 (2017), paras. 14, 26(a), 28, 38(c) (states should aim to prevent, protect, prosecute, punish, and redress gender-based violence “with a victim/survivor-centered approach, acknowledging women as subjects of rights and promoting their agency and autonomy, including the evolving capacity of girls, from childhood to adolescence,” including by ensuring privacy, confidentiality, and victims/survivors’ free and informed consent).
- **CEDAW Committee, *General Recommendation No. 24 on Art. 12 of the Convention (women and health)***, U.N. Doc. A/54/38/Rev.1 (1999), paras. 8, 12(b), 12(d), 18, 20–23 (noting that a lack of confidentiality in medical services can have a disproportionately detrimental effect on women’s and girls’ right to health; women and girls are entitled to access sexual and reproductive health care under conditions of confidentiality and informed consent).
- **Committee for Economic Social and Cultural Rights (CESCR), *General Comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the ICESCR)***, U.N. Doc. E/C.12/GC/22 (2016), paras. 18–19, 41, 43–44, 49(f) (outlining states parties’ human rights obligations with respect to sexual and reproductive health, including to information, privacy, confidentiality, and consent-based care, specifically for adolescent girls in line with their evolving capacities).
- **CESCR, *General Comment No. 14 on the Right to the Highest Attainable Standard of Health (Art. 12)***, U.N. Doc. E/C.12/2000/4 (2000), paras. 21, 23 (outlining that the realization of adolescents’ right to health “is dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services”).

## INQUIRIES AND INDIVIDUAL COMPLAINTS

- **CEDAW Committee, *LC v. Peru, Communication No. 22/2009***, U.N. Doc. CEDAW/C/50/D/22/2009 (2011), paras. 8.7–8.18, 9(b)(ii) (where a 13-year-old girl became pregnant following rape and was denied critical medical care, including an abortion: finding violations of, *inter alia*, the rights to non-discrimination, to prevent sex-based stereotyping, and to access health services, further exacerbated because the victim was a minor and sexual abuse victim; and requiring the state to train health providers to “change their attitudes and behavior” towards adolescent women seeking reproductive health services and to address specific health needs of sexual violence survivors).
- **Human Rights Committee, *K.L. v. Peru, Communication No. 1153/2003***, U.N. Doc. CCPR/C/85/D/1153/2003 (2005), paras. 6.1–8 (where an adolescent girl was denied a legal abortion to the detriment of her mental and physical health, finding violations of the rights to privacy, to special measures of protection as an adolescent girl, including psychological and medical support, and to be free of inhuman and degrading treatment; and requiring the state to pay compensation and guarantee non-repetition).

## UNITED NATIONS HUMAN RIGHTS EXPERT REPORTS

- **Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR Health), *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover***, U.N. Doc. A/HRC/14/20 (2010), paras. 47–50 (summarizing children’s rights to medical confidentiality, medical counselling and advice, and consent-based medical goods and services, especially with respect to sexual and reproductive health, in keeping with the child’s evolving capacities).
- **SR Health, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. E/CN.4/2004/49 (2004), paras. 36–37, 39–42 (with respect to sexual and reproductive health, underscoring adolescents’ right to and need for sexual and reproductive health information, to privacy and confidentiality in medical settings, to protection from abuse, exploitation and violence, to nondiscrimination, and to participation in decisions affecting them with regard for their evolving capacities, in particular for survivors of gender-based and/or sexual violence).



## REGIONAL CASE LAW

### EUROPEAN COURT OF HUMAN RIGHTS

- ***P and S v. Poland*, Application No. 15966/04 (2009)**, paras. 108–109, 111, 128–137, 157–169 (affirming state obligation to ensure adolescents' autonomous reproductive choices and privacy in a case where a 14-year-old rape survivor was denied abortion care and where medical professionals shared her personal information without her permission; establishing that authorities should have taken into account her young age and vulnerability as a rape survivor; and finding violations, *inter alia*, of the rights to be free from ill treatment, to private life, and to liberty and security of the person).

### INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

- ***Asunto niña Mainumby respect de Paraguay*, Precautionary Measures No. 178/15, (2015)**, para. 23, section V [*available only in Spanish*] (in a case where a 10-year-old rape survivor's health was determined to be at risk from her pregnancy, issuing precautionary measures to protect her life and personal integrity, to ensure her access to adequate medical treatment, to ensure that the rights of the child are guaranteed in all health decisions affecting the child's health in accordance with her age and maturity, and to guarantee her protection from future abuse).
- ***Paulina Ramírez v. Mexico*, Report No. 21/07, Petition 161–02, Friendly Settlement (2007)** (outlining the terms of friendly settlement by a state providing reparations and public apology, and preventing reoccurrence in a case involving a 13-year-old rape survivor who was given false information about the safety of abortion procedures and therefore decided to carry her pregnancy to term under incorrect, coercive pretenses).

# RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

## IN THE SUPREME COURT OF INDIA

**Shankar Kisanrao Khade v. State of Maharashtra**

**(2013) 5 SCC 546**

**K.S.P. Radhakrishnan and Madan B. Lokur, JJ.**

*The accused kidnapped a minor girl diagnosed with moderate intellectual disability and then raped and murdered her. The rape was witnessed by a man, but he did not report the same to the police. The accused was convicted and sentenced to death by the Additional Sessions Court; this was confirmed by the High Court. The accused filed an appeal before the Supreme Court against the High Court's confirmation order. While deciding the issue, the Court made certain observations on the mandatory reporting requirement under the POCSO Act. Note however, that the incident had occurred before 2012, when the POCSO Act was enacted and came into force.*

Radhakrishnan, J.: "...

### NON-REPORTING THE OFFENCE OF SEXUAL ASSAULT

**64.** Let me now refer to another disturbing trend in our society that is non-reporting of sexual assault on minor children, which has happened in this case as well. Ravindra Lavate (PW8), in his deposition, has stated as follows:

"I heard that the girl was weeping. I, therefore, come in Verandah and observed that Accused No.1 was lying on the body of the said girl. I observed it in the electric light. I also observed that Accused No.1 was committing sexual intercourse with the girl. I and my wife asked Accused No.1 as to what he was doing. I asked Accused No.1 Shankar to take out the said girl. Accused No.1 thereafter took away the said girl on cycle."

**65.** PW8 has admitted in his cross-examination that he had not reported the said fact to the police, possibly due to the reason that there was no clear cut legislative provision casting an obligation on him to report to the J.J. Board or to the S.J.P.U. dealing with sexual offences towards children after having witnessed the incident. Is there not a duty cast on every citizen of this country if they witness or come to know any act of sexual assault or abuse on a minor child to report the same to the police or to the J.J. Board or can they keep mum so as to screen the culprit from legal punishment?

...

**69.** ... Parliament later passed the Act titled "The Protection of Children from Sexual Offences Act, 2012. (Act 32 of 2012) which received the assent of the President on 19th June, 2012. The Act provides for reporting of sexual offences and the punishment for failure to report or record punishment for filing false complaint and/or false information. The Act also provides for a Justice Delivery System for child victims and few other provisions to safeguard the interest of children.

**70.** Chapter V of the Act deals with the Procedure of reporting of cases. Sec. 19(1) deals with the manner in which the case has to be reported to the Special Juvenile Police Unit or local police...

**71.** Section 21 prescribes punishment for failure to report or record a case, which reads as follows:

**"21. Punishment for failure to report or record a case. -**

(1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine."

**72.** ... Witnesses of many such heinous crimes often keep mum taking shelter on factors like social stigma, community pressure, and difficulties of navigating the criminal justice system, total dependency on perpetrator emotionally and economically and so on. Some adult members of family including parents choose not to report such crimes to the police on the plea that it was for the sake of protecting the child from social stigma and it would also do more harm to the victim. Further, they also take shelter pointing out that in such situations some of the close family members having known such incidents would not extend medical help to the child to keep the same confidential and so on, least bothered about the emotional, psychological and physical harm done to the child. Sexual abuse can be in any form like sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted or encouraging, inducing or forcing the child to be used for the sexual gratification of another person, using a child or deliberately exposing a child to sexual activities or pornography or procuring or allowing a child to be procured for commercial exploitation and so on.

**73.** In my view, whenever we deal with an issue of child abuse, we must apply the *best interest child standard*, since best interest of the child is paramount and not the interest of perpetrator of the crime. Our approach must be child centric. Complaints received from any quarter, of course, have to be kept confidential without casting any stigma on the child and the family members. But, if the tormentor is the family member himself, he shall not go scot-free. Proper and sufficient safeguards also have to be given to the persons who come forward to report such incidents to the police or to the Juvenile Justice Board.

**74.** The conduct of the police for not registering a case under Section 377 IPC against the accused, the agony undergone by a child of 11 years with moderate intellectual disability, non-reporting of offence of rape committed on her, after having witnessed the incident either to the local police or to the J.J. Board compel us to give certain directions for compliance in future which, in my view, are necessary to protect our children from such sexual abuses. This Court as *parens patriae* has a duty to do so because Court has guardianship over minor children, especially with regard to the children having intellectual disability, since they are suffering from legal disability. Prompt reporting of the crime in this case could have perhaps, saved the life of a minor child of moderate intellectual disability.

...

**77.** In my opinion, the case in hand calls for issuing the following directions to various stake-holders for due compliance:

**77.1.** The persons in-charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails etc. or wherever children are housed, if they come across instances of sexual abuse or assault on a minor child which they believe to have committed or come to know that they are being sexually molested or assaulted are directed to report those facts keeping upmost secrecy to the nearest S.J.P.U. or local police, and they, depending upon the gravity of the complaint and its genuineness, take appropriate follow up action casting no stigma to the child or to the family members.

**77.2.** Media personals, persons in charge of hotels, lodges, hospitals, clubs, studios, photograph facilities have to duly comply with the provision of Section 20 of the Act 32 of 2012 and provide information to the S.J.P.U., or local police. Media has to strictly comply with Section 23 of the Act as well.

**77.3.** Children with intellectual disability are more vulnerable to physical, sexual and emotional abuse. Institutions which house them or persons in care and protection, come across any act of sexual abuse, have a duty to bring to the notice of the J.J. Board/S.J.P.U. or local police and they in turn be in touch with the competent authority and take appropriate action.

**77.4.** Further, it is made clear that if the perpetrator of the crime is a family member himself, then utmost care be taken and further action be taken in consultation with the mother or other female members of the family of the child, bearing in mind the fact that best interest of the child is of paramount consideration.

**77.5.** If hospitals, whether government or privately-owned or medical institutions where children are being treated come to know that children admitted are subjected to sexual abuse, the same will immediately be reported to the nearest J.J. Board/SJPU and the JJ Board, in consultation with SJPU, should take appropriate steps in accordance with the law safeguarding the interest of child.

**77.6.** The non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting they are screening offenders from legal punishment and hence be held liable under the ordinary criminal law and prompt action be taken against them, in accordance with law.

**77.7.** Complaints, if any, received by NCPDR, SCPCR, Child Welfare Committee (CWC) and Child Helpline, NGO's or Women's Organizations etc., they may take further follow up action in consultation with the nearest J.J. Board, S.J.P.U. or local police in accordance with law.

**77.8.** The Central Government and the State Governments are directed to constitute SJPU's in all the Districts, if not already constituted and they have to take prompt and effective action in consultation with J. J. Board to take care of child and protect the child and also take appropriate steps against the perpetrator of the crime.

**77.9.** The Central Government and every State Government should take all measures as provided under Section 43 of the Act 32/2012 to give wide publicity of the provisions of the Act through media including television, radio and print media, at regular intervals, to make the general public, children as well as their parents and guardians, aware of the provisions of the Act.

...

## IN THE HIGH COURT OF CHHATTISGARH

**Kamal Prasad Patade v. State of Chhattisgarh**

**Writ Petition (Criminal) No. 8/2016, decided on May 12, 2016**

**Sanjay K. Agrawal, J.**

***The petitioner was a headmaster in a school. A chargesheet was submitted by the police against him alleging commission of an offence punishable under Section 21, POCSO Act. The allegation was that a worker in the school had committed an offence of penetrative sexual assault on a student of the school. The grandmother of the child informed the petitioner of the incident, in his capacity as the headmaster of the school. Around two and a half hours later, the grandmother filed an FIR against the worker. The petitioner was arrested the next day for not reporting the offence as required by Section 19(1) of the POCSO Act. The petitioner filed this writ petition seeking quashing of the chargesheet.***

**Agrawal, J.:** "...

**3.** ...[L]earned counsel appearing for the petitioner, would submit that initiation and continuance of the prosecution against the petitioner for offence under Section 21(2) of the POSCO Act for non-reporting the commission of offence by co-accused Indrajeet Thakur under Section 4 of the POSCO Act as envisaged under Section 19(1) of the POSCO Act is nothing but sheer abuse of process of the law as co-accused Indrajeet Thakur is still facing trial and it has not been established beyond reasonable doubt that he has committed offences under Section 377, 506 Part-II, 511 of the IPC and Sections 4 & 6 of the POSCO Act and unless and until he is convicted for the aforesaid offences, there is no reason to implicate the petitioner for offence under Section 21(2) of the POSCO Act for non-reporting the commission of the Act under Sections 4 & 6 of the POSCO Act. He would further submit that the prosecution ought to have waited till the principal offences for which co-accused Indrajeet Thakur is charged are determined finally by the jurisdictional criminal Court/Special Judge (POSCO). He would further submit that simultaneous prosecution of the petitioner with co-accused Indrajeet Thakur, before the co-accused is held guilty for the principal offences, runs contrary to the settled law in this behalf. He would also submit that even otherwise, he was not having exclusive knowledge of offences in question, even otherwise, on 21.8.2015 at 10.30 a.m. the matter was reported to Kanker Police and Kanker Police immediately started investigation and the petitioner was also arrested on 22.8.2015 i.e. on the very next day, therefore, he has no such opportunity to investigate the matter and report the matter to the police as required under Section 19(2) of the POSCO Act, therefore, the initiation and continuance of prosecution even if taking the entire charge-sheet in its face value as it is, does not disclose the prima-facie offence under Section 21(2) of the POSCO Act against the petitioner. Therefore, prosecution against the petitioner in the jurisdictional criminal Court being abuse of process of law deserves to be quashed.

**4.** ...[L]earned counsel appearing for respondent No. 1/State would vehemently oppose the writ petition and would submit that the petitioner was duly informed by respondent No. 2 on 21.8.2015 at about 8 a.m. in the morning, but he did not report the matter to the authority concerned that offence under the POSCO Act has been committed by his subordinate and co-accused Indrajeet Thakur and as such, the petitioner was having knowledge that such an offence has been committed failed to report the matter as envisaged under Section 19(1) of the POSCO Act to the competent

authority, therefore, he is criminally liable under Section 21(2) of the POSCO Act and therefore, initiation and continuance of prosecution along with co-accused Indrajeet Thakur for the above-stated offences is in accordance with law and the writ petition deserves to be dismissed.

...

**6.** Mr. Prasun Kumar Bhaduri, learned counsel appearing as Amicus Curiae would submit that Section 21(2) of the POSCO is itself liability on any person being in-charge of any company or in institution to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control presumes imprisonment for one year with fine as a punishment if such person being in-charge failed to report the commission of an offence in accordance with Section 19(1) of the POSCO Act. Such provision is imperative in character. He would rely upon paragraphs 71, 72 and 73 of the judgment of the Supreme Court in the matter of *Shankar Kisanrao Khade v. State of Maharashtra* in which Their Lordships have held since best interest of the child is paramount and not the interest of perpetrator of the crime, therefore, approach must be child-centric. He has also highlighted paragraph 77.6 of the judgment in which it has been held by the Supreme Court that non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting they are screening the offenders from legal punishment and hence they be held liable under the ordinary criminal law and prompt action be taken against them in accordance with law.

...

**11.** At this stage, it is appropriate to notice Section 19(1) of the POSCO Act which states as under:-

“19. Reporting of offences.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2) of 1974), any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to.-

(a) the Special Juvenile Police Unit; or

(b) the local police.”

Non-compliance of Section 19(1) of the POSCO Act is made punishable under Section 21(2) of the POSCO Act, which states as under:-

“21. Punishment for failure to report or record a case.-

(1) xxx xxx xxx

(2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.”

(3) xxx xxx xxx”.

**12.** Thus, sub-section (2) of Section 21 of the POSCO Act is charging provision for non-compliance of the provisions of the POSCO Act, which is prescribed under Section 19(1) of the POSCO Act. The Act which constitutes an offence under Section 21(2) of the POSCO Act relates to failure to make report of commission of offence under the provision of the POSCO Act under Section 19(1) of the POSCO Act which prescribes that any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information. Thus, this provision is in three parts:-

(A) Any person including the child or

(B) who has apprehension that an offence under POSCO Act is likely to be committed or

(C) has knowledge that such an offence has been committed under POSCO Act.

**13.** The qualifying word in Section 19(1) of the POSCO Act is apprehension regarding an offence is likely to be committed or has knowledge that such an offence under POSCO Act has been committed, he shall provide such information to the Special Juvenile Police Unit or local police. Thus, Section 19(1) of the POSCO Act can be invoked only when the person concerned was having exclusive knowledge of commission of offence under POSCO Act and if the person is in-charge of the institution who fails to report the commission of an offence under sub-section (1) of Section 19 of the POSCO Act in respect of a subordinate under his control, he would be liable for prosecution under Section 21(2) of the POSCO Act.

**14.** Meaning of “knowledge” has been defined in the law lexicon as under:-

**Knowledge:** The certain perception of truth; belief which amounts to or results in moral certainty indubitable apprehension; information; intelligence; implying truth, proof and conviction; the act or state of knowing; clear perception of fact; that which is or may be known; acquaintance with things ascertainable; specific information; settled belief; reasonable conviction; anything which may be the subject of human instruction.

**15.** The word ‘knowledge’ has been considered by the Supreme Court in the matter of *Joti Prasad v. State of Haryana* (AIR 1991 SC 1167). Paragraph 5 of the said judgment reads as under:-

“5. Under the Indian Penal law, guilt in respect of almost all the offences is fastened either on the ground of “intention” or “knowledge” or “reasons to believe”. We are now concerned with the expressions “knowledge” and “reasons to believe”. “Knowledge” is awareness on the part of person concerned indicating his state of mind. “Reasons to believe” is another facet of the state of mind. “Reasons to believe” is not the same thing as “suspicion” or “doubt” and mere seeing also cannot be equated to believing. “Reasons to believe” is higher level of state of mind. Likewise “knowledge” will be slightly on higher plane than “reasons to believe”. A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same...”

**16.** Likewise, in the matter of *A.S. Krishnan v. State of Kerala*, (2004) 11 SCC 576, their Lordships of the Supreme Court have held as under:-

“9. Under the IPC, guilt in respect of almost all the offences is fastened either on the ground of “intention” or “knowledge” or “reasons to believe”. We are now concerned with the expressions “knowledge” and “reasons to believe”. “Knowledge” is awareness on the part of person concerned indicating his state of mind. “Reasons to believe” is another facet of the state of mind. “Reasons to believe” is not the same thing as “suspicion” or “doubt” and mere seeing also cannot be equated to believing. “Reasons to believe” is higher level of state of mind. Likewise “knowledge” will be slightly on higher plane than “reasons to believe”. A person can be supposed to know where there is a direct appeal to his senses and a person is presumed to have a reason to believe if he has sufficient cause to believe the same. Section 26, IPC explains the meaning of the words “reason to believe” thus.

26. “Reason to believe”. A person is said to have ‘reason to believe’ a thing, if he has sufficient cause to believe that thing but not otherwise”.

**17.** At this stage, it would be appropriate to mention that charge-sheet against the petitioner and co-accused Indrajeet Thakur was filed consolidatedly and simultaneously by the jurisdictional police in the criminal court for trying co-accused Indrajeet Thakur for the principal offences under Sections 377, 506 Part-II, 511 of the IPC and Sections 4 & 6 of the POSCO Act and to the petitioner under Section 21(2) of the POSCO Act together for trying them jointly.

**18.** From careful perusal of the record, it is quite vivid that in a proceeding launched by the prosecution against co-accused Indrajeet Thakur, the prosecution is yet to establish that the co-accused Indrajeet Thakur has committed penetrative sexual assault/aggravated penetrative assault within the meaning of Sections 3 & 5 of the POSCO Act which is punishable under Sections 4 & 6 of the POSCO Act respectively with grandson of respondent No. 2 on 20.8.2015 and also to establish other offences, which are pending trial. Thus, this fact is to be established that such an offence has been committed by co-accused/principal offender Indrajeet Thakur with grandson of respondent No. 2. In the prosecution under Section 21(2) of the POSCO Act, it is necessary for the prosecution to establish first commission of main offence under Sections 4 & 6 of the POSCO Act before making the person liable under Section 21(2) of the POSCO Act as the prosecution has firstly to establish beyond doubt in the jurisdictional criminal court that an offence under Sections 4 & 6 of the POSCO Act has been committed by an accused person and once finding is recorded by jurisdictional criminal court convicting the accused therein for offences under Sections 4 & 6 of the POSCO Act, then to establish the petitioner had exclusive knowledge of such an offence having been committed by the co-accused under POSCO Act and despite such knowledge, he failed to report the matter under Section 19(1) of the POSCO Act to the competent authority including local police station, then only penal provision contained in Section 21(2) of the POSCO Act would attract.

**19.** The law in this regard is well settled. Way back, in the matter of *Harishchandrasing Sajjansinh Rathod v. State of Gujrat*, (1979) 4 SCC 502, Their Lordships of the Supreme Court while considering the scope and applicability of Section 202 of the IPC have held that said provision does not apply to the person alleged to have committed the principal offence and also held that for prosecution under Section 202 of the IPC, it is necessary for the prosecution to establish that main offence before making the person liable under Section 202 of the IPC...

...

**21.** Thus, it is absolutely necessary for the prosecution to establish the main offence under the POSCO Act before the criminal court beyond reasonable doubt and main offender is brought to book before the Head of the Institution is charged/prosecuted for intentionally not giving information to the competent authority including the police under Section 19(1) of the POSCO Act. The Madhya Pradesh High Court has also struck similar proposition and held that accused of the principal offences and accused of offence under Section 202 of the IPC cannot be tried jointly. Thus, applying the law so laid down by Their Lordships of the Supreme Court in *Harishchandrasing* (supra) to the facts of the present case, undoubtedly prosecution of main accused for commission of offence under Sections 4 & 6 of the POSCO Act and related offences under the IPC is pending trial and the petitioner is being tried jointly as consolidated charge-sheet has been filed by the prosecution against main accused Indrajeet Thakur and the petitioner. Therefore, pending establishment of the principal offences against main accused for commission of offences under POSCO Act, the initiation and continuance of prosecution against the petitioner for offence under Section 21(2) of the POSCO Act is nothing but clear abuse of the process of law.

**22.** This matter can be considered from another angle. Pari-materia provision like Section 21(2) of the POSCO Act is also exist in other enactments i.e. Section 201 of the IPC for causing disappearance of evidence of offence, or giving false information to screen offender. Section 202 of the IPC i.e. intentional omission to give information of offence by person bound to inform. Section 376F of the IPC i.e. liability of person in-charge of workplace and others to give information about offence and likewise the provisions in the Cr.P.C. i.e. Sections 39 and 40 of the CrPC. It has been held that omission to give information must be with reasonable cause to avoid culpability.

...

**26.** In the matter of *Ramphal v. King Emperor*, AIR 1921 Oudh 227, it has been held that provisions contained in Section 202 IPC are not intended to be punitive in themselves, but are intended to be facilitate information as to the commission of an offence...

**27.** In the matter of *P.K. Sarangi v. State of Orissa*, 1995(1) OLR 319, it has been held by the Orissa High Court that omission under Section 202 IPC must not only be omission, but a willful omission with some ulterior object...

...

**29.** A conspectus of the afore-stated judgments would show that Section 21(2) of the POSCO Act is a penal provision which obliges any person being in-charge of the institution to give information before the police about the commission of an offence under the POSCO Act. The said provision has been enacted for the purpose of screening the offender relating to commission of offence under the POSCO Act with an intention that information relating to commission of offence under the POSCO Act must reach to the police authorities with all expedition so that wheels of investigation for the offences under the POSCO Act will start running at the earliest and once the information relating to commission of offence actually reaches to the Police Station, the requirement of Section 19(1) of the POSCO Act stood satisfied and therefore, no prosecution for non-reporting the matter under Section 21(2) of the POSCO Act would lie against the Head of the Institution.

**30.** Thus, on the basis of aforesaid discussion, it is held that the prosecution of the petitioner for non-reporting the commission of offence by co-accused Indrajeet Thakur under Sections 4 & 6 of the POSCO Act offence under Section 21(2) of the POSCO Act is unsustainable in law as the prosecution of co-accused Indrajeet Thakur for the principal offences is still pending consideration and it has not been established beyond doubt that co-accused Indrajeet Thakur has committed the offence under Sections 4 & 6 of the POSCO Act and other related offences under the provisions of the IPC and therefore, unless the commission of the principal offences by the main accused for offences under the POSCO Act is established, question of prosecution of the petitioner for non-compliance of Section 19(1) that he has knowledge of commission of offence would not arise. The information as to the commission of offence has already reached to the jurisdictional police and after registration of an offence under the POSCO Act & IPC, crime has been investigated and offender has been charge-sheeted, thereafter, prosecution of the petitioner for offence under Section 21(2) of the POSCO Act is unsustainable in law.

...

**33.** Section 21(2) of the POSCO Act is a penal provision. Any person being in-charge of any institution is liable to be prosecuted criminally for failure to report for commission of an offence under Section 19(1) and 20 of the Act. In this case, the Head of the Institution is the Principal of Central School. The Principal is the key post in the running of a school...

...

**35.** Thus, the petitioner being the Head of the Institution/Principal of a reputed school holding such a key post of running of a school was not given due respect which the Head of the Institution is usually entitled to by giving reasonable/sufficient time to inquire and collect the material as on 21.8.2015 at 8 a.m. alleged crime was said to be reported to him and before he could collect the material at his own school, the matter was reported to police at 10 a.m. on said day, crime was registered against the co-accused and investigation commenced, but unfortunately on the next date, the petitioner was arrested for non-reporting the matter to police under Section 21(2) of the POSCO Act for his failure of non-reporting the matter between 8 a.m. to 10 a.m. on 21.8.2015. Such a course on the part of investigating agency is wholly impermissible in law. Head of the Institution is entitled to and should be allowed sufficient/reasonable time to find out the correct facts by making an enquiry at the institutional level before reporting the matter to make the reporting of an offence responsible by the Head of Institution based on material collected, which legislature has intended while enacting the provision under Section 21(2) of the POSCO Act and therefore the prosecuting agency should be circumspect in initiating prosecution under Section 21(2) of the POSCO Act against the In-charge of the institution.

..."

## IN THE SUPREME COURT OF INDIA

**Independent Thought v. Union of India & Anr.**

**(2017) 10 SCC 800**

**Madan B. Lokur & Deepak Gupta, JJ.**

***The petitioner society filed a writ petition under Article 32 of the Indian Constitution in public interest to challenge the exception created under Section 375 of the IPC with regard to married girls above 15 and below 18 years of age. The issue before the Court was whether sexual intercourse between a man and his wife, the wife being a girl between the age of 15 and 18 years, is rape and thus a punishable offence.***

**Lokur, J.:** "The issue before us is a limited but one of considerable public importance — whether sexual intercourse between a man and his wife being a girl between 15 and 18 years of age is rape? Exception 2 to Section 375 of the Penal Code, 1860 (IPC) answers this in the negative, but in our opinion sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The Exception carved out in IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15(3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice. What is equally dreadful, the artificial distinction turns a blind eye to trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil.

...

**4.** According to the petitioner, Section 375 IPC prescribes the age of consent for sexual intercourse as 18 years meaning thereby that any person having sexual intercourse with a girl child below 18 years of age would be statutorily guilty of rape even if the sexual activity was with her consent. Almost every statute in India recognises that a girl below 18 years of age is a child and it is for this reason that the law penalises sexual intercourse with a girl who is below 18 years of age. Unfortunately, by virtue of Exception 2 to Section 375 IPC, if a girl child between 15 and 18 years of age is married, her husband can have non-consensual sexual intercourse with her, without being penalised under IPC, only because she is married to him and for no other reason. The right of such a girl child to bodily integrity and to decline to have sexual intercourse with her husband has been statutorily taken away and non-consensual sexual intercourse with her husband is not an offence under IPC.



**5.** The learned counsel for the petitioner submitted that absolutely nothing is achieved by entitling the husband of a girl child between 15 and 18 years of age to have non-consensual sexual intercourse with her. It was also submitted that whatever be the (unclear) objective sought to be achieved by this, the marital status of the girl child between 15 and 18 years of age has no rational nexus with that unclear object. Moreover, merely because a girl child between 15 and 18 years of age is married does not result in her ceasing to be a child or being mentally or physically capable of having sexual intercourse or indulging in any other sexual activity and conjugal relations. It was submitted that to this extent Exception 2 to Section 375 IPC is not only arbitrary but is also discriminatory and contrary to the beneficial intent of Article 15(3) of the Constitution which enables Parliament to make special provision for women and children. In fact, by enacting Exception 2 to Section 375 IPC in the statute book, the girl child is placed at a great disadvantage, contrary to the visionary and beneficent philosophy propounded by Article 15(3) of the Constitution.

## LAW COMMISSION OF INDIA – 84<sup>TH</sup> REPORT

**6.** The learned counsel for the petitioner drew our attention to the 84th Report of the Law Commission of India (LCI) presented on 25-4-1980 dealing with the rape of a girl child below the prescribed minimum age. The report considered the anomalies in the law relating to rape, particularly in the context of the age of consent for sexual intercourse with a girl child. The view expressed by the LCI is quite explicit and is to be found in Paras 2.18, 2.19 and 2.20 of the Report. The view is that since the Child Marriage Restraint Act, 1929 prohibits the marriage of a girl below 18 years of age, sexual intercourse with a girl child below 18 years of age should also be prohibited and IPC should reflect that position thereby making sexual intercourse with a girl child below 18 years of age an offence. ...

...

**10.** ... [T]he counter-affidavit of the Union of India refers to the National Family Health Survey-3 (of 2005) in which it is stated that 46% of women in India between the ages of 18 and 29 years were married before the age of 18 years. It is also estimated, interestingly but disturbingly, that there are about 23 million child brides in the country. As far as any remedy available to a child bride is concerned, the counter-affidavit draws attention to Section 3 of the Prohibition of Child Marriage Act, 2006 (the PCMA). Under Section 3(1) of the PCMA a child marriage is voidable at the option of any contracting party who was a child at the time of the marriage. The marriage can be declared a nullity in terms of the proviso to Section 3(1) of the PCMA through an appropriate petition filed by the child within two years of attaining majority and by approaching an appropriate court of law. It is also stated that in terms of Section 13(2)(iv) of the Hindu Marriage Act, 1955 a child bride can file a petition for a divorce on the ground that her marriage (whether consummated or not) was solemnised before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining 18 years of age. In other words a child marriage is sought to be somehow “legitimised” by the Union of India and the onus for having it declared voidable or a nullity is placed on the child bride or the child groom.

## DOCUMENTARY MATERIAL

**11.** Apart from but in addition to the legal issue, the learned counsel for the petitioner and the learned counsel for the intervener (The Child Rights Trust) relied on a large amount of documentary material to highlight several adverse challenges that a girl child might face on her physical and mental health and some of them could even have an inter-generational impact if a girl child is married below 18 years of age. The girl child could also face adverse social consequences that might impact her for the rest of her life. ...

**12.** [The Report titled ‘A Statistical Analysis of Child Marriages in India based on Census 2011’] refers to the consequences of child marriage in Chapter 5. Broadly, it is stated:

“Child marriage is not only a violation of human rights, but is also recognised as an obstacle to the development of young people. The practice of child marriage cuts short a critical stage of self-discovery and exploring one’s identity. Child marriage is an imposition of a marriage partner on children or adolescents who are in no way ready and matured, and thus, are at a loss to understand the significance of marriage. Their development gets comprised due to being deprived of freedom, opportunity for personal development, and other rights including health and well-being, education, and participation in civic life and nullifies their basic rights as envisaged in the United Nation’s Convention on the Right of the Child ratified by India in 1989. Marriage at a young age prevents both girls and boys from exercising agency in making important life decisions and securing basic freedoms, including pursuing opportunities for education, earning a sustainable livelihood and accessing sexual health and rights.

\*\*\*

*The key consequences of child marriage of girls* may include early pregnancy; maternal and neonatal mortality; child health problems; educational setbacks; lower employment/livelihood prospects; exposure to violence and abuse, including a range of controlling and inequitable behaviours, leading to inevitable negative physical and psychological consequences; and limited agency of girls to influence decisions about their lives.

Census data have demonstrated an *upswing of female deaths* in the age group of 15-19 years. This high mortality rate could be attributed to the deaths of teenage mothers. Child marriage virtually works like a double-edged sword; lower age at marriage is significantly associated with worse outcomes for the child and worse pregnancy outcomes for the mother. All these factors push girls and their families into perpetuation of intergenerational poverty and marginalisation. The impact of early marriage on girls—and to a lesser extent on boys—is wide-ranging, opines the Innocenti Digest on child marriage. Child brides often experience overlapping vulnerabilities—they are young, often poor and undereducated. This affects the resources and assets they can bring into their marital household, thus reducing their decision-making ability. Child marriage places a girl under the control of her husband and often in-laws, limiting her ability to voice her opinions and form and pursue her own plans and aspirations. While child marriage is bound to have a detrimental effect on boys who would need to shoulder the responsibility of a wife and in most cases, have to also discontinue their education, there is very little research evidence to capture the long-term economic and psychological effect on boys who are married early. The Lancet 2015 acknowledges that adolescent boys are not important and neglected part of the equation. The assumption that girls need more attention than boys is now being challenged.

Looking at the impact of early marriage from rights perspective, it can be said that the key concerns are denial of childhood and adolescence, curtailment of personal freedom, deprivation of opportunities to develop a full sense of selfhood and denial of psychosocial and emotional well-being, reproductive health and educational opportunity along with consequences described earlier.” (emphasis supplied).

13. There is a specific discussion in the Statistical Analysis on the impact of early childbirth on health in which it is stated that “girls aged 15 to 19 [years] are twice more likely than older women to die from childbirth and pregnancy, making pregnancy the leading cause of death in poor countries for these age groups. Girls from the Scheduled Castes and Scheduled Tribes were on an average 10 per cent more likely (after accounting for other variables) to give birth earlier than girls from the other castes”. It has been found that girls most likely to have had a child by 19 years (as compared with all other married and unmarried girls) were from the poorest groups; were more likely to live in rural areas; had the least educated mothers; had earlier experiences of menarche; had lower education aspirations; and were less likely to be enrolled in school between the age of 12 and 15 years. Being young and immature mothers, they have little say in decision-making about the number of children they want, nutrition, health-care, etc. Lack of self-esteem or of a sense of ownership of her own body exposes a woman to repeated unwanted pregnancies.

...

15. We are not dealing with these reports in any detail but draw attention to them since they support the view canvassed by the learned counsel. All that we need say is that a reading of these reports gives a good idea of the variety and magnitude of problems that a girl child who is married between 15 and 18 years of age could ordinarily encounter, including those caused by having sexual intercourse and child-bearing at an early age.

## IN-DEPTH STUDY ON ALL FORMS OF VIOLENCE AGAINST WOMEN

16. On 6-7-2006 the Secretary-General of the United Nations submitted a report to the General Assembly called the “*In-depth study on all forms of violence against women*”. In the chapter relating to violence against women within the family and harmful traditional practices, early marriage was one of the commonly identified forms of violence. [“*In-depth study on all forms of violence against women*”, para 111 (9-10-2006)] Similarly, early marriage was considered a harmful traditional practice [*Id*, para 118] — a thought echoed a year later in the *Study on Child Abuse: India 2007* (referred to later) by the Government of India.

**17.** An early marriage is explained as involving the marriage of a child, that is, a person below the age of 18 years. It is stated that:

“121. ... Minor girls have not achieved full maturity and capacity to act and lack ability to control their sexuality. When they marry and have children, their health can be adversely affected, their education impeded and economic autonomy restricted. Early marriage also increases the risk of HIV infection.”

Among the under-documented forms of violence against women are included traditional harmful practices, prenatal sex selection, early marriage, acid throwing and dowry or “honour” related violence, etc. [*Id*, para 222]

...

**24.** A reading of the National Policy and the National Plan of Action for Children reveals, quite astonishingly, that even though the Government of India realises the dangers of early marriages, it is merely dishing out platitudes and has not taken any concrete steps to protect the girl child from marital rape, except enacting the Protection of Children from Sexual Offences Act, 2012.

...

**26.** In our opinion, it is not necessary to detail the contents of every report or study placed before us except to say that there is a strong established link between early marriage and sexual intercourse with a married girl child between 15 and 18 years of age. There is a plethora of material to clearly indicate that sexual intercourse with a girl child below the age of 18 years (even within marriage) is not at all advisable for her for a variety of reasons, including her physical and mental well-being and her social standing—all of which should ordinarily be of paramount importance to everybody, particularly the State.

**27.** The social cost of a child marriage (and therefore of sexual intercourse with a girl child) is itself quite enormous and in the long run might not even be worth it. This is in addition to the economic cost to the country which would be obliged to take care of infants who might be malnourished and sickly; the young mother of the infant might also require medical assistance in most cases. All these costs eventually add up and apparently only for supporting a pernicious practice.

**28.** We can only express the hope that the Government of India and the State Governments intensively study and analyse these and other reports and take an informed decision on the effective implementation of the PCMA and actively prohibit child marriages which “encourage” sexual intercourse with a girl child. Welfare schemes and catchy slogans are excellent for awareness campaigns but they must be backed up by focused implementation programmes, other positive and remedial action so that the pendulum swings in favour of the girl child who can then look forward to a better future.

...

**32.** ... Section 375 IPC provides for three circumstances relating to “rape”. *Firstly*, sexual intercourse with a girl below 18 years of age is rape (statutory rape). *Secondly*, and by way of an exception, if a woman is between 15 and 18 years of age then sexual intercourse with her is not rape if the person having sexual intercourse with her is her husband. Her willingness or consent is irrelevant under this circumstance. *Thirdly*, sexual intercourse with a woman above 18 years of age is rape if it is under any of the seven descriptions given in Section 375 IPC (non-consensual sexual intercourse).

**33.** The result of the above three situations is that the husband of a girl child between 15 and 18 years of age has blanket liberty and freedom to have non-consensual sexual intercourse with his wife and he would not be punishable for rape under IPC since such non-consensual sexual intercourse is not rape for the purposes of Section 375 IPC. Very strangely, and as pointed out by Sakshi before the LCI, the husband of a girl child does not have the liberty and freedom under IPC to commit a lesser “sexual” act with his wife, as for example, if the husband of a girl child assaults her with the intention of outraging her modesty, he would be punishable under the provisions of Section 354 IPC. In other words, IPC permits a man to have non-consensual sexual intercourse with his wife if she is between 15 and 18 years of age but not to molest her. This view is surprisingly endorsed by the LCI in its 172nd Report adverted to above.

## THE PROTECTION OF HUMAN RIGHTS ACT, 1993

**34.** The Protection of Human Rights Act, 1993 defines “human rights” in Section 2(1)(d) as meaning the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in International Covenants and enforceable by courts in India. There can be no doubt that if a girl child is forced by her husband into sexual intercourse against her will or without her consent, it would amount to a violation of her human right to liberty or her dignity guaranteed by the Constitution or at least embodied in International Conventions accepted by India such as the Convention on the Rights of the Child (the CRC) and the Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW).

...

## THE PROHIBITION OF CHILD MARRIAGE ACT, 2006 (PCMA)

**37.** ... Interestingly, and notwithstanding the fact that a child marriage is only voidable, Parliament has made a child marriage an offence and has provided punishments for contracting a child marriage. For instance, Section 9 of the PCMA provides that any male adult above 18 years of age marrying a child shall be punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both. Therefore regardless of his age, a male is penalised under this section if he marries a girl child. ...

**37.** ... Parliament is not in favour of child marriages per se but is somewhat ambivalent about it. However, Parliament recognises that although a child marriage is a criminal activity, the reality of life in India is that traditional child marriages do take place and as the studies (referred to above) reveal, it is a harmful practice. Strangely, while prohibiting a child marriage and criminalising it, a child marriage has not been declared void and what is worse, sexual intercourse within a child marriage is not rape under IPC even though it is a punishable offence under the Protection of Children from Sexual Offences Act, 2012.

## THE PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 (POCSO)

...

**43.** The Preamble to the POCSO Act states that it was enacted with reference to Article 15(3) of the Constitution. The Preamble recognises that the best interest of a child should be secured, a “child” being defined under Section 2(1)(d) as any person below the age of 18 years. In fact, securing the best interest of the child is an obligation cast upon the Government of India having acceded to the *Convention on the Rights of the Child* (the CRC). The Preamble to the POCSO Act also recognises that it is imperative that the law should operate “in a manner that the best interest and well-being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child”.

Finally, the Preamble also provides that “sexual exploitation and sexual abuse of children are heinous crimes and need to be effectively addressed”. This is directly in conflict with Exception 2 to Section 375 IPC which effectively provides that the sexual exploitation or sexual abuse of a girl child is not even a crime, let alone a heinous crime—on the contrary, it is a perfectly legitimate activity if the sexual exploitation or sexual abuse of the girl child is by her husband.

**44.** Under Article 34 of the CRC, the Government of India is bound to “undertake all appropriate national, bilateral and multilateral measures to prevent the coercion of a child to engage in any unlawful sexual activity”. The key words are “unlawful sexual activity” but IPC declares that a girl child having sexual intercourse with her husband is not “unlawful sexual activity” within the provisions of IPC, regardless of any coercion. However, for the purposes of the POCSO Act, any sexual activity engaged in by any person (husband or otherwise) with a girl child is unlawful and a punishable offence. This dichotomy is certainly not in the spirit of Article 34 CRC.

**45.** Further, in terms of our international obligations under Article 1 and Article 34 of the CRC, the Government of India must undertake all appropriate measures to prevent the sexual exploitation or sexual abuse of any person below 18 years of age since such sexual exploitation or sexual abuse is a heinous crime. What has the Government of India done? It has persuaded Parliament to convert what is otherwise universally accepted as a heinous crime into a legitimate activity for the purposes of Section 375 IPC if the exploiter or abuser is the husband of the girl child. But, contrarily the rape of a married girl child (called “aggravated penetrative sexual assault” in the POCSO Act) is made an offence for the purposes of the POCSO Act.

**46.** Section 3 of the POCSO Act defines “penetrative sexual assault”. Clause (n) of Section 5 provides that if a person commits penetrative sexual assault with a child, then that person actually commits aggravated penetrative sexual assault if that person is related to the child, inter alia, through marriage. Therefore, if the husband of a girl child commits penetrative sexual assault on his wife, he actually commits aggravated penetrative sexual assault as defined in Section 5(n) of the POCSO Act which is punishable under Section 6 of the POCSO Act by a term of rigorous imprisonment of not less than ten years and which may extend to imprisonment for life and fine.

**47.** The duality therefore is that having sexual intercourse with a girl child between 15 and 18 years of age, the husband of the girl child is said to have not committed rape as defined in Section 375 IPC but is said to have committed aggravated penetrative sexual assault in terms of Section 5(n) of the POCSO Act.

**48.** There is no real or material difference between the definition of “rape” in the terms of Section 375 IPC and “penetrative sexual assault” in the terms of Section 3 of the POCSO Act. [**3. Penetrative sexual assault.**—A person is said to commit “penetrative sexual assault” if—(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or (b) he inserts, to any extent, any object

or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”“**375. Rape.**—A man is said to commit “rape” if he—(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person....”] The only difference is that the definition of rape is somewhat more elaborate and has two Exceptions but the sum and substance of the two definitions is more or less the same and the punishment [under Section 376(1) IPC] for being found guilty of committing the offence of rape is the same as for penetrative sexual assault (under Section 4 of the POCSO Act). Similarly, the punishment for “aggravated” rape under Section 376(2) IPC is the same as for aggravated penetrative sexual assault under Section 6 of the POCSO Act. Consequently, it is immaterial if a person is guilty of the same sexual activity under the provisions of the POCSO Act or the provisions of IPC—the end result is the same and only the forum of trial changes. In a violation of the provisions of the POCSO Act, a Special Court constituted under Section 28 of the said Act would be the trial court but the ordinary criminal court would be the trial court for an offence under IPC.

**49.** At this stage it is necessary to refer to Section 42-A inserted in the POCSO Act by an amendment made on 3-2-2013. This section reads:

**“42-A. Act not in derogation of any other law.**—The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency.”

The consequence of this amendment is that the provisions of the POCSO Act will override the provisions of any other law (including IPC) to the extent of any inconsistency.

**50.** One of the questions that arises for our consideration is whether there is any incongruity between Exception 2 to Section 375 IPC and Section 5(n) of the POCSO Act and which provision overrides the other. To decide this, it would be necessary to keep Section 42-A of the POCSO Act in mind as well as Sections 5 and 41 IPC which read:

**“5. Certain laws not to be affected by this Act.**—Nothing in this Act shall affect the provisions of any Act for punishing mutiny and desertion of officers, soldiers, sailors or airmen in the service of the Government of India or the provisions of any special or local law.

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**41. “Special law.”**—A “special law” is a law applicable to a particular subject.”

**51.** These two provisions are of considerable importance in resolving the controversy and conflict presented before us.

...

**53.** It is obvious from a brief survey of the various statutes referred to above that a child is a person below 18 years of age who is entitled to the protection of her human rights including the right to live with dignity; if she is unfortunately married while a child, she is protected from domestic violence, both physical and mental, as well as from physical and sexual abuse; if she is unfortunately married while a child, her marriage is in violation of the law and therefore an offence and such a marriage is voidable at her instance and the person marrying her is committing a punishable offence; the husband of the girl child would be committing aggravated penetrative sexual assault when he has sexual intercourse with her and is thereby committing a punishable offence under the POCSO Act. The only jarring note in this scheme of the pro-child legislations is to be found in Exception 2 to Section 375 IPC which provides that sexual intercourse with a girl child between 15 and 18 years of age is not rape if the sexual intercourse is between the girl child and her husband. Therefore, the question of punishing the husband simply does not arise. A girl child placed in such circumstances is a child in need of care and protection and needs to be cared for, protected and appropriately rehabilitated or restored to society. All these “child-friendly statutes” are essential for the well-being of the girl child (whether married or not) and are protected by Article 15(3) of the Constitution. These child-friendly statutes also link child marriages and sexual intercourse with a girl child and draw attention to the adverse consequences of both.

...

## RIGHT TO BODILY INTEGRITY AND REPRODUCTIVE CHOICE

**61.** The right to bodily integrity and the reproductive choice of any woman has been the subject of discussion in quite a few decisions of this Court. The discussion has been wide-ranging and several facets of these concepts have been considered from time to time. The right to bodily integrity was initially recognised in the context of privacy in *State of Maharashtra v. Madhukar Narayan Mardikar* [*State of Maharashtra v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57 : 1991 SCC (Cri) 1] wherein it was observed that no one has any right to violate the person of anyone else, including of an “unchaste” woman.

...

**62.** In *Suchita Srivastava v. UT of Chandigarh* [*Suchita Srivastava v. UT of Chandigarh*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] the right to make a reproductive choice was equated with personal liberty under Article 21 of the Constitution, privacy, dignity and bodily integrity. It includes the right to abstain from procreating. In para 22 of the Report it was held: (SCC p. 15)

“22. There is no doubt that a woman's right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution of India. *It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods.* Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a “compelling State interest” in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.” (emphasis supplied)

...

**65.** Finally, in *Devika Biswas v. Union of India* [*Devika Biswas v. Union of India*, (2016) 10 SCC 726] it was observed that: (SCC p. 754, para 110)

“110. Over time, there has been recognition of the need to respect and protect the reproductive rights and reproductive health of a person.”

This is all the more so in the case of a girl child who has little or no say in reproduction after an early marriage. As observed in *Suchita Srivastava* [*Suchita Srivastava v. UT of Chandigarh*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] : (SCC p. 18, para 37)

“37. ... the “best interests” test requires the Court to ascertain the course of action which would serve the best interests of the person in question.”

**66.** The discussion on the bodily integrity of a girl child and the reproductive choices available to her is important only to highlight that she cannot be treated as a commodity having no say over her body or someone who has no right to deny sexual intercourse to her husband. The human rights of a girl child are very much alive and kicking whether she is married or not and deserve recognition and acceptance.

## RAPE OR PENETRATIVE SEXUAL ASSAULT

**67.** Whether sexual intercourse that a husband has with his wife who is between 15 and 18 years of age is described as rape (not an offence under Exception 2 to Section 375 IPC) or aggravated penetrative sexual assault [an offence under Section 5(n) of the POCSO Act and punishable under Section 6 of the POCSO Act] the fact is that it is rape as conventionally understood, though Parliament in its wisdom has chosen to not recognise it as rape for the purposes of IPC. That it is a heinous crime which also violates the bodily integrity of a girl child, causes trauma and sometimes destroys her freedom of reproductive choice is a composite issue that needs serious consideration and deliberation.

...

**72.** ... An anomalous state of affairs exists on a combined reading of IPC and the POCSO Act. An unmarried girl below 18 years of age could be a victim of rape under IPC and a victim of penetrative sexual assault under the POCSO Act. Such a victim might have the solace (if we may say so) of prosecuting the rapist. A married girl between 15 and 18 years of age could be a victim of aggravated penetrative sexual assault under the POCSO Act, but she cannot be a victim of rape under IPC if the rapist is her husband since IPC does not recognise such penetrative sexual assault as rape. Therefore such a girl child has no recourse to law under the provisions of IPC notwithstanding that the marital rape could degrade and humiliate her, destroy her entire psychology pushing her into a deep emotional crisis and dwarf and destroy her whole personality and degrade her very soul. However, such a victim could prosecute the rapist under the POCSO Act. We see no rationale for such an artificial distinction.

...

## HARMONISING IPC, THE POCSO ACT, THE JJ ACT AND THE PCMA

**76.** There is an apparent conflict or incongruity between the provisions of IPC and the POCSO Act. The rape of a married girl child (a girl child between 15 and 18 years of age) is not rape under IPC and therefore not an offence in view of Exception 2 to Section 375 IPC thereof but it is an offence of aggravated penetrative sexual assault under Section 5(n) of the POCSO Act and punishable under Section 6 of that Act. This conflict or incongruity needs to be resolved in the best interest of the girl child and the provisions of various complementary statutes need to be harmonised and read purposively to present an articulate whole.

**77.** The most obvious and appropriate resolution of the conflict has been provided by the State of Karnataka—the State Legislature has inserted sub-section (1-A) in Section 3 of the PCMA (on obtaining the assent of the President on 20-4-2017) declaring that henceforth every child marriage that is solemnised is void ab initio. Therefore, the husband of a girl child would be liable for punishment for a child marriage under the PCMA, for penetrative sexual assault or aggravated penetrative sexual assault under the POCSO Act and if the husband and the girl child are living together in the same or shared household for rape under IPC. The relevant extract of the Karnataka Amendment reads as follows:

**“3. (1-A)** Notwithstanding anything contained in sub-section (1) [of Section 3 of the PCMA] every child marriage solemnised on or after the date of coming into force of the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 shall be void ab initio.”

**78.** It would be wise for all the State Legislatures to adopt the route taken by Karnataka to void child marriages and thereby ensure that sexual intercourse between a girl child and her husband is a punishable offence under the POCSO Act and IPC. Assuming all other State Legislatures do not take the Karnataka route, what is the correct position in law?

**79.** There is no doubt that pro-child statutes are intended to and do consider the best interest of the child. These statutes have been enacted in the recent past though not effectively implemented. Given this situation, we are of opinion that a few facts need to be acknowledged and accepted:

**79.1.** *Firstly*, a child is and remains a child regardless of the description or nomenclature given to the child. It is universally accepted in almost all relevant statutes in our country that a child is a person below 18 years of age. Therefore, a child remains a child whether she is described as a street child or a surrendered child or an abandoned child or an adopted child. Similarly, a child remains a child whether she is a married child or an unmarried child or a divorced child or a separated child or a widowed child. At this stage we are reminded of Shakespeare's eternal view that a rose by any other name would smell as sweet—so also with the status of a child, despite any prefix.

**79.2.** *Secondly*, the age of consent for sexual intercourse is definitively 18 years and there is no dispute about this. Therefore, under no circumstance can a child below 18 years of age give consent, express or implied, for sexual intercourse. The age of consent has not been specifically reduced by any statute and unless there is such a specific reduction, we must proceed on the basis that the age of consent and willingness to sexual intercourse remains at 18 years of age.

**79.3.** *Thirdly*, Exception 2 to Section 375 IPC creates an artificial distinction between a married girl child and an unmarried girl child with no real rationale and thereby does away with consent for sexual intercourse by a husband with his wife who is a girl child between 15 and 18 years of age. Such an unnecessary and artificial distinction if accepted can again be introduced for other occasions for divorced children or separated children or widowed children.

**80.** What is sought to be achieved by this artificial distinction is not at all clear except perhaps to acknowledge that child marriages are taking place in the country. Such child marriages certainly cannot be in the best interest of the girl child. That the solemnisation of a child marriage violates the provisions of the PCMA is well known. Therefore, it is for the State to effectively implement and enforce the law rather than dilute it by creating artificial distinctions. Can it not be said, in a sense, that through the artificial distinction, Exception 2 to Section 375 IPC encourages violation of the PCMA? Perhaps “yes” and looked at from another point of view, perhaps “no” for it cannot reasonably be argued that one statute (IPC) condones an offence under another statute (the PCMA). Therefore the basic question remains—what exactly is the artificial distinction intended to achieve?

### JUSTIFICATION GIVEN BY THE UNION OF INDIA

**81.** The only justification for this artificial distinction has been culled out by the learned counsel for the petitioner from the counter-affidavit filed by the Union of India. This is given in the written submissions filed by the learned counsel for the petitioner and the justification (not verbatim) reads as follows:

(i) Economic and educational development in the country is still uneven and child marriages are still taking place. It has been, therefore, decided to retain the age of 15 years under Exception 2 of Section 375 IPC so as to give protection to husband and wife against criminalising the sexual activity between them.

(ii) As per National Family Health Survey-III, 46% of women between the ages 18-29 years in India were married before the age of 18. It is also estimated that there are 23 million child brides in the country. Hence, criminalising the consummation of a marriage union with a serious offence such as rape would not be appropriate and practical.

(iii) Providing punishment for child marriage with consent does not appear to be appropriate in view of socio-economic conditions of the country. Thus, the age prescribed in Exception 2 of Section 375 IPC has been retained considering the basic facts of the still evolving social norms and issues.

(iv) The Law Commission also recommended for raising the age from 15 years to 16 years and it was incorporated in the Criminal Law (Amendment) Ordinance, 2013. However, after wide ranging consultations with various stakeholders it was further decided to retain the age at 15 years.

(v) Exception 2 of Section 375 IPC envisages that if the marriage is solemnised at the age of 15 years due to traditions, it should not be a reason to book the husband in the case of offence of rape under IPC.

(vi) It is also necessary that the provisions of law should be in such a manner that it cannot affect a particular class of society. Retaining the age of 15 years in Exception 2 of Section 375 IPC has been provided considering the social realities of the nation.

**82.** The above justifications given by the Union of India are really explanations for inserting Exception 2 in Section 375 IPC. Besides, they completely sidetrack the issue and overlook the provisions of the PCMA, the provisions of the JJ Act as well as the provisions of the POCSO Act. Surely, the Union of India cannot be oblivious to the existence of the trauma faced by a girl child who is married between 15 and 18 years of age or to the three pro-child statutes and other human rights obligations. That these facts and statutes have been overlooked confirms that the distinction is artificial and makes Exception 2 to Section 375 IPC all the more arbitrary and discriminatory.

**83.** During the course of oral submissions, three further but more substantive justifications were given by the learned counsel for the Union of India for making this distinction. The *first* justification is that by virtue of getting married, the girl child has consented to sexual intercourse with her husband either expressly or by necessary implication. The *second* justification is that traditionally child marriages have been performed in different parts of the country and therefore such traditions must be respected and not destroyed. The *third* justification is that Para 5.9.1 of the 167th Report of the Parliamentary Standing Committee of the Rajya Sabha (presented in March 2013) records that several Members felt that marital rape has the potential of destroying the institution of marriage.

**84.** In law, it is difficult to accept any one of these justifications. There is no question of a girl child giving express or implied consent for sexual intercourse. The age of consent is statutorily and definitively fixed at 18 years and there is no law that provides for any specific deviation from this. Therefore unless Parliament gives any specific indication (and it has not given any such indication) that the age of consent could be deviated from for any rational reason, we cannot assume that a girl child who is otherwise incapable of giving consent for sexual intercourse has nevertheless given such consent by implication, necessary or otherwise only by virtue of being married. It would be reading too much into the mind of the girl child and assuming a state of affairs for which there is neither any specific indication nor any warrant. It



must be remembered that those days are long gone when a married woman or a married girl child could be treated as subordinate to her husband or at his beck and call or as his property. Constitutionally a female has equal rights as a male and no statute should be interpreted or understood to derogate from this position. If there is some theory that propounds such an unconstitutional myth, then that theory deserves to be completely demolished.

**85.** Merely because child marriages have been performed in different parts of the country as a part of a tradition or custom does not necessarily mean that the tradition is an acceptable one nor should it be sanctified as such. Times change and what was acceptable a few decades ago may not necessarily be acceptable today. ...

...

**89.** We have adverted to the wealth of documentary material which goes to show that an early marriage and sexual intercourse at an early age could have detrimental effects on the girl child not only in terms of her physical and mental health but also in terms of her nutrition, her education, her employability and her general well-being. To make matters worse, the detrimental impact could pass on to the children of the girl child who may be malnourished and may be required to live in an impoverished state due to a variety of factors. An early marriage therefore could have an intergenerational adverse impact. In effect therefore the practice of early marriage or child marriage even if sanctified by tradition and custom may yet be an undesirable practice today with increasing awareness and knowledge of its detrimental effects and the detrimental effects of an early pregnancy. Should this traditional practice still continue? We do not think so and the sooner it is given up, it would be in the best interest of the girl child and for society as a whole.

**90.** We must not and cannot forget the existence of Article 21 of the Constitution which gives a fundamental right to a girl child to live a life of dignity. The documentary material placed before us clearly suggests that an early marriage takes away the self-esteem and confidence of a girl child and subjects her, in a sense, to sexual abuse. Under no circumstances can it be said that such a girl child lives a life of dignity. The right of a girl child to maintain her bodily integrity is effectively destroyed by a traditional practice sanctified by IPC. Her husband, for the purposes of Section 375 IPC, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such an activity would not be rape. Anomalously, although her husband can rape her but he cannot molest her for if he does so he could be punished under the provisions of IPC. This was recognised by LCI in its 172nd Report but was not commented upon. It appears therefore that different and irrational standards have been laid down for the treatment of the girl child by her husband and it is necessary to harmonise the provisions of various statutes and also harmonise different provisions of IPC inter se.

**91.** We have also adverted to the issue of reproductive choices that are severely curtailed as far as a married girl child is concerned. There is every possibility that being subjected to sexual intercourse, the girl child might become pregnant and would have to deliver a baby even though her body is not quite ready for procreation. The documentary material shown to us indicates that there are greater chances of a girl child dying during childbirth and there are greater chances of neonatal deaths. The results adverted to in the material also suggest that children born from early marriages are more likely to be malnourished. In the face of this material, would it be wise to continue with a practice, traditional though it might be, that puts the life of a girl child in danger and also puts the life of the baby of a girl child born from an early marriage at stake? Apart from constitutional and statutory provisions, constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 IPC that sanctifies a tradition or custom that is no longer sustainable.

...

**94.** Assuming some objective is sought to be achieved by the artificial distinction, the further question is: what is the rational nexus between decriminalising sexual intercourse under IPC with a married girl child and an unclear and uncertain statutory objective? There is no intelligible answer to this question particularly since sexual intercourse with a married girl child is a criminal offence of aggravated penetrative sexual assault under the POCSO Act. Therefore, while the husband of a married girl child might not have committed rape for the purposes of IPC but he would nevertheless have committed aggravated penetrative sexual assault for the purposes of the POCSO Act. The punishment for rape (assuming it is committed) and the punishment for penetrative sexual assault is the same, namely, imprisonment for a minimum period of 7 years which may extend to imprisonment for life. Similarly, for an "aggravated" form of rape the punishment is for a minimum period of 10 years' imprisonment which may extend to imprisonment for life (under IPC) and the punishment for aggravated penetrative sexual assault (which is what is applicable in the case of a married girl child) is the same (under the POCSO Act). In other words, the artificial distinction merely takes the husband of the girl child out of the clutches of IPC while retaining him within the clutches of the POCSO Act. We are unable to understand why this is so and no valid justification or explanation is forthcoming from the Union of India.

## APPLICATION OF SPECIAL LAWS

**95.** Whatever be the explanation, given the context and purpose of their enactment, primacy must be given to pro-child statutes over IPC as provided for in Sections 5 and 41 IPC. There are several reasons for this including the absence of any rationale in creating an artificial distinction, in relation to sexual offences, between a married girl child and an unmarried girl child. Statutes concerning the rights of children are special laws concerning a special subject of legislation and therefore the provisions of such subject-specific legislations must prevail and take precedence over the provisions of a general law such as IPC. It must also be remembered that the provisions of the JJ Act as well as the provisions of the POCSO Act are traceable to Article 15(3) of the Constitution which enables Parliament to make special provisions for the benefit of children. We have already adverted to some decisions relating to the interpretation of Article 15(3) of the Constitution in a manner that is affirmative, in favour of children and for children and we have also adverted to the discussion in the Constituent Assembly in this regard. There can therefore be no other opinion regarding the pro-child slant of the JJ Act as well as the POCSO Act.

...

### (i) *The JJ Act*

**97.** A cursory reading of the JJ Act gives a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years of age is a child in need of care and protection [Section 2(14)(xi) of the JJ Act]. In our opinion, it cannot be said with any degree of rationality that such a girl child loses her status as a child in need of care and protection soon after she gets married. The JJ Act provides that efforts must be made to ensure the care, protection, appropriate rehabilitation or restoration of a girl child who is at imminent risk of marriage and therefore a child in need of care and protection. If this provision is ignored or given a go by, it would put the girl child in a worse off situation because after marriage she could be subjected to aggravated penetrative sexual assault for which she might not be physically, mentally or psychologically ready. The intention of the JJ Act is to benefit a child rather than place her in difficult circumstances. A contrary view would not only destroy the purpose and spirit of the JJ Act but would also take away the importance of Article 15(3) of the Constitution. Surely, such an interpretation and understanding cannot be given to the provisions of the JJ Act.

### (ii) *The POCSO Act*

**98.** Similarly, the provisions of the POCSO Act make it quite explicit that the dignity and rights of a child below 18 years of age must be recognised and respected. For this purpose, special provisions have been made in the POCSO Act as for example Section 28 thereof which provides for the establishment of a Special Court to try offences under the Act. Section 29 of the POCSO Act provides that where a person is prosecuted for committing or abetting or attempting to commit an offence under Section 3 (penetrative sexual assault) or under Section 5 (aggravated penetrative sexual assault) then the Special Court shall presume that such a person has committed or abetted or attempted to commit the offence unless the contrary is proved. Similarly, the procedure and powers of a Special Court have been delineated in Section 33 of the POCSO Act and this section provides for not only a child-friendly atmosphere in the Special Court but also child-friendly procedures, some of which are given in subsequent sections of the statute. Once again the legislative slant is in favour of a child thereby giving substantive meaning to Article 15(3) of the Constitution.

**99.** However, of much greater importance and significance is Section 42-A of the POCSO Act. This section provides that the provisions of the POCSO Act are in addition to and not in derogation of the provisions of any other law in force which includes IPC. Moreover, the section provides that in the event of any inconsistency between the provisions of the POCSO Act and any other law, the provisions of the POCSO Act shall have overriding effect. It follows from this that even though IPC decriminalises the marital rape of a girl child, the husband of the girl child would nevertheless be liable for punishment under the provisions of the POCSO Act for aggravated penetrative sexual assault.

**100.** Prima facie it might appear that since rape is an offence under IPC (subject to Exception 2 to Section 375) while penetrative sexual assault or aggravated penetrative sexual assault is an offence under the POCSO Act and both are distinct and separate statutes, therefore there is no inconsistency between the provisions of IPC and the provisions of the POCSO Act. However the fact is that there is no real distinction between the definition of “rape” under IPC and the definition of “penetrative sexual assault” under the POCSO Act. There is also no real distinction between the rape of a married girl child and aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act. Additionally, the punishment for the respective offences is the same, except that the marital rape of a girl child between 15 and 18 years of age is not rape in view of Exception 2 to Section 375 IPC. In sum, marital rape of a girl child is effectively nothing

but aggravated penetrative sexual assault and there is no reason why it should not be punishable under the provisions of IPC. Therefore, it does appear that only a notional or linguistic distinction is sought to be made between rape and penetrative sexual assault and rape of a married girl child and aggravated penetrative sexual assault. There is no rationale for this distinction and it is nothing but a completely arbitrary and discriminatory distinction.

...

## CONCLUSION

**107.** On a complete assessment of the law and the documentary material, it appears that there are really five options before us: (i) To let the incongruity remain as it is — this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 IPC — in the present case this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years — this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 IPC — this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes; (v) To read Exception 2 to Section 375 IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, we are of opinion that this is the only pragmatic option available. Therefore, we are left with absolutely no other option but to harmonise the system of laws relating to children and require Exception 2 to Section 375 IPC to now be meaningfully read as: “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.” It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the Framers of our Constitution can be preserved and protected and perhaps given impetus.

**108.** We make it clear that we have not at all dealt with the larger issue of marital rape of adult women since that issue was not raised before us by the petitioner or the intervener.

**Gupta, J. (concurring):** “...

**181.** When a girl is compelled to marry before she attains the age of 18 years, her health is put in serious jeopardy. As is evident from various reports referred to above, girls who were married before the age of 19 years are likely to suffer medical and psychological problems. A 15 or 16-year-old girl, when forcibly subjected to sexual intercourse by her “husband”, undergoes a trauma, which her body and mind is not ready to face. The girl child is also twice as more likely to die in childbirth than a grown up woman. The least, that one would expect in such a situation, is that the State would not take the defence of tradition and sanctity of marriage in respect of girl child, which would be totally violative of Articles 14, 15 and 21 of the Constitution. Therefore, this Court is of the view that Exception 2 to Section 375 IPC is arbitrary since it is violative of the principles enshrined in Articles 14, 15 and 21 of the Constitution of India.

...

**183.** Law cannot be hidebound and static. It has to evolve and change with the needs of the society. Recognising these factors, Parliament increased the minimum age for marriage. Parliament also increased the minimum age of consent but the inaction in raising the age in Exception 2 is by itself an arbitrary non-exercise of power. When the age was being raised in all other laws, the age under Exception 2 should also have been raised to bring it in line with the evolving laws especially the laws to protect women and the girl child aged below 18 years. Therefore, I have no hesitation in holding that Exception 2, insofar as it relates to the girl child below eighteen years, is unreasonable, unjust, unfair and violative of the rights of the girl child. To that extent the same is arbitrary and liable to be set aside.

## WHETHER EXCEPTION 2 TO SECTION 375 IPC IS DISCRIMINATORY?

**184.** There can be no dispute that a law can be set aside if it is discriminatory. Some elements of discrimination have already been dealt with while dealing with the issue of arbitrariness. However, there are certain other aspects which make Exception 2 to Section 375 IPC insofar as it deals with the girl child totally discriminatory. The law discriminates between a girl child aged less than 18 years, who may be educated and has sexual intercourse with her consent and a girl child who may be married even before the age of 15 years, but her marriage has been consummated after 15 years even against her consent. This is invidious discrimination which is writ large. The discrimination is between a consenting girl child, who is almost an adult and non-consenting child bride. To give an example, if a girl aged 15 years is married off by her parents without her consent and the marriage is consummated against her consent, then also this girl child

cannot file a criminal case against her husband. The State is talking of the reality of the child marriages. What about the reality of the rights of the girl child? Can this helpless, underprivileged girl be deprived of her rights to say “yes” or “no” to marriage? Can she be deprived of her right to say “yes” or “no” to having sex with her husband, even if she has consented for the marriage? In my view, there is only one answer to this and the answer must be a resounding “no”. While interpreting such a law the interpretation which must be preferred is the one which protects the human rights of the child, which protects the fundamental rights of the child, the one which ensures the good health of the child and not the one which tries to say that though the practice is “evil” but since it is going on for a long time, such “criminal” acts should be decriminalised.

**185.** The State is entitled and empowered to fix the age of consent. The State can make reasonable classification but while making any classification it must show that the classification has been made with the object of achieving a certain end. The classification must have a reasonable nexus with the object sought to be achieved. In this case the justification given by the State is only that it does not want to punish those who consummate their marriage. The stand of the State is that keeping in view the sanctity attached to the institution of marriage, it has decided to make a provision in the nature of Exception 2 to Section 375 IPC. This begs the question as to why in this Exception the age has been fixed as 15 years and not 18 years. As pointed out earlier, a girl can legally consent to have sex only after she attains the age of 18 years. She can legally enter into marriage only after attaining the age of 18 years. When a girl gets married below the age of 18 years, the persons who contract such a marriage or abet in contracting such child marriage, commit a criminal offence and are liable for punishment under the PCMA. In view of this position there is no rationale for fixing the age at 15 years. This age has no nexus with the object sought to be achieved viz. maintaining the sanctity of marriage because by law such a marriage is not legal. It may be true that this marriage is voidable and not void ab initio (except in the State of Karnataka) but the fact remains that if the girl has got married before the age of 18 years, she has the right to get her marriage annulled. Irrespective of the fact that the right of the girl child to get her marriage annulled, it is indisputable that a criminal offence has been committed and other than the girl child, all other persons including her husband, and those persons who were involved in getting her married are guilty of having committed a criminal act. In my opinion, when the State on the one hand, has, by legislation, laid down that abetting child marriage is a criminal offence, it cannot, on the other hand defend this classification of girls below 18 years on the ground of sanctity of marriage because such classification has no nexus with the object sought to be achieved. Therefore, also Exception 2 insofar as it relates to girls below 18 years is discriminatory and violative of Article 14 of the Constitution.

**186.** One more ground for holding that Exception 2 to Section 375 IPC is discriminatory is that this is the only provision in various penal laws which gives immunity to the husband. The husband is not immune from prosecution as far as other offences are concerned. Therefore, if the husband beats a girl child and has forcible sexual intercourse with her, he may be charged for the offences under Sections 323, 324, 325 IPC, etc. but he cannot be charged with rape. This leads to an anomalous and astounding situation where the husband can be charged with lesser offences, but not with the more serious offence of rape. As far as sexual crimes against women are concerned, these are covered by Sections 354, 354-A, 354-B, 354-C, 354-D IPC. These relate to assault or use of criminal force against a woman with intent to outrage her modesty; sexual harassment and punishment for sexual harassment; assault or use of criminal force to woman with intent to disrobe; voyeurism; and stalking respectively. There is no exception clause giving immunity to the husband for such offences. The Domestic Violence Act will also apply in such cases and the husband does not get immunity. There are many other offences where the husband is either specifically liable or may be one of the accused. The husband is not given the immunity in any other penal provision except in Exception 2 to Section 375 IPC. It does not stand to reason that only for the offence of rape the husband should be granted such an immunity especially where the “victim wife” is aged below 18 years i.e. below the legal age of marriage and is also not legally capable of giving consent to have sexual intercourse. Exception 2 to Section 375 IPC is, therefore, discriminatory and violative of Article 14 of the Constitution of India, on this count also.

**187.** The discrimination is absolutely patent and, therefore, in my view, Exception 2, insofar as it relates to the girl child between 15 to 18 years is not only arbitrary but also discriminatory, against the girl child.

...

## IN THE SUPREME COURT OF INDIA

**Dr. Sr. Tessy Jose v. State of Kerala**

**2018 SCC OnLine SC 957**

**A.K. Sikri and Ashok Bhushan, JJ.**

***Two doctors, a gynaecologist and a paediatrician, along with a hospital administrator were prosecuted under the POCSO Act for not reporting a case to the police as required under the Act. A girl was brought to the hospital when she was in labour and gave birth under the care of a gynaecologist in the hospital. The paediatrician had attended to the newborn child, once it was delivered. Since the age of the girl (mother) was recorded as 18 at the time of admission, the prosecution argued that the doctors and the hospital administrator should have known that the girl was under 18 when she conceived. Consequently, they should have reported the case to the police, since an offence under the POCSO Act had been constituted. The accused persons approached the Supreme Court seeking quashing of the case registered against them.***

Sikri, J.: “...

3. First Information Report under the provisions of Protection of Children from Sexual Offences Act, 2012 (For short, POCSO Act) has been registered in which charge sheet has been filed and the case registered...is pending before the Special Judge, Ernakulam. The appellants herein are arrayed as accused nos. 3, 4 and 5. Insofar as the appellants are concerned, allegations against them are under Sections 201 read with Section 34 of the Indian Penal Code (for short, ‘IPC’), Section 19(1) read with Section 21(1) of POCSO Act and Section 75 of the Juvenile Justice Act.

4. The case of the prosecution, in brief, is that accused no. 1 had raped the victim when she was a minor in the year 2016. As a result, she became pregnant. As per victim's mother, when the victim started complaining about pain in her stomach, thinking it to be some problem related to stomach, she brought her to the hospital where the appellants were working, on 7<sup>th</sup> February, 2017. It was found that the victim was in advance stage of pregnancy. In fact, soon after she was brought to the hospital, she went into labour. She delivered the child. Insofar as the appellants are concerned, their role is that they attended to the victim. Appellant no. 1 is a 66 years' old lady who is a Gynecologist and had conducted the delivery. Appellant no. 2 is a Paediatrician who had attended to the baby of the victim after the delivery. Appellant no. 3, is a 69 years' old Hospital Administrative. She is roped-in in that capacity though she did not attend to the victim or the baby.

5. It is not the case of the prosecution that these appellants had any knowledge about the alleged rape of the victim allegedly committed by accused No. 1 at any time earlier. In fact, they did not come into picture before 7<sup>th</sup> February, 2017 when the victim was brought to the hospital. However, the charge against these appellants is primarily on account of purported commission of an act under Sections 19(1) of POCSO Act. This Section reads as under:

“Section 19(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to—

- (a) the Special Juvenile Police Unit; or
- (b) the local police.

...

6. As is clear from the aforesaid provision, a person who had an apprehension that an offence under the said Act is likely to be committed or has knowledge that such an offence had been committed would be required to provide such information to the relevant authorities.

7. Thus, what is alleged against the appellants is that they had the knowledge that an offence under the Act had been committed and, therefore, they were required to provide this information to the relevant authorities which they failed to do.

8. After going through the record and hearing the counsel for the parties, we are of the opinion that no such case is made out even as per the material collected by the prosecution and filed in the Court. The statement of the mother of the victim was recorded by the police. The statement of the victim was also recorded. They have not stated at all that when the victim was brought to the hospital, her mother informed the appellants that she had been raped by the accused no. 1 when she

was a minor. Admittedly, the victim was pregnant and immediately went into labour. In these circumstances, it was even the professional duty of Appellant No. 1 to attend to her and conduct the delivery, which she did. Likewise, after the baby was born, the Appellant No. 2 as a Paediatrician performed her professional duty.

**9.** The entire case set up against the appellants is on the basis that when the victim was brought to the hospital her age was recorded as 18 years. On that basis appellants could have gathered that at the time of conception she was less than 18 years and was, thus, a minor and, therefore, the appellants should have taken due care in finding as to how the victim became pregnant. Fastening the criminal liability on the basis of the aforesaid allegation is too far fetched. The provisions of Section 19(1), reproduced above, put a legal obligation on a person to inform the relevant authorities, inter alia, when he/she has knowledge that an offence under the Act had been committed. The expression used is “knowledge” which means that some information received by such a person gives him/her knowledge about the commission of the crime. There is no obligation on this person to investigate and gather knowledge. If at all, the appellants were not careful enough to find the cause of pregnancy as the victim was only 18 years of age at the time of delivery. But that would not be translated into criminality.

**10.** The term “knowledge” has been interpreted by this Court in *AS Krishnan v. State of Kerala*<sup>1</sup> to mean an awareness on the part of the person concerned indicating his state of mind. Further, a person can be supposed to know only where there is a direct appeal to his senses. We have gone through the medical records of the victim which were referred by Mr. Basant R., Senior Advocate for the appellants. The medical records, which are relied upon by the prosecution, only show that the victim was admitted in the hospital at 9.15 am and she immediately went into labour and at 9.25 am she gave birth to a baby. Therefore, appellant no. 1 attended to the victim for the first time between 9.15 am and 9.25 am on 7<sup>th</sup> February, 2017. The medical records of the victim state that she was 18 years' old as on 7<sup>th</sup> February, 2017. Appellant no. 1 did not know that the victim was a minor when she had sexual intercourse.

**11.** Appellant no. 2 had not even examined the victim and was not in contact with the victim. As per the medical records relied upon by the prosecution, the baby was attended to by appellant no. 2 at 5.30 pm on 7<sup>th</sup> February, 2017. He advised that the baby be given to the mother. Therefore, appellant no. 2 had no occasion to examine/treat the victim.

**12.** Appellant no. 3 had not come in contact with the victim or the baby at all. Being the administrator of the hospital it was not possible for her to be aware of the details of each patient. Considering that the victim was brought to the said hospital for the first time on 7<sup>th</sup> February, 2017, it would not be possible for appellant no. 3 to be aware of the circumstances surrounding the admission of the victim.

**13.** The knowledge requirement foisted on the appellants cannot be that they ought to have deduced from circumstances that an offence has been committed.

**14.** Accordingly, we are of the view that there is no evidence to implicate the appellants. Evidence should be such which should at least indicate grave suspicion. Mere likelihood of suspicion cannot be the reason to charge a person for an offence. Accordingly, these appeals are allowed and the proceedings against the appellants in the aforesaid Sessions Case...are hereby quashed.”

## IN THE HIGH COURT OF MADRAS

**Sabari @ Sabarinathan v. The Inspector of Police, Belukurichi Police Station & Ors.**  
**Criminal Appeal No. 490/ 2018, decided on April 26, 2019**  
**V. Parthiban, J.**

***The appellant in this case had been convicted by a Sessions Court for the offences punishable under Section 6 of the POCSO Act (penetrative sexual assault), and Section 363 of the IPC (kidnapping from lawful guardian). He had been sentenced to rigorous imprisonment for ten years under Section 6 of the POCSO Act. The victim did not support the prosecution's case at the trial. Moreover, multiple witnesses had also turned hostile. The High Court acquitted the appellant of the charges. It then made certain observations relating to criminalisation of consensual sexual activity by adolescents.***

Parthiban, J.: “...

21. When this case was taken up for hearing, this Court became concerned about the growing incidence of offences under the POCSO Act on one side and also the Rigorous Imprisonment envisaged in the Act. Sometimes it happens that such offences are slapped against teenagers, who fall victim of the application of the POCSO Act at a young age without understanding the implication of the severity of the enactment.

...

26. [T]his Court is of the view that as per the 3rd respondent's report, majority of cases are due to relationship between adolescent boys and girls. Though under Section 2(d) of the Act, “Child” is defined as a person below the age of 18 years and in case of any love affair between a girl and a boy, where the girl happened to be 16 or 17 years old, either in the school final or entering the college, the relationship invariably assumes the penal character by subjecting the boy to the rigours of POCSO Act. Once the age of the girl is established in such relationship as below 18 years, the boy involved in the relationship is sure to be sentenced 7 years or 10 years as minimum imprisonment, as the case may be.

27. When the girl below 18 years is involved in a relationship with the teen age boy or little over the teen age, it is always a question mark as to how such relationship could be defined, though such relationship would be the result of mutual innocence and biological attraction. Such relationship cannot be construed as an unnatural one or alien to between relationship of opposite sexes. But in such cases where the age of the girl is below 18 years, even though she was capable of giving consent for relationship, being mentally matured, unfortunately, the provisions of the POCSO Act get attracted if such relationship transcends beyond platonic limits, attracting strong arm of law sanctioned by the provisions of POCSO Act, catching up with the so called offender of sexual assault, warranting a severe imprisonment of 7/10 years.

28. Therefore, on a profound consideration of the ground realities, the definition of “Child” under Section 2(d) of the POCSO Act can be redefined as 16 instead of 18. Any consensual sex after the age of 16 or bodily contact or allied acts can be excluded from the rigorous provisions of the POCSO Act and such sexual assault, if it is so defined can be tried under more liberal provision, which can be introduced in the Act itself and in order to distinguish the cases of teen age relationship after 16 years, from the cases of sexual assault on children below 16 years. The Act can be amended to the effect that the age of the offender ought not to be more than five years or so than the consensual victim girl of 16 years or more. So that the impressionable age of the victim girl cannot be taken advantage of by a person who is much older and crossed the age of presumable infatuation or innocence.

29. In this regard, the respondents 3 to 5 are directed to place the decision before the competent authority and initiate appropriate steps to explore whether the suggestions made by this Court are acceptable to all stakeholders. The respondents are directed therefore to take the issue forward as they deem fit, as expeditiously as possible.

...”

## Endnotes

- 1 Subsequent to the enactment of the POCSO Act, the Criminal Law (Amendment) Act, 2013, amended Section 375 of the Indian Penal Code (IPC) (which defines rape) and increased the age at which a person can consent to sexual activity from 16 years to 18 years, bringing the IPC in line with POCSO Act. Consequently, both the IPC and POCSO Act, criminalize all sexual activity for children under the age of 18.
- 2 Section 19, POCSO Act. Section 21, POCSO Act provides the punishment for violation of Section 19.
- 3 Note: Cases relating to access to medical termination of pregnancy for adolescents are discussed in Chapter 5, "Medical Termination of Pregnancy".
- 4 Section 376(3), IPC.
- 5 Criminal Appeal No. 490/2018, decided on Apr. 26, 2019 (High Court of Madras)
- 6 Report of the Justice Verma Committee on Amendments to the Criminal Law (2013), p. 444.
- 7 (2017) 10 SCC 800.
- 8 Note that the POCSO Act does not have a similar express provision.
- 9 (2013) 5 SCC 546.
- 10 The case involved an incident that had occurred prior to 2012, when the POCSO Act was enacted, and came into force. Hence, there was no prosecution under POCSO in this case. The Supreme Court notes the enactment of the POCSO Act and discusses its provisions.
- 11 Writ Petition (Criminal) No. 8/2016, decided on May 12, 2016 (High Court of Chhattisgarh)
- 12 2018 SCC OnLine 257.
- 13 U.N. Office of the High Commissioner for Human Rights, "Status of Ratification Interactive Dashboard—India," <http://indicators.ohchr.org/>.
- 14 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained in U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001), Arts. 3-4.*
- 15 Vishaka v. State of Rajasthan, AIR 1997 SC 3011.





# CHAPTER SEVEN

# DISABILITY AND REPRODUCTIVE RIGHTS

The reproductive rights of women with disabilities have been adjudicated by courts on various occasions, especially over the last decade. Parliament enacted the Rights of Persons with Disabilities Act, 2016 (RPD Act), which guarantees various rights to persons with disabilities,<sup>1</sup> including in relation to their reproductive autonomy.<sup>2</sup> Section 3(4)(b) of the Medical Termination of Pregnancy Act, 1971 (MTP Act), mandates that no pregnancy shall be terminated without the consent of the pregnant woman. This is further reiterated, in the context of women with disabilities, by the RPD Act. Section 92(f) of the RPD Act criminalizes performing, conducting, or directing a medical procedure on a woman with disability which leads to or is likely to lead to the termination of pregnancy without her express consent. It exempts procedures where medical termination of pregnancy is carried out in severe cases of disability, with the consent of the guardian of the woman, and on the opinion of a registered medical practitioner. This exemption is in line with Section 3(4)(a) of the MTP Act, which states that the pregnancy of a woman who is above the age of 18 and mentally ill cannot be terminated without the consent in writing of her guardian. The MTP Act defines a “mentally ill” person as a “person who is in need of treatment by reason of any mental disorder other than mental retardation.” In the context of this statutory framework, in this chapter we discuss cases that examine reproductive autonomy of women with intellectual disabilities.<sup>3</sup>

## Pregnant Women with Intellectual Disabilities

In *Suchita Srivastava v. Chandigarh Administration*,<sup>4</sup> the Supreme Court set aside the High Court’s order for termination of pregnancy of a woman with “mild mental retardation” (intellectual disability) without her consent. The Court noted that the woman was not “mentally ill” and had attained majority and upheld her fundamental right to make reproductive choices under Article 21 of the Indian Constitution. It contrasted “mental retardation” with “mental illness” in interpreting Section 3 of the MTP Act in relation to the issue of consent of a woman to terminate her pregnancy, stating that diluting the requirement of consent for women with “mental retardation” would be an arbitrary and unreasonable restriction of reproductive rights. The Court noted the state obligation under the Convention on the Rights of Persons with Disabilities to ensure respect for reproductive choice of women with mental retardation.

In *Z v. State of Bihar & Ors.*,<sup>5</sup> the Supreme Court laid emphasis on a woman’s right to bodily integrity, personal autonomy, and sovereignty over her body and stated that the concept of a guardian should not be overemphasized. In the case of denial of abortion to a woman with mild mental retardation because of lack of guardian and spousal consent, the Court criticized the insistence on the consent of the woman’s guardian, when (i) she was over the age of majority and did not suffer from mental illness; (ii) she had been raped and wished to terminate her pregnancy; and (iii) her medical report did not indicate any risk to her life from termination of pregnancy. The Court awarded compensation to the woman under the public law remedy and victim compensation scheme under the Code of Criminal Procedure, 1973 for the grave mental injury of having to carry a pregnancy resulting from rape to term and to give birth, due to the laxity of the state authorities.

## Related Human Rights Standards and Jurisprudence

Below is a selection of international and regional human rights standards and jurisprudence relating to state obligations to ensure the reproductive autonomy of women and girls with disabilities. Human rights mechanisms recognize that women and girls with disabilities are particularly vulnerable to sexual and reproductive health violations and have established state obligations to ensure that sexual and reproductive health information, facilities, goods, and services are available, accessible, acceptable, and of good quality for women and girls with disabilities on a basis of equality with others.

The Government of India has committed itself to comply with obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>6</sup> Under international law, all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.<sup>7</sup> The Supreme

Court has held that in light of the obligation to “foster respect for international law” in Article 51 (c) of the Indian Constitution “[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”<sup>8</sup>

## INTERNATIONAL TREATY STANDARDS

### TREATIES

- **CRPD, Articles 3, 5–7, 8(1)(b), 9–10, 12, 15, 17, 22–23, 25** (calling for respect for inherent dignity and individual autonomy, and guaranteeing the rights to life, privacy, personal integrity, nondiscrimination, freedom from torture and inhuman or degrading treatment, and equality of legal capacity as well as support in exercising this capacity; outlining states’ duties to “combat stereotypes, prejudices and harmful practices relating to persons with disability, including those based on sex and age”; safeguarding the rights to sexual and reproductive health on a basis of free and informed consent, including the rights to retain fertility, to decide the number and spacing of children, to access reproductive and family planning facilities, information and services, including in rural areas, and to access the necessary means to exercise these rights; and protecting the right to found a family and to access child-rearing support, in keeping with the best interests of the child).
- **CEDAW, Articles 1–3, 5(a), 10(h), 12, 16(d)–(f)** (outlining women’s rights to equality in law and practice, including within the family; to health, including access to family planning information and services; and to determine the number and spacing of children; and defining states’ duty to eliminate cultural prejudices based on stereotyped roles for men and women).
- **ICESCR, Articles 2(2), 3, 10, 12(1), 15(1)(b)** (guaranteeing the rights to health, equality, and non-discrimination, and to enjoy the benefits of scientific progress and its applications; and according “the widest possible protection and assistance to the family, [...] particularly for its establishment,” including “[s]pecial measures of protection and assistance [...] on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions”).
- **ICCPR, Articles 2(1), 6, 7, 17, 23, 26** (protecting the rights to life, non-discrimination, equality before the law, freedom from torture, ill-treatment and non-consensual medical experimentation, privacy, and to found a family).

### SELECTED GENERAL COMMENTS

- **Joint statement by the CRPD and CEDAW Committees, *Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities***, 19 Aug. 2018 (outlining the obligation of states to respect, protect, and fulfill the rights of all women, including women with disabilities, in relation to their sexual and reproductive health and rights; emphasizing that “states parties should decriminalize abortion in all circumstances and legalize it in a manner that fully respects the autonomy of women, including women with disabilities”; affirming the obligation of states to place women’s autonomy at the center of policy and law-making relating to sexual and reproductive health and to ensure that all women, including women with disabilities are protected against reproductive health procedures against their will or without their informed consent; and stating that states must address the root causes of discrimination against women and persons with disabilities).
- **CRPD, *General Comment No. 6 (2018) on equality and non-discrimination***, U.N. Doc. CRPD/C/GC/6 (2018), paras. 7, 17, 30, 36, 61–62, 66 (emphasizing that prohibited discrimination includes “denial of reasonable accommodations” for people with disabilities as well as denials of access to health care and forced or involuntary sterilization, contraception, pregnancy, abortion, or hormone interventions; and calling on states to protect the rights to health and to family by protecting the rights to legal capacity, to access justice, to receive health care on a basis of free and informed consent, to accessible facilities and information, and for parents with disabilities to access the necessary support to care for children).
- **CRPD Committee, *General Comment No. 3 (2016) on women and girls with disabilities***, U.N. Doc. CRPD/C/GC/3 (2016), paras. 2, 10, 23, 28–30, 32, 38–44, 47–48, 51, 54, 57, 63(a), 64(b)–(c), 65 (calling on states to ensure that sexual and reproductive health facilities, information, and services are available, accessible, and affordable for women with physical and mental impairments, on a basis of free and informed consent, with decision-making support where desired; highlighting that violations of the rights to sexual and reproductive

health, such as forced or involuntary sterilization, abortion, pregnancy, or contraception, are a high-priority concern for women with disabilities; and noting that such violations are often facilitated by restrictions of legal capacity and harmful stereotypes).

- **CRPD Committee, *General Comment No. 1: Article 12: Equal Recognition Before the Law***, U.N. Doc. CRPD/C/GC/1 (2014), paras. 8, 29(f), 33, 35, 41–42 (outlining that the rights to autonomous decision-making, to reproductive health on a basis of free and informed consent, to physical and mental integrity, to found a family, and to freedom from torture, violence, and abuse often depend upon recognition of the right to legal capacity; and underscoring that the right to supported decision-making, where desired, must not be used to justify limiting a person's legal capacity or other fundamental rights).
- **CEDAW Committee, *General Recommendation No. 24 on article 12 of the Convention (women and health)***, U.N. Doc. A/54/38/Rev.1 (1999), paras. 6, 12, 14, 25–27, 31 (highlighting that, particularly for women with disabilities, including mental disabilities, states must ensure that health services are accessible, sensitive to their needs, and respectful of their dignity and rights to autonomy, privacy, confidentiality, informed consent, and choice; and outlining that states should remove all barriers and restrictions to women's access to health services, including abortion as well as prenatal, perinatal, and postnatal care).
- **Committee for Economic Social and Cultural Rights (CESCR), *General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the ICESCR)***, U.N. Doc. E/C.12/GC/22 (2016), paras. 8–9, 12–21, 24, 30 (outlining that to ensure the realization of the right to sexual and reproductive health, states must address contextual social determinants such as sex and disability and ensure that facilities, information, and decision-making support are accessible, available, acceptable, and of good quality for persons with disabilities).
- **CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)***, U.N. Doc. E/C.12/2000/4 (2000), paras. 12, 18–23, 26, 33–37 (emphasizing the state duty to respect, protect, and fulfill the right to health without discrimination against women or persons with disabilities).
- **Human Rights Committee, *General Comment No. 36 (2018) on Article 6 of the ICCPR, on the right to life***, U.N. Doc. CCPR/C/GC/36 (2018), paras. 8, 24–25 (outlining that states may not adopt measures on voluntary termination of pregnancy that violate women's rights to life, dignity, nondiscrimination, freedom from inhuman and degrading treatment, and privacy; and highlighting that persons with disabilities, including psychosocial and intellectual disabilities, are entitled to specific measures of protection so as to enjoy their right to life on an equal basis with others, including access to essential facilities and services and heightened protection for those in detention or institutions).

## INQUIRIES AND INDIVIDUAL COMPLAINTS

- **Human Rights Committee, *L.M.R. v. Argentina, Communication No. 1608/2007***, U.N. Doc. CCPR/C/101/D/1608/2007 (2011), paras. 9.2–11 (where a rape survivor with an intellectual disability sought an abortion as permitted under the law, but was prevented from receiving it by a court injunction that delayed the abortion past a gestational period where the hospital would perform it, even after the Supreme Court overturned the injunction: finding violations of her rights to privacy, to be free from cruel and inhuman treatment, with a particular view to her vulnerability due to her disability, and to access an effective remedy that could guarantee timely access to legal abortion in practice; and requiring the state to provide compensation and guarantees of non-repetition).

## UNITED NATIONS HUMAN RIGHTS EXPERT REPORTS

- **Special Rapporteur on the rights of persons with disabilities (SR Disability), *Rights of persons with disabilities***, U.N. Doc. A/73/161 (2018), paras. 13, 16, 27, 40, 44, 49–50, 54, 57, 68, 72, 74 (highlighting persons with disabilities' rights to access sexual and reproductive health information and services, and to retain fertility and decide on the number and spacing of their children on a basis of informed consent and free from violence or coercion; stressing that stereotypes and stigmas undermine women's and girls' access to sexual and reproductive health care; and urging states to ensure that sexual and reproductive health-care goods, services, facilities, and information are available, accessible, affordable, acceptable, and of good quality for women and girls with disabilities, free from third-party consent requirements or substitute decision-making, including by guardians, family members, or health professionals).

- **SR Disability, *Sexual and reproductive health and rights of girls and young women with disabilities***, U.N. Doc. A/72/133 (2017), in its entirety, but particularly paras. 60–62 (providing guidance to states on how to ensure legal and policy frameworks that ensure women and girls with disabilities’ sexual and reproductive health and rights, including by working to amend stigma and stereotypes; establishing laws, policies, and procedural safeguards that protect their rights, including the right to autonomous decision-making; and providing human rights training to health-care and service providers, teachers, families, and legal officers).
- **Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. A/64/272 (2009), paras. 38, 54–55, 57–60, 69–74, 94–95, 98 (highlighting the rights of women with disabilities to give free and informed consent with decision-making support where necessary; noting that nonconsensual sterilization may amount to torture and ill-treatment; outlining that women are entitled to reproductive health information and services and that women may not be denied the right to consent-based health care justified by the best interests of the unborn child or due to third-party consent requirements, with particular attention to gender inequality and legal capacity for persons with disabilities).
- **Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (SR Torture), *Report of the SR Torture, Juan E. Méndez***, U.N. Doc. A/HRC/22/53 (2013), paras. 20, 23, 27, 30, 32, 35, 48–50, 58–59, 65–66, 80, 90 (emphasizing the role of deprivation of legal capacity in facilitating forced medical interventions against persons with disability, which may rise to the level of torture or ill treatment).
- **Working Group on the issue of discrimination against women in law and in practice, *Report of the Working Group on the issue of discrimination against women in law and in practice***, U.N. Doc. A/HRC/32/44 (2016), paras. 45–47 (highlighting that “[w]omen with disabilities face particular barriers in accessing health care for reasons of cost, distance, discriminatory attitudes, and lack of physical access or information”; and noting the heightened vulnerability of women with disabilities, and particularly intellectual disabilities, to nonconsensual sterilization, abortion, or long-term contraception).

## SELECTED REGIONAL CASE LAW

### EUROPEAN COURT OF HUMAN RIGHTS

- ***Tysi c v. Poland*, Application No. 5410/03 (2007)**, paras. 105–130, 146–152 (where a woman suffered the loss of her eyesight, worsening a preexisting disability, due to pregnancy but was denied an abortion that was legally permitted on the grounds of risk to her health: finding violations of her right to private life, encompassing the rights to personal autonomy, physical integrity, and to access information; reiterating that where legal, abortion must be practically accessible; and ordering the state to pay compensation for the woman’s mental suffering due to her inability to prevent the risk of vision loss by terminating the pregnancy).

### INTER-AMERICAN COURT OF HUMAN RIGHTS

- ***Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, Ser. C, No. 257, Preliminary Objections, Merits, Reparations and Costs (2012)**, paras. 272, 285–304 (where couples were denied access to assisted reproductive technology: holding that the decision to have children is encompassed in the rights to personal integrity, private and family life, and autonomy and identity of the person, and that denial of access to this technology was discriminatory on the basis of reproductive disability, gender, and financial situation).

# RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

## IN THE SUPREME COURT OF INDIA

**Suchita Srivastava & Anr. v. Chandigarh Administration**  
(2009) 9 SCC 1

**K.G. Balakrishnan, C.J., and P. Sathasivam and B.S. Chauhan, JJ.**

***A “mentally retarded” woman became pregnant as a result of rape while she was living as an inmate in a government run welfare home in Chandigarh. The Chandigarh Administration had received approval from the Punjab and Haryana High Court to terminate her pregnancy (of 19 weeks), as it was considered by the court to be in her best interest. In this appeal, the Supreme Court examined the validity of the High Court’s order which did not take into account the woman’s consent. It also considered what should be the appropriate approach for a court while ascertaining the “best interests” of an intellectually disabled woman in exercise of its “parens patriae” jurisdiction.***

**Balakrishnan, C.J.:** “Leave granted. A Division Bench of the High Court of Punjab and Haryana in *Chandigarh Admn. v. Nemo*, by orders dated 9-6-2009 [ CWP No. 8760 of 2009, order dated 9-6-2009] and 17-7-2009 [ CWP No. 8760 of 2009, order dated 17-7-2009], ruled that it was in the best interests of a mentally retarded woman to undergo an abortion.

**2.** The said woman (name withheld, hereinafter “the victim”) had become pregnant as a result of an alleged rape that took place while she was an inmate at a government-run welfare institution located in Chandigarh. After the discovery of her pregnancy, the Chandigarh Administration, which is the respondent in this case, had approached the High Court seeking approval for the termination of her pregnancy, keeping in mind that in addition to being mentally retarded she was also an orphan who did not have any parent or guardian to look after her or her prospective child.

**3.** The High Court had the opportunity to peruse a preliminary medical opinion and chose to constitute an expert body consisting of medical experts and a judicial officer for the purpose of a more thorough inquiry into the facts. In its order dated 9-6-2009 [ CWP No. 8760 of 2009, order dated 9-6-2009], the High Court framed a comprehensive set of questions that were to be answered by the expert body. In such cases, the presumption is that the findings of the expert body would be given due weightage in arriving at a decision. However, in its order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009] the High Court directed the termination of the pregnancy in spite of the expert body’s findings which show that the victim had expressed her willingness to bear a child.

**4.** Aggrieved by these orders, the appellants moved this Court...and sought a hearing on an urgent basis because the woman in question had been pregnant for more than 19 weeks at that point of time. We agreed to the same since the statutory limit for permitting the termination of a pregnancy i.e. 20 weeks was fast approaching.

...

**6.** After hearing the counsel at length we had also considered the opinions of some of the medical experts who had previously examined the woman in question. Subsequent to the oral submissions made by the counsel and the medical experts, we had granted a stay on the High Court’s orders thereby ruling against the termination of the pregnancy.

**7.** The rationale behind our decision hinges on two broad considerations. The first consideration is whether it was correct on the part of the High Court to direct the termination of pregnancy without the consent of the woman in question. This was the foremost issue since a plain reading of the relevant provision in the Medical Termination of Pregnancy Act, 1971 clearly indicates that consent is an essential condition for performing an abortion on a woman who has attained the age of majority and does not suffer from any “mental illness”. As will be explained below, there is a clear distinction between “mental illness” and “mental retardation” for the purpose of this statute.

**8.** The second consideration before us is that even if the said woman was assumed to be mentally incapable of making an informed decision, what are the appropriate standards for a court to exercise “parens patriae” jurisdiction? If the intent was to ascertain the “best interests” of the woman in question, it is our considered opinion that the direction for

termination of pregnancy did not serve that objective. Of special importance is the fact that at the time of hearing, the woman had already been pregnant for more than 19 weeks and there is a medico-legal consensus that a late-term abortion can endanger the health of the woman who undergoes the same.

...

**13.** [Upon discovery of the pregnancy of the woman], [t]he Director-Principal of GMCH thereafter constituted a three-member Medical Board on 25-5-2009 which was headed by the Chairperson of the Department of Psychiatry in the said hospital. Their task was to evaluate the mental status of the victim and they opined that the victim's condition was that of "mild mental retardation".

...

### TERMINATION OF PREGNANCY CANNOT BE PERMITTED WITHOUT THE CONSENT OF THE VICTIM IN THIS CASE

**18.** Even though the expert body's findings were in favour of continuation of the pregnancy, the High Court decided to direct the termination of the same in its order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009]. We disagree with this conclusion since the victim had clearly expressed her willingness to bear a child.

**19.** The victim's reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter. We have adopted this position since the applicable statute clearly contemplates that even a woman who is found to be "mentally retarded" should give her consent for the termination of a pregnancy.

**20.** In this regard we must stress upon the language of Section 3 of the Medical Termination of Pregnancy Act, 1971 (hereinafter also referred to as "the MTP Act") ...

...

**22.** There is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a "compelling State interest" in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

**23.** A perusal of [Sections 3 and 4 of the MTP Act] makes it clear that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a "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 per Section 3(2)(i)] or when "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" [as per Section 3(2)(ii)]...

**24.** The Explanations to Section 3 have also contemplated the termination of pregnancy when the same is the result of a rape or a failure of birth control methods since both of these eventualities have been equated with a "grave injury to the mental health" of a woman.

**25.** In all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in Section 3(4)(b) of the MTP Act, 1971.

**26.** The exceptions to this rule of consent have been laid down in Section 3(4)(a) of the Act. Section 3(4)(a) lays down that when the pregnant woman is below eighteen years of age or is a "mentally ill" person, the pregnancy can be terminated if the guardian of the pregnant woman gives consent for the same. The only other exception is found in Section 5(1) of the MTP Act which permits a registered medical practitioner to proceed with a termination of pregnancy when he/she is of an opinion formed in good faith that the same is "immediately necessary to save the life of the pregnant woman". Clearly, none of these exceptions are applicable to the present case.



**27.** In the facts before us, the State could claim that it is the guardian of the pregnant victim since she is an orphan and has been placed in government-run welfare institutions. However, the State's claim to guardianship cannot be mechanically extended in order to make decisions about the termination of her pregnancy. An ossification test has revealed that the physical age of the victim is around 19-20 years. This conclusively shows that she is not a minor. Furthermore, her condition has been described as that of "mild mental retardation" which is clearly different from the condition of a "mentally ill person" as contemplated by Section 3(4)(a) of the MTP Act.

**28.** It is pertinent to note that the MTP Act had been amended in 2002, by way of which the word "lunatic" was replaced by the expression "mentally ill person" in Section 3(4)(a) of the said statute. The said amendment also amended Section 2(b) of the MTP Act, where the erstwhile definition of the word "lunatic" was replaced by the definition of the expression "mentally ill person" which reads as follows:

"2. (b) 'mentally ill person' means a person who is in need of treatment by reason of any mental disorder other than mental retardation;"

The 2002 amendment to the MTP Act indicates that the legislative intent was to narrow down the class of persons on behalf of whom their guardians could make decisions about the termination of pregnancy. It is apparent from the definition of the expression "mentally ill person" that the same is different from that of "mental retardation". A similar distinction can also be found in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. This legislation treats "mental illness" and "mental retardation" as two different forms of "disability". This distinction is apparent if one refers to Sections 2(i), (q) and (r) [of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.] which define "disability", "mental illness" and "mental retardation" in the following manner:

"2. (i) 'disability' means—

...

(vi) mental retardation;

(vii) mental illness;

\*\*\*

(q) 'mental illness' means any mental disorder other than mental retardation;

(r) 'mental retardation' means a condition of arrested or incomplete development of mind of a person which is specially characterised by subnormality of intelligence."

The same definition of "mental retardation" has also been incorporated in Section 2(g) of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.

**29.** These legislative provisions clearly show that persons who are in a condition of "mental retardation" should ordinarily be treated differently from those who are found to be "mentally ill". While a guardian can make decisions on behalf of a "mentally ill person" as per Section 3(4)(a) of the MTP Act, the same cannot be done on behalf of a person who is in a condition of "mental retardation".

**30.** The only reasonable conclusion that can be arrived at in this regard is that the State must respect the personal autonomy of a mentally retarded woman with regard to decisions about terminating a pregnancy. It can also be reasoned that while the explicit consent of the woman in question is not a necessary condition for continuing the pregnancy, the MTP Act clearly lays down that obtaining the consent of the pregnant woman is indeed an essential condition for proceeding with the termination of a pregnancy.

**31.** As mentioned earlier, in the facts before us the victim has not given consent for the termination of pregnancy. We cannot permit a dilution of this requirement of consent since the same would amount to an arbitrary and unreasonable restriction on the reproductive rights of the victim. We must also be mindful of the fact that any dilution of the requirement of consent contemplated by Section 3(4)(b) of the MTP Act is liable to be misused in a society where sex-selective abortion is a pervasive social evil.

**32.** Besides placing substantial reliance on the preliminary medical opinions presented before it, the High Court has noted some statutory provisions in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 as well as the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental

Retardation and Multiple Disabilities Act, 1999 where the distinction between “mental illness” and “mental retardation” has been collapsed. The same has been done for the purpose of providing affirmative action in public employment and education as well as for the purpose of implementing anti-discrimination measures. The High Court has also taken note of the provisions in IPC which lay down strong criminal law remedies that can be sought in cases involving the sexual assault of “mentally ill” and “mentally retarded” persons. The High Court points to the blurring of these distinctions and uses this to support its conclusion that “mentally ill” persons and those suffering from “mental retardation” ought to be treated similarly under the MTP Act, 1971. We do not agree with this proposition.

**33.** We must emphasise that while the distinction between these statutory categories can be collapsed for the purpose of empowering the respective classes of persons, the same distinction cannot be disregarded so as to interfere with the personal autonomy that has been accorded to mentally retarded persons for exercising their reproductive rights.

### TERMINATION OF PREGNANCY IS NOT IN THE “BEST INTERESTS” OF THE VICTIM

**34.** In the impugned orders, the High Court has in fact agreed with the proposition that a literal reading of Section 3 of the MTP Act would lead to the conclusion that a mentally retarded woman should give her consent in order to proceed with the termination of a pregnancy. However, the High Court has invoked the doctrine of “*parens patriae*” while exercising its writ jurisdiction to go beyond the literal interpretation of the statute and adopt a purposive approach. The same doctrine has been used to arrive at the conclusion that the termination of pregnancy would serve the “best interests” of the victim in the present case even though she has not given her consent for the same. We are unable to accept that line of reasoning.

**35.** The doctrine of “*parens patriae*” has been evolved in common law and is applied in situations where the State must make decisions in order to protect the interests of those persons who are unable to take care of themselves. Traditionally this doctrine has been applied in cases involving the rights of minors and those persons who have been found to be mentally incapable of making informed decisions for themselves.

**36.** Courts in other common law jurisdictions have developed two distinct standards while exercising “*parens patriae*” jurisdiction for the purpose of making reproductive decisions on behalf of mentally retarded persons. These two standards are the “best interests” test and the “substituted judgment” test.

**37.** As evident from its literal description, the “best interests” test requires the Court to ascertain the course of action which would serve the best interests of the person in question. In the present setting this means that the Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim. It is important to note that the Court’s decision should be guided by the interests of the victim alone and not those of the other stakeholders such as guardians or the society in general. It is evident that the woman in question will need care and assistance which will in turn entail some costs. However, that cannot be a ground for denying the exercise of reproductive rights.

**38.** The application of the “substituted judgment” test requires the Court to step into the shoes of a person who is considered to be mentally incapable and attempt to make the decision which the said person would have made, if she was competent to do so. This is a more complex inquiry but this test can only be applied to make decisions on behalf of persons who are conclusively shown to be mentally incompetent.

**39.** In the present case the victim has been described as a person suffering from “mild mental retardation”. This does not mean that she is entirely incapable of making decisions for herself. The findings recorded by the expert body indicate that her mental age is close to that of a nine-year-old child and that she is capable of learning through rote memorisation and imitation. Even the preliminary medical opinion indicated that she had learnt to perform basic bodily functions and was capable of simple communications. In light of these findings, it is the “best interests” test alone which should govern the inquiry in the present case and not the “substituted judgment” test.

**40.** We must also be mindful of the varying degrees of mental retardation, namely, those described as borderline, mild, moderate, severe and profound instances of the same. Persons suffering from severe and profound mental retardation usually require intensive care and supervision and a perusal of academic materials suggests that there is a strong preference for placing such persons in an institutionalised environment. However, persons with borderline, mild or moderate mental retardation are capable of living in normal social conditions even though they may need some supervision and assistance from time to time.

**41.** A developmental delay in mental intelligence should not be equated with mental incapacity and as far as possible the law should respect the decisions made by persons who are found to be in a state of mild to moderate “mental retardation”.

**42.** In the present case, the victim has expressed her willingness to carry the pregnancy till its full term and bear a child. The expert body has found that she has a limited understanding of the idea of pregnancy and may not be fully prepared for assuming the responsibilities of a mother. As per the findings, the victim is physically capable of continuing with the pregnancy and the possible risks to her physical health are similar to those of any other expecting mother. There is also no indication that the prospective child may be born with any congenital defects. However, it was repeatedly stressed before us that the victim has a limited understanding of the sexual act and perhaps does not anticipate the social stigma that may be attached to a child which will be born on account of an act of rape.

**43.** Furthermore, the medical experts who appeared before us also voiced the concern that the victim will need constant care and supervision throughout the pregnancy as well as for the purposes of delivery and childcare after birth. Maternal responsibilities do entail a certain degree of physical, emotional and social burdens and it was proper for the medical experts to gauge whether the victim is capable of handling them.

**44.** The counsel for the respondent also alerted us to the possibility that even though the victim had told the members of the expert body that she was willing to bear the child, her opinion may change in the future since she was also found to be highly suggestible.

**45.** Even if it were to be assumed that the victim's willingness to bear a child was questionable since it may have been the product of suggestive questioning or because the victim may change her mind in the future, there is another important concern that should have been weighed by the High Court. At the time of the order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009], the victim had already been pregnant for almost 19 weeks. By the time the matter was heard by this Court on an urgent basis on 21-7-2009, the statutory limit for terminating a pregnancy i.e. 20 weeks, was fast approaching. There is of course a cogent rationale for the provision of this upper limit of 20 weeks (of the gestation period) within which the termination of a pregnancy is allowed. This is so because there is a clear medical consensus that an abortion performed during the later stages of a pregnancy is very likely to cause harm to the physical health of the woman who undergoes the same.

...

**48.** ...[I]t is our considered opinion that the direction given by the High Court (in its order dated 17-7-2009 [CWP No. 8760 of 2009, order dated 17-7-2009]) to terminate the victim's pregnancy was not in pursuance of her “best interests”. Performing an abortion at such a late stage could have endangered the victim's physical health and the same could have also caused further mental anguish to the victim since she had not consented to such a procedure.

**49.** We must also mention that the High Court in its earlier order had already expressed its preference for the termination of the victim's pregnancy (see para 38 in order dated 9-6-2009 [CWP No. 8760 of 2009, order dated 9-6-2009]) even as it proceeded to frame a set of questions that were to be answered by an expert body which was appointed at the instance of the High Court itself. In such a scenario, it would have been more appropriate for the High Court to express its inclination only after it had considered the findings of the expert body.

**50.** Our conclusions in the present case are strengthened by some norms developed in the realm of international law. For instance one can refer to the principles contained in the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971 [GA Res 2856 (XXVI) of 20-12-1971] which have been reproduced below:

“1. The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.

2. The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential.

3. The mentally retarded person has a right to economic security and to a decent standard of living. He has a right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.

4. Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life.
5. The mentally retarded person has a right to a qualified guardian when this is required to protect his personal well-being and interests.
6. The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment. If prosecuted for any offence, he shall have a right to due process of law with full recognition being given to his degree of mental responsibility.
7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.”

Special emphasis should be placed on Principle 7 (cited above) which prescribes that a fair procedure should be used for the “restriction or denial” of the rights guaranteed to mentally retarded persons, which should ordinarily be the same as those given to other human beings.

**51.** In respecting the personal autonomy of mentally retarded persons with regard to the reproductive choice of continuing or terminating a pregnancy, the MTP Act lays down such a procedure. We must also bear in mind that India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) on 1-10-2007 and the contents of the same are binding on our legal system.

**52.** The facts of the present case indeed posed some complex questions before us. While we must commend the counsel for their rigorous argumentation, this case also presents an opportunity to confront some social stereotypes and prejudices that operate to the detriment of mentally retarded persons. Without reference to the present proceedings, we must admit to the fact that even medical experts and judges are unconsciously susceptible to these prejudices. [See generally: Susan Stefan, “Whose Egg is it anyway? Reproductive Rights of Incarcerated, Institutionalised and Incompetent Women”, 13 Nova Law Review 405-56 (November 1989).]

**53.** We have already stressed that persons who are found to be in borderline, mild and moderate forms of mental retardation are capable of living in normal social conditions and do not need the intensive supervision of an institutionalised environment. As in the case before us, institutional upbringing tends to be associated with even more social stigma and the mentally retarded person is denied the opportunity to be exposed to the elements of routine living. For instance, if the victim in the present case had received the care of a family environment, her guardians would have probably made the efforts to train her to avoid unwelcome sexual acts. However, the victim in the present case is an orphan who has lived in an institutional setting all her life and she was in no position to understand or avoid the sexual activity that resulted in her pregnancy. The responsibility of course lies with the State and fact situations such as those in the present case should alert all of us to the alarming need for improving the administration of the government-run welfare institutions.

**54.** It would also be proper to emphasise that persons who are found to be in a condition of borderline, mild or moderate mental retardation are capable of being good parents. Empirical studies have conclusively disproved the eugenics theory that mental defects are likely to be passed on to the next generation. The said “eugenics theory” has been used in the past to perform forcible sterilisations and abortions on mentally retarded persons. [See generally: Elizabeth C. Scott, “Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy”, Duke Law Journal 806-65 (November 1986).] We firmly believe that such measures are anti-democratic and violative of the guarantee of “equal protection before the law” as laid down in Article 14 of our Constitution.

**55.** It is also pertinent to note that a condition of “mental retardation” or developmental delay is gauged on the basis of parameters such as intelligence quotient (IQ) and mental age (MA) which mostly relate to academic abilities. It is quite possible that a person with a low IQ or MA may possess the social and emotional capacities that will enable him or her to be a good parent. Hence, it is important to evaluate each case in a thorough manner with due weightage being given to medical opinion for deciding whether a mentally retarded person is capable of performing parental responsibilities.

## CONCLUSION AND DIRECTIONS

...

**57.** The substantive questions posed before us were whether the victim's pregnancy could be terminated even though she had expressed her willingness to bear a child and whether her "best interests" would be served by such termination. As explained in the forementioned discussion, our conclusion is that the victim's pregnancy cannot be terminated without her consent and proceeding with the same would not have served her "best interests".

**58.** In our considered opinion, the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority. Since none of the other statutory conditions have been met in this case, it is amply clear that we cannot permit a dilution of the requirement of consent for proceeding with a termination of pregnancy. We have also reasoned that proceeding with an abortion at such a late stage (19-20 weeks of gestation period) poses significant risks to the physical health of the victim.

**59.** Lastly, we have urged the need to look beyond social prejudices in order to objectively decide whether a person who is in a condition of mild mental retardation can perform parental responsibilities.

**60.** The findings recorded by the expert body which had examined the victim indicate that the continuation of the pregnancy does not pose any grave risk to the physical or mental health of the victim and that there is no indication that the prospective child is likely to suffer from a congenital disorder. However, concerns have been expressed about the victim's mental capacity to cope with the demands of carrying the pregnancy to its full term, the act of delivering a child and subsequent childcare. In this regard, we direct that the best medical facilities be made available so as to ensure proper care and supervision during the period of pregnancy as well as for post-natal care.

**61.** Since there is an apprehension that the woman in question may find it difficult to cope with maternal responsibilities, the Chairperson of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities (constituted under the similarly named 1999 Act) has stated in an affidavit that the said Trust is prepared to look after the interests of the woman in question which will include assistance with childcare. In the said affidavit, it has been stated that this Trust will consult the Chandigarh Administration as well as experts from the Post Graduate Institute of Medical Education and Research (PGIMER) in order to ensure proper care and supervision.

**62.** If any grievances arise with respect to the same subject-matter in the future, the respondent can seek directions from the High Court of Punjab and Haryana under its writ jurisdiction. The present appeal is disposed of accordingly."

## IN THE SUPREME COURT OF INDIA

**Z v. State of Bihar & Ors.****(2018) 11 SCC 572****Dipak Misra, Amitava Roy and A.M. Khanwilkar, JJ.**

***The petitioner, a destitute woman aged 35 years, was found to be pregnant, HIV+ and was diagnosed with mild mental retardation. Subsequently, she disclosed that she had been raped and wished to terminate her pregnancy of 17 weeks. The hospital authorities, however, refused to carry the procedure as her father, who signed the consent form, failed to prove his identity. The petitioner approached the Patna High Court where her request was denied on several grounds, including that her pregnancy was over 20 weeks at the time of writ petition, her medical report did not indicate any foetal abnormality or risk to her life due to the pregnancy, and that termination would require a major surgical procedure. In this case, the Supreme Court examined the correctness of the High Court's order and dealt with the question of compensation to the victim for the suffering caused due to laxity on part of the State authorities.***

Misra, J.: “...

2. The factual score that has been depicted in the instant appeal is reflective of a retardant attitude and laxness to the application of the provisions of law at the appropriate time by the authorities that can cause a disastrous effect on the mind of a hapless victim. And the victim here is a destitute woman, who was brought to a shelter home from the footpath, as she was not wanted by her husband and her family, living in abject poverty and being scared of social stigma could not afford her a home...The woman, a destitute, was found to be pregnant by the functionaries of the home and further being aware of the fact that she had been condemned to that condition because of rape committed on her, the competent authority of the home took her to the hospital for termination of pregnancy with her consent. Though the steps taken by the shelter home were prompt, yet delay was caused by the authorities of the hospital. The delay in such a situation has the seed that can cause depression to a woman, who is already in despair. And this despair has the potentiality to drive one on the path of complete distress. In such a situation, the victim in a state of anguish may even think of surrendering to death or live with a traumatic experience which can be compared to having a life that has been fragmented at the cellular level. It is because the duty cast on the authorities under the Medical Termination of Pregnancy Act, 1971 (for brevity “the Act”) is not dutifully performed, and the failure has ultimately given rise to a catastrophe, a prolonged torment. That is the sad narrative of the appellant victim.

3. The appellant, a thirty-five year old woman, was living on the footpath in Phulwarisharif, Patna. On 25-1-2017 she was brought to Shanti Kutir. The medical test done by Shanti Kutir showed that she was pregnant. On 2-2-2017, she was taken to Patna Medical College Hospital, Patna (PMCH) for medical examination. On 8-2-2017 an ultrasound test was done at PMCH and it was found that she was 13 weeks and 6 days pregnant. On 4-3-2017, she expressed her desire to terminate the pregnancy and, accordingly, she was taken to PMCH for further medical examination. At that juncture, the appellant revealed that she had been raped and, therefore, the pregnancy should be terminated. On 14-3-2017, she was taken to PMCH for termination and her father and brother were called and made to sign a consent form, which they duly signed. However, the hospital authorities did not proceed with the termination of the pregnancy. It is worthy to mention here that on 18-3-2017, an FIR under Section 376 of the Penal Code, 1860 (IPC) was registered with Mahila Police Station, Patna as Case No. 13 of 2017. The Home Superintendent, Shanti Kutir wrote to the Superintendent of Patna Medical College and Hospital, Patna, stating, inter alia, that the pregnancy is more than 17 weeks and a divorce petition had been filed by the husband, and the father and the brother of the appellant expressed their inability to take her with them because of social and financial constraints. On 3-4-2017, she was again taken to PMCH, but the termination was not carried out and, by that time, her pregnancy was 20 weeks old. As the factual narration would reveal, the appellant was found to be HIV+ve.

4. As the medical termination of pregnancy was not carried out, the appellant approached the High Court in CWJC No. 5286 of 2017 with the prayer to ascertain the physical condition including the stage of pregnancy and to direct for termination of pregnancy as she had been sexually assaulted and further she was HIV+ve. The High Court, on 10-4-2017 [*Z v. State of Bihar*, 2017 SCC OnLine Pat 1713], permitted the counsel for the victim to implead the husband and her father and the Director of Indira Gandhi Institute of Medical Sciences, Patna (IGIMS). Thereafter, the learned Single Judge directed for constitution of a Medical Board at IGIMS, Patna, to assess the physical and mental condition of the writ petitioner therein and the foetus...

5. ...IGIMS examined the victim and submitted a report in a sealed cover.

6. As the factual matrix would further uncurtain, on 18-4-2017 [*Z v. State of Bihar*, 2017 SCC OnLine Pat 1714], the High Court took note of the fact that the name of the appellant's husband had been wrongly mentioned and a direction was issued to make dasti service on the husband and the father through the officer in charge of the local police station and the matter was fixed for 20-4-2017. On 20-4-2017, the matter could not be taken up and stood adjourned to 21-4-2017. On the adjourned date, the father of the appellant prayed for time to file counter-affidavit... Thereafter, the High Court proceeded to determine the issue whether the victim, who is HIV+ve and is carrying a pregnancy of 24 weeks could be allowed to have medical termination of pregnancy under the Act. The stand of the Government before the High Court was that the victim was being provided with all facilities to survive in the rehabilitation centre and the pregnancy could not be terminated because the identity of the father of the victim was not established and he had refused to swear an affidavit in this regard and subsequently escaped from the scene. The stand of the father of the victim before the High Court was that he did not have any objection for getting the pregnancy terminated. The husband, Respondent 8 before the High Court, admitted that he had entered into wedlock with the victim and from the said wedlock two children were born, but the victim had deserted him in March 2007, and the said circumstances led him to file Matrimonial Suit No. 984 of 2015 before the Principal Judge, Family Court, Patna, seeking dissolution of marriage.

7. The High Court perused the report submitted by IGIMS, which suggested that the pregnancy was 20 to 24 weeks old and the termination of pregnancy would require major surgical procedure along with the subsequent consequences such as bleeding, sepsis and anaesthesia hazards. The report that was filed by IGIMS, which has been referred to by the High Court, needs to be reproduced: (*Z case* [*Z v. State of Bihar*, 2017 SCC OnLine Pat 786], SCC OnLine Pat para 16)

Issues	Opinion
1. Examination report of the patient (petitioner) with regard to her physical and mental state (physical medical examination of all systems will be desirable): Respiratory, CVS, Neurology, etc.	Physical examination: Pulse — 100/min regular, BP-114/80 mmHg, Pallor-Mild, Icterus—NIL, edema—Nil, Cyanosis & clubbing—Nil, JVP — normal, Chest — B/L clear no added sound; CVS-S1 & S2 — Normal, no added sound; P/A exam-fundal height corresponds to 22-24 week pregnancy; CNS — Higher mental function intact, no focal neurological deficit. Mentally alert, well oriented with time, place and person (Annexure I).
2. Stage of pregnancy	2nd trimester of approximately 23 weeks (as per 1st USG report of whole abdomen on 8-2-2017 of PMCH. And IGIMS, USG on dated 11-4-2017 shows 21 weeks' foetus ... (Annexure II).  According to recommendations 1st i.e. earliest USG is to be used for gestational age calculation.
3. Overall condition of foetus	Normal single alive intra-uterine foetus (as per physical examination and USG report)
4. How far the termination of pregnancy will be detrimental to the petitioner.	Termination of pregnancy at this stage sometimes may need major surgical procedure along with the subsequent consequences such as bleeding, sepsis and anaesthesia hazards.
5. How far it will be detrimental, if the petitioner is allowed to complete full term of pregnancy.	The patient can continue pregnancy according to NACO guidelines. Still there is likelihood that foetus may be HIV+ve. But definitive diagnosis can only be given when the child is 18 months old.
6. How far it will be detrimental to the petitioner and foetus, particularly in view of the fact that she is mentally abraded and HIV+ve.	As per the clinical assessment and documentary evidence, the patient is diagnosed to have psychiatry illness, provisionally schizophrenia with mild mental retardation. She is currently on medications and behaviourally stable and will require long-term psychiatry treatment.
7. Investigation reports	Reports which are made available before the Board Members are ... Annexure III. Some investigation reports which are not available at IGIMS like CD4 +T lymphocyte count, serum HIV RNA level (viral load) and triple marker maternal blood test advised by members concerned are still awaited, after which progression of HIV and through marker congenital abnormality of foetus can be assessed."

8. The learned Single Judge, after referring to the provisions of the Act, observed thus: (*Z case* [*Z v. State of Bihar*, 2017 SCC OnLine Pat 786], SCC OnLine Pat para 18)

“18. In the present case, the medical report does not suggest that the foetus is suffering from any abnormality. It further does not suggest that the foetus has already been infected with HIV+ve. It only predicts that any definite opinion can be given only when the child attains the age of 18 months. The medical report further does not suggest that if the victim is allowed to carry the pregnancy to its full course, then she will suffer any risk of life or grave injury to her physical or mental health. Explanation 1 of sub-section (2) of Section 3 provides that such pregnancy which is alleged to have been caused by rape shall be presumed to constitute grave injury to the mental health of the pregnant woman. In the present case, the victim has alleged that she had been ravished, but her conduct of not disclosing the incident of rape for more than 13 weeks and deciding not to get the pregnancy terminated for more than 20 weeks, as the writ application has been filed after 20 weeks of pregnancy i.e. on 7-4-2017, prima facie, does not suggest that such alleged conception has really caused grave injury to the mental health of the victim. Moreover, the termination, as contemplated under Section 3 of the 1971 Act, is only permissible up to 20 weeks of pregnancy. Definitely the effort for termination was made on behalf of the victim in the 17th week of pregnancy, but the present writ application has been filed before this Court after 20 weeks of her pregnancy.”

9. After so stating, the High Court adverted to Sections 3 to 5 of the Act and opined that the provisions are not applicable to the writ petitioner. The learned Single Judge also referred to Section 10 of the Human Immunodeficiency Virus and AIDS (Prevention and Control) Act, 2017 and distinguished the decisions rendered in *Meera Santosh Pal v. Union of India* [*Meera Santosh Pal v. Union of India*, (2017) 3 SCC 462 : AIR 2017 SC 461] , *X v. Union of India* [*X v. Union of India*, (2017) 3 SCC 458 : AIR 2017 SC 1055] and *X v. Union of India* [*X v. Union of India*, (2016) 14 SCC 382 : (2016) 14 SCC 383 (2) : (2016) 4 SCC (Cri) 388 : (2016) 4 SCC (Cri) 389 (2) : AIR 2016 SC 3525] . He placed reliance on *Sheetal Shankar Salvi v. Union of India* [*Sheetal Shankar Salvi v. Union of India*, (2018) 11 SCC 606 : (2017) 5 Scale 428] , wherein this Court has declined termination of 20 weeks of pregnancy. The High Court, thereafter, adverted to the statement of law in *Suchita Srivastava v. State (UT of Chandigarh)* [*Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] and reproduced certain paragraphs and took note of the concept that in the case of a pregnant woman and “compelling State interest” and further adverted to the doctrine of “parens patriae” where in certain situations the State must make decisions in order to protect the interest of those persons who are unable to take care of themselves. Thereafter, the learned Single Judge adverted to the two standards, namely, “best interests” test and “substituted judgment” test as laid down in *Suchita Srivastava* [*Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] . The High Court also dwelled upon the role of the court that it must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim.

10. After so stating, the learned Single Judge delved into the factual score projected in the writ petition and opined thus: (*Z case* [*Z v. State of Bihar*, 2017 SCC OnLine Pat 786] , SCC OnLine Pat paras 28-32)

“28. In the present case also, in the “best interest” of the victim and the foetus, this Court finds no reason to exercise the jurisdiction under Article 226 of the Constitution of India for directing the pregnancy to be terminated in its 23-24 weeks, particularly such termination of pregnancy, as per the Medical Board report would be hazardous to the life of the victim. However, keeping in view the fact that the victim was leading a life of destitute and she has been almost deserted by her husband, her father, her brother and her sister, as none of them in their counter-affidavit have stated that they are ready to take her to their house, this Court feels that she will be safe if she is allowed to remain in rehabilitation centre, Shanti Kutir so long as she desires.

29. Mr Kaushal Kumar Jha, learned AAG-8 submits that the rehabilitation centre is run by the Government and the Government is ready to provide all medical facilities, as well as amenities of day-to-day life to the victim.

30. In the circumstances, it is expected from the Superintendent, PMCH to get the victim medically examined every month or so and provide all medicines or other medical facilities required for carrying the pregnancy to its full term and bringing up the child after its birth, till the child attains the age of five years. The Superintendent, PMCH would ensure to provide the victim with necessary medical cover in light of the direction made above.

31. This Court is hopeful that the NGO will take care of the victim and provide all the facilities for the post-natal care.



32. In the circumstances, in the interest of justice and in the interest of victim and foetus/prospective child, this Court is not inclined to permit the medical termination of pregnancy of the victim.”

11. After so holding, the learned Single Judge issued certain directions, which are to the following effect: (*Z case [Z v. State of Bihar, 2017 SCC OnLine Pat 786]* , SCC OnLine Pat para 33)

“(i) Respondent 4 will get the bank account of the victim opened within a period of one week, if she does not have one.

(ii) Respondents 7 and 8, the father and the husband of the victim will deposit Rs 1000 and Rs 1500, respectively, per month in the account of the victim from May 2017.

(iii) If Respondents 7 and 8 make default in payment on three consecutive occasions, of the instalment of the aforesaid amount, then any of the parties concerned would be at liberty to file an application before this Court and Respondents 7 and 8 will be answerable to this Court, in this regard.

(iv) Respondents 7 and 8 will provide their mobile number to Respondent 4 and shall visit the victim every month.

(v) Respondent 4 shall allow the relatives and husband of the victim to meet her.

...”

12. The High Court decided the matter on 26-4-2017 [*Z v. State of Bihar, 2017 SCC OnLine Pat 786*] . When the said order was challenged, the present appeal was taken up on 3-5-2017. The learned counsel for the appellant referred to the facts as asserted in the special leave petition which is evincible from the order of the High Court. Though the Union of India is not a party, Mr P.S. Narasimha and Mr Tushar Mehta, learned Additional Solicitors General were asked as to whether arrangements could be made for the appellant to come to Delhi to be examined by a Medical Board at All India Institute of Medical Sciences (AIIMS), New Delhi. The learned counsel for the appellant, after obtaining instructions, stated that she is inclined to be examined by the Medical Board at AIIMS. ...

13. In pursuance of the order passed by this Court, the Medical Board at AIIMS examined the appellant. The opinion of the Medical Board was that the procedure involved in termination of the pregnancy is risky to the life of the appellant and the foetus in the womb. It has suggested that she should be advised to continue HAART therapy and routine antenatal care to reduce the risk of HIV transmission to the foetus. In view of the said report, the Court on 9-5-2017 [*Z v. State of Bihar, (2017) 14 SCC 525 : (2017) 14 SCC 527 : (2017) 4 SCC (Cri) 916 : (2017) 4 SCC (Cri) 918*] , directed as follows: (*Z case [Z v. State of Bihar, (2017) 14 SCC 525 : (2017) 14 SCC 526 : (2017) 4 SCC (Cri) 916 : (2017) 4 SCC (Cri) 917]* , SCC pp. 529-30, paras 10-15)

“10. In view of the aforesaid opinion, it is the accepted position at the Bar that there cannot be termination of pregnancy. The learned counsel for the petitioner would submit that the petitioner along with the companion be sent back to Patna and for the said purpose appropriate arrangements be made by the Union of India to which Mr Tushar Mehta, learned Additional Solicitor General concedes. We appreciate the stand taken by the Union of India in this regard.

11. The learned counsel for the petitioner submitted that the doctors at AIIMS may give the appropriate treatment graph for the petitioner so that she can survive the health hazard that she is in. Mr Tushar Mehta, learned Additional Solicitor General submitted that she will be given the treatment graph by 10-5-2017.

12. The controversy does not end here. The learned counsel for the petitioner would submit that because of the delay caused, she is compelled to undergo the existing miserable situation and, therefore, she is entitled to get compensation and that apart, she is also entitled to get compensation under the Victim Compensation Scheme as framed under Section 357-A of the Code of Criminal Procedure by the State of Bihar.

13. Apart from the above submission, we are obligated to direct the State of Bihar to provide all the medical facilities to the petitioner as per the treatment graph given by the doctors who are going to examine the petitioner at AIIMS through the Indira Gandhi Institute of Medical Sciences at Patna. The Indira Gandhi Institute of Medical Sciences shall work in coordination with AIIMS, New Delhi so that the health condition of the petitioner is not further jeopardized.

14. The learned counsel for the petitioner is granted liberty to file an additional affidavit with regard to the facet of compensation within six weeks thence. The State of Bihar, which is represented by Ms Abha R. Sharma, learned counsel shall file a reply to the special leave petition as well as to the additional affidavit within four weeks therefrom.

15. We have stated about the grant of compensation hereinbefore. The one facet of granting compensation pertains to negligence and delay which comes within the domain of public law remedy. The other aspect of the compensation comes under the scheme dated 24-3-2014 framed under Section 357-A of the Code of Criminal Procedure. Needless to say, the petitioner is eligible to get the compensation under the said Scheme and, therefore, the petitioner shall be paid a sum of Rs 3,00,000 (Rupees three lakhs only) by the State of Bihar as she has been a victim of rape. Needless to say, we have determined the compensation regard being had to Clause 4 of the Scheme. The said amount shall be paid to her within four weeks hence and compliance report thereof shall be filed before the Registry of this Court. As far as the other aspect of compensation is concerned, the said aspect shall be considered on 9-8-2017.”

14. We have narrated the facts in extenso so that the controversy can be appreciated in proper perspective and further the laxity on the part of the authorities and also the approach of the High Court can be appositely deliberated upon. ...

...

18. To appreciate the rivalised submissions advanced at the Bar, it is necessary to understand the background in which the Act was enacted by Parliament. The Statement of Objects and Reasons of the Act reads as follows:...

The aforesaid makes it absolutely clear that the legislature intended to liberalise the existing provisions relating to termination of pregnancy keeping in view the danger to life or risk to physical or mental health of the woman; on humanitarian grounds, such as when pregnancy arises from a sex crime like rape or intercourse with a lunatic woman, and eugenic grounds where there is substantial risk that the child, if born, would suffer from deformities and diseases.

19. Section 2, which is the dictionary clause, defines the term “guardian” to mean a person having the care of the person of a minor or a mentally ill person. “Mentally ill person” has been defined to mean a person who is in need for treatment by reason of any mental disorder other than mental retardation. The dictionary clause also defines the terms “minor” and “registered medical practitioner”.

20. Section 3 stipulates that when pregnancy may be terminated by the registered medical practitioners. ...

21. ...[W]here length of pregnancy exceeds 12 weeks but does not exceed 20 weeks, two registered medical practitioners, after forming an opinion in good faith, that 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 and that there is substantial risk that if the child were born, it would suffer from physical or mental abnormalities as to be seriously handicapped, may terminate the pregnancy. Explanation 1 to sub-section (2) of Section 3 to which our attention has been drawn postulates that where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the same has to be presumed to constitute a grave injury to the mental health of the pregnant woman. Once such a statutory presumption is provided, the same comes within the compartment of grave injury to mental health. Sub-section (4) of Section 3 requires consent of the guardian of a minor, or a major who is mentally ill person. The opinion to be formed by the medical practitioners is to be in good faith.

22. In the instant case, the gravamen of the submission of the learned counsel for the appellant is that negligence and delay have been caused by the authorities of the State. Be it noted, the learned counsel for the appellant has filed a chart giving various dates to highlight the chronology of events. On a perusal of the same, it is demonstrable that after the appellant was brought to Shanti Kutir, it was noticed that she was pregnant. She was taken to PMCH. At that time, she was 13 weeks and 6 days pregnant. In the midst of 18th week, she expressed her desire to terminate her pregnancy and that was communicated by Shanti Kutir to the hospital and, thereafter, she was taken to PMCH, where she made an allegation that she had been raped and expressed her desire to terminate her pregnancy. Though she was taken to the hospital for termination of pregnancy, yet the hospital authorities instead of proceeding with the termination, called the father of the appellant to sign the consent form. According to the learned counsel for the appellant, while she had gone to the government hospital and clearly stated that she had been raped and further she was taken by the persons from Shanti Kutir, which is a women rehabilitation centre, and further there was no material that she was suffering from any mental illness, it was obligatory on the part of the hospital to terminate the pregnancy. Had that been done at the

right time, the grave mental torture that she has been going through could have been avoided. The learned counsel also criticised the approach of the High Court in not dealing with the matter with required amount of sensitivity and not adhering to the statutory provision that when there is an allegation of rape, the pregnancy can be terminated. The High Court directed for a Medical Board to be constituted and after receipt of the report of the Medical Board some time was consumed and, thereafter, also the High Court required the father of the appellant to file an affidavit giving his consent.

**23.** We have already analysed in detail the factual score and the approach of the High Court. We do not have the slightest hesitation in saying that the approach of the High Court is completely erroneous. The report submitted by IGIMS stated that termination of pregnancy may need major surgical procedure along with subsequent consequences such as bleeding, sepsis and anaesthesia hazards, but there was no opinion that the termination could not be carried out and it was risky to the life of the appellant. There should have been a query in this regard by the High Court which it did not do. That apart, the report shows that the appellant, who was a writ petitioner before the High Court, was suffering from mild mental retardation and she was on medications and her condition was stable and she would require long-term psychiatry treatment. The Medical Board has not stated that she was suffering from any kind of mental illness. The appellant was thirty-five years old at that time. She was a major. She was able to allege that she had been raped and that she wanted to terminate her pregnancy. PMCH, as we find, is definitely a place where pregnancy can be terminated.

**24.** For the said purpose, we may usefully reproduce Section 4 of the Act:...

**25.** The Medical Termination of Pregnancy Regulations, 2003 (for short “the Regulations”) deal with various aspects.

**25.1.** Regulation 3 provides for form of certifying opinion or opinions. It stipulates that where one registered medical practitioner forms or not less than two registered medical practitioners form such opinion as is referred to in sub-section (2) of Section 3 or 5, he or she shall certify such opinion in Form I. It further provides that every registered medical practitioner who terminates any pregnancy shall within three hours from the termination of the pregnancy certify such termination in Form I.

...

**25.3.** In the present case, we are concerned with Regulation 3 only.

**26.** Form I has been provided under Regulation 3 and that covers sub-section (2) of Section 3 and Section 5...

**27.** Thus, the opinion has to be formed by the registered practitioners as per the Act and they are required to form an opinion that continuance of pregnancy would involve a grave mental or physical harm to her. We have already referred to Explanation 1 which includes allegation of rape. As is perceivable, the appellant had gone from a women rehabilitation centre, had given consent for termination of pregnancy and had alleged about rape committed on her, but the termination was not carried out. In such a circumstance, we are obliged to hold that there has been negligence in carrying out the statutory duty, as a result of which, the appellant has been constrained to suffer grave mental injury.

**28.** In such a situation, submits Ms Grover, the State is bound to compensate the appellant under public law remedy. It is her proponentment that the appellant was suffering from mental retardation, but not from mental illness and the distinction is clear from the language of sub-section (4) of Section 3 of the Act. That apart, her contention is that the victim was a destitute and in such a situation, impleadment of her husband and father for obtaining their consent was wholly unwarranted and, in a way, allow time to “rule”.

**29.** In *Suchita Srivastava* [*Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570], the High Court of Punjab and Haryana ruled [*State (UT of Chandigarh) v. Nemo*, 2009 SCC OnLine P&H 6879] that it was in the best interests of a mentally retarded woman to undergo an abortion. The victim had become pregnant as a result of an alleged rape that took place when she was an inmate at a Government-run welfare institution located in Chandigarh and after discovery of her pregnancy, the Chandigarh Administration, approached the High Court seeking approval for the termination of her pregnancy, keeping in mind that in addition to being mentally retarded she was also an orphan who did not have any parent or guardian to look after her or her prospective child. The High Court perused the preliminary medical opinion and constituted an expert body and, eventually, directed the termination of pregnancy in spite of the expert body's findings which show that the victim had expressed her willingness to bear a child. In that context, the Court adverted to the distinction between the “mental illness” and “mental retardation”. It also noted that the expert body's findings were in favour of continuation of pregnancy and took note of the fact that the victim had clearly given her willingness to bear a child.

**30.** In that context, the Court stated: (*Suchita Srivastava case* [*Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] , SCC p. 13, para 19)

“19. The victim's reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter. We have adopted this position since the applicable statute clearly contemplates that even a woman who is found to be “mentally retarded” should give her consent for the termination of a pregnancy.”

And again: (SCC p. 15, para 22)

“22. There is no doubt that a woman's right to make reproductive choices is also a dimension of “personal liberty” as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a “compelling State interest” in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.”

**31.** Explaining the provision of the Act, the Court in *Suchita Srivastava* [*Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] opined that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a 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 when 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. While the satisfaction of one medical practitioner is required for terminating a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period.

**32.** The Court in *Suchita Srivastava* [*Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] also took note of the provision that termination of the pregnancy has been contemplated when the same is the result of a rape or a failure of birth control methods, since both of these eventualities have been equated with a grave injury to the mental health of a woman. The Court emphasised that in all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. The three-Judge Bench referred to the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short “the 1995 Act”) and opined that in the said Act also “mental illness” has been defined as mental disorder other than mental retardation.

**33.** The Court also took note of the definition of “mental retardation” under the 1995 Act. The definition read as follows: (*Suchita Srivastava case* [*Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] , SCC p. 17, para 28)

“28. ... ‘**2. (r) “mental retardation”** means a condition of arrested or incomplete development of mind of a person which is specially characterised by subnormality of intelligence.’

**34.** The Court in *Suchita Srivastava* [*Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] also apprised itself that the same definition of “mental retardation” has also been incorporated under Section 2(g) of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. Analysing the provision of the Act, the Court opined that while a guardian can make decisions on behalf of a “mentally ill person” as per Section 3(4)(a) of the 1971 Act, the same cannot be done on behalf of a person who is in a condition of “mental retardation.” Thus, the difference between the “mental illness” and “mental retardation” as recognised in law, was emphasised.

**35.** The three-Judge Bench proceeded to address the “best interest” of the victim and invocation of the doctrine of *parens patriae*. In that context, it held: (*Suchita Srivastava case [Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] , SCC p. 18, para 37)

“37. As evident from its literal description, the “best interests” test requires the Court to ascertain the course of action which would serve the best interests of the person in question. In the present setting this means that the Court must undertake a careful inquiry of the medical opinion on the feasibility of the pregnancy as well as social circumstances faced by the victim. It is important to note that the Court's decision should be guided by the interests of the victim alone and not those of the other stakeholders such as guardians or the society in general. It is evident that the woman in question will need care and assistance which will in turn entail some costs. However, that cannot be a ground for denying the exercise of reproductive rights.”

**36.** After so stating, the Court in *Suchita Srivastava [Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] adverted to the facts of the case and came to hold that though the victim had been described as a person suffering from mild mental retardation, that did not mean that she was entirely incapable of making decision for herself. It discarded the “substituted judgment” test, which requires the Court to step into the shoes of a person who is considered to be mentally incapable and attempt to make the decision which the said person would have made, if she was competent to do so. The Court observed that it is a more complex inquiry but this test can only be applied to make decisions on behalf of persons who are conclusively shown to be mentally incompetent. The Court noted that there are varying degrees of mental retardation, namely, those described as borderline, mild, moderate, severe and profound instances of the same. Persons suffering from severe and profound mental retardation usually require intensive care and supervision and a perusal of academic materials suggests that there is a strong preference for placing such persons in an institutionalised environment. However, persons with borderline, mild or moderate mental retardation are capable of living in normal social conditions even though they may need some supervision and assistance from time to time.

**37.** The Court referred to the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971 [GA Res 2856 (XXVI) of 20-12-1971] and relied on Principle 7 of the same. Principle 7 reads as follows: (*Suchita Srivastava case [Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] , SCC pp. 21-22, para 50)

“50. ... ‘7. Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the right of appeal to higher authorities.’

**38.** Placing reliance on the same, it observed thus: (*Suchita Srivastava case [Suchita Srivastava v. State (UT of Chandigarh)*, (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] , SCC pp. 22-23, paras 51 & 54-55)

“51. In respecting the personal autonomy of mentally retarded persons with regard to the reproductive choice of continuing or terminating a pregnancy, the MTP Act lays down such a procedure. We must also bear in mind that India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) on 1-10-2007 and the contents of the same are binding on our legal system.

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54. It would also be proper to emphasise that persons who are found to be in a condition of borderline, mild or moderate mental retardation are capable of being good parents. Empirical studies have conclusively disproved the eugenics theory that mental defects are likely to be passed on to the next generation. The said “eugenics theory” has been used in the past to perform forcible sterilisations and abortions on mentally retarded persons. [See generally: Elizabeth C. Scott, “Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy”, *Duke Law Journal* 806-65 (November 1986).] We firmly believe that such measures are anti-democratic and violative of the guarantee of “equal protection before the law” as laid down in Article 14 of our Constitution.

55. It is also pertinent to note that a condition of “mental retardation” or developmental delay is gauged on the basis of parameters such as intelligence quotient (IQ) and mental age (MA) which mostly relate to academic abilities. It is quite possible that a person with a low IQ or MA may possess the social and emotional capacities that will enable him or her to be a good parent. Hence, it is important to evaluate each case in a thorough manner with due weightage being given to medical opinion for deciding whether a mentally retarded person is capable of performing parental responsibilities.”

**39.** On the basis of the aforesaid analysis, the Court concluded: (*Suchita Srivastava case* [*Suchita Srivastava v. State (UT of Chandigarh)*], (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] , SCC p. 23, para 58)

“58. In our considered opinion, the language of the MTP Act clearly respects the personal autonomy of mentally retarded persons who are above the age of majority. Since none of the other statutory conditions have been met in this case, it is amply clear that we cannot permit a dilution of the requirement of consent for proceeding with a termination of pregnancy. We have also reasoned that proceeding with an abortion at such a late stage (19-20 weeks of gestation period) poses significant risks to the physical health of the victim.”

**40.** In the said case in *Suchita Srivastava* [*Suchita Srivastava v. State (UT of Chandigarh)*], (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] , the Court took note of the fact that the expert body which had examined the victim indicated that the continuation of the pregnancy did not pose any grave risk to the physical and mental health of the victim and that there was no indication that the prospective child was likely to suffer from a congenital disorder. Regard being had to the totality of the facts and circumstances of the case, it was directed that the best medical facilities be made available so as to ensure proper care and supervision during the period of pregnancy as well as for the post-natal care.

**41.** In a recent decision in *Eera v. State (NCT of Delhi)* [*Eera v. State (NCT of Delhi)*], (2017) 15 SCC 133 : (2017) 8 Scale 112] , the distinction between mental illness and mental retardation, keeping in view the statutory provisions and the concept of purposive interpretation, has been accepted.

**42.** In the case at hand, the appellant is a victim of rape. She suffers from mild mental retardation and she is administered psychiatry treatment, but she is in a position to express her consent. Under the statutory framework, she was entitled to give her consent for termination of pregnancy. As is evident, she did not desire to bear a child. This is a reverse situation what has been portrayed in *Suchita Srivastava* [*Suchita Srivastava v. State (UT of Chandigarh)*], (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] . The principle set out in *Suchita Srivastava* [*Suchita Srivastava v. State (UT of Chandigarh)*], (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] emphasises on consent. As the facts would unfurl, the appellant had given consent for termination and she had categorically alleged about rape. In such a circumstance, we perceive no fathomable reason on the part of PMCH not to have proceeded for termination of the pregnancy because there was nothing on record to show that there was any danger to the life of the victim.

**43.** In this context, we may refer with profit to the recent decision rendered in *X v. Union of India* [*X v. Union of India*], (2017) 3 SCC 458 : AIR 2017 SC 1055] wherein the Court laying stress on a woman's right to make reproductive choices and further taking into consideration the report of the Medical Board directed as follows: (SCC pp. 460-61, para 9)

“9. Though the current pregnancy of the petitioner is about 24 weeks and endangers the life and the death of the foetus outside the womb is inevitable, we consider it appropriate to permit the petitioner to undergo termination of her pregnancy under the provisions of the Medical Termination of Pregnancy Act, 1971. We order accordingly.”

**44.** In *Sheetal Shankar Salvi* [*Sheetal Shankar Salvi v. Union of India*], (2018) 11 SCC 606 : (2017) 5 Scale 428] , a two-Judge Bench declined termination of pregnancy after perusal of the report of the Medical Board. The observations and the conclusion of the Court are to the following effect: (SCC p. 607, paras 6-7)

“6. ... However, having regard to the fact that there is no danger to the mother's life and the likelihood that ‘the baby may be born alive and may survive for variable period of time, we do not consider it appropriate in the interests of justice to direct the respondents to allow Petitioner 1 to undergo medical termination of her pregnancy. In fact, the aforesaid Medical Board has itself stated that it does not advise medical termination of pregnancy for Petitioner 1 on medical grounds.

7. The only other ground that appears from the observations made in the aforesaid medical report apart from the medical grounds, is that Petitioner 1 is anxious about the outcome of the pregnancy. We find that the termination of pregnancy cannot be permitted due to this reason.”

**45.** On a careful reading of the aforesaid decision in *Sheetal Shankar Salvi case* [*Sheetal Shankar Salvi v. Union of India*, (2018) 11 SCC 606 : (2017) 5 Scale 428], we do not have slightest hesitation in our mind that the facts in the said cases and the observations made therein have no application to the facts of the instant case.

**46.** In *Meera Santosh Pal* [*Meera Santosh Pal v. Union of India*, (2017) 3 SCC 462 : AIR 2017 SC 461], the Court noted the fact that the foetus is without a skull and would, therefore, not be in a position to survive. The Court adverted to the fact that the petitioner therein was a woman of average intelligence and with good comprehension and she had understood that her foetus was abnormal and the risk of foetal mortality was high. She had also the support of her husband in her decision-making. The Court allowed the termination of pregnancy despite the pregnancy having gone into 24th week. What weighed with the Court was danger to the life of the woman and the certain inability of the foetus to survive extra-uterine life. Emphasis has been laid on the aspect that the overriding consideration is that she has a right to take all such steps as necessary to preserve her own life against the avoidable danger to it.

**47.** In the case at hand, we have noted, termination of pregnancy could have been risky to the life of the appellant as per the report of the Medical Board at AIIMS which was constituted as per the direction of this Court on 3-5-2017 [*Z v. State of Bihar*, (2017) 14 SCC 525 : (2017) 14 SCC 526 : (2017) 4 SCC (Cri) 916 : (2017) 4 SCC (Cri) 917]. This situation could have been avoided had the decision been taken at the appropriate time by the Government Hospital at Patna. For the negligence and carelessness of the hospital, the appellant has been constrained to suffer. The mental torture on certain occasions has more grievous impact than the physical torture.

**48.** In *Mehmood Nayyar Azam v. State of Chhattisgarh* [*Mehmood Nayyar Azam v. State of Chhattisgarh*, (2012) 8 SCC 1 : (2012) 4 SCC (Civ) 34 : (2012) 3 SCC (Cri) 733 : (2012) 2 SCC (L&S) 449], the Court has observed that the word “torture” in its denotative concept includes mental and psychological harassment. It has the potentiality to cause distress and affects the dignity of a citizen. Under the present Act, the appellant is covered by the definition. In such a situation, there was no justification to push back her rights and throw her into darkness to corrode her self-respect and individual concern. She had decided to exercise her statutory right, being a victim of rape, not to bear the child and more so, when there is possibility of the child likely to suffer from HIV+ve, the authorities of the State should have been more equipped to assist the appellant instead of delaying the process. That apart, as is seen, the State in a way contested the matter before the High Court on the foundation of State interest. The principle of State interest is not at all applicable to the present case. Therefore, the concept of grant of compensation under public law remedy emerges.

**49.** In *Nilabati Behera* [*Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746 : 1993 SCC (Cri) 527], J.S. Verma, J., (as his Lordship then was), opined thus: (SCC pp. 762-63, para 17)

“17. ... “a claim in public law for compensation” for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is “distinct from, and in addition to, the remedy in private law for damages for the tort” resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution.”

**50.** Dr A.S. Anand, (as his Lordship then was), in his concurring opinion, expressed that: (*Nilabati case* [*Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746 : 1993 SCC (Cri) 527], SCC pp. 768-69, para 34)

“34. ... The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by [the Supreme Court] or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilise public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting “compensation” in proceedings under Articles 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it

does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making “monetary amends” under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of “exemplary damages” awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law.”

**51.** In *Sube Singh v. State of Haryana* [*Sube Singh v. State of Haryana*, (2006) 3 SCC 178 : (2006) 2 SCC (Cri) 54] , a three-Judge Bench, after referring to earlier decisions, held: (SCC pp. 198-99, para 38)

“38. It is thus now well settled that the award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in the enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under Section 357 of the Code of Criminal Procedure.

**52.** In *Hardeep Singh v. State of M.P.* [*Hardeep Singh v. State of M.P.*, (2012) 1 SCC 748 : (2012) 1 SCC (Cri) 684] , though the High Court had granted compensation of Rs 70,000, this Court, while concurring with the opinion that related to justification of compensation, enhanced the compensation by holding thus: (SCC pp. 752-53, para 17)

“17. Coming, however, to the issue of compensation, we find that in the light of the findings arrived at by the Division Bench, the compensation of Rs 70,000 was too small and did not do justice to the sufferings and humiliation undergone by the appellant. In the facts and circumstances of the case, we feel that a sum of Rs 2,00,000 (Rupees two lakhs) would be an adequate compensation for the appellant and would meet the ends of justice. We, accordingly, direct the State of Madhya Pradesh to pay to the appellant the sum of Rs 2,00,000 (Rupees two lakhs) as compensation. In case the sum of Rs 70,000 as awarded by the High Court, has already been paid to the appellant, the State would naturally pay only the balance amount of Rs 1,30,000 (Rupees one lakh thirty thousand).”

**53.** In *Railway Board v. Chandrima Das*, (2000) 2 SCC 465] , the Court copiously adverted to the public law remedy and finding fault with the Railways opined that: (SC pp. 485-86, para 42)

“42. Running of the Railways is a commercial activity. Establishing the Yatri Niwas at various railway stations to provide lodging and boarding facilities to passengers on payment of charges is a part of the commercial activity of the Union of India and this activity cannot be equated with the exercise of sovereign power. The employees of the Union of India who are deputed to run the Railways and to manage the establishment, including the railway stations and the Yatri Niwas, are essential components of the government machinery which carries on the commercial activity. If any of such employees commits an act of tort, the Union Government, of which they are the employees, can, subject to other legal requirements being satisfied, be held vicariously liable in damages to the person wronged by those employees. *Kasturi Lal [Kasturi Lal Ralia Ram Jain v. State of U.P.]*, AIR 1965 SC 1039 : (1965) 2 Cri LJ 144] decision therefore, cannot be pressed into aid. Moreover, we are dealing with this case under the public law domain and not in a suit instituted under the private law domain against persons who, utilising their official position, got a room in the Yatri Niwas booked in their own name where the act complained of was committed.”

**54.** On the aforesaid basis, this Court in *Railway Board v. Chandrima Das*, (2000) 2 SCC 465] affirmed the judgment of the High Court and directed that the amount of compensation should be made over to the High Commissioner for Bangladesh in India for payment of the same to the victim as she was entitled to it.



**55.** In *Rini Johar v. State of M.P.* [*Rini Johar v. State of M.P.*, (2016) 11 SCC 703 : (2017) 1 SCC (Cri) 364], the petitioners therein were arrested in violation of the mandate of law under Section 41-A of the Code of Criminal Procedure and the judgment of this Court rendered in *D.K. Basu* [*D.K. Basu v. State of W.B.*, (1997) 1 SCC 416 : 1997 SCC (Cri) 92]. The petitioners in the said case were a doctor and a practising advocate. The arrest being illegal, the Court opined that their dignity had been absolutely jeopardised. Referring to the earlier decisions, the Court held as under: (*Rini Johar case* [*Rini Johar v. State of M.P.*, (2016) 11 SCC 703 : (2017) 1 SCC (Cri) 364], SCC pp. 716-17, paras 23-24)

“23. In such a situation, we are inclined to think that the dignity of the petitioners, a doctor and a practising advocate has been seriously jeopardised. Dignity, as has been held in *Charu Khurana v. Union of India* [*Charu Khurana v. Union of India*, (2015) 1 SCC 192 : (2015) 1 SCC (L&S) 161] is the quintessential quality of a personality, for it is a highly cherished value. It is also clear that liberty of the petitioner was curtailed in violation of law. The freedom of an individual has its sanctity. When the individual liberty is curtailed in an unlawful manner, the victim is likely to feel more anguished, agonised, shaken, perturbed, disillusioned and emotionally torn. It is an assault on his/her identity. The said identity is sacrosanct under the Constitution. Therefore, for curtailment of liberty, requisite norms are to be followed. Fidelity to statutory safeguards instil faith of the collective in the system. It does not require wisdom of a seer to visualise that for some invisible reason, an attempt has been made to corrode the procedural safeguards which are meant to sustain the sanguinity of liberty. The investigating agency, as it seems, has put its sense of accountability to law on the ventilator. The two ladies have been arrested without following the procedure and put in the compartment of a train without being produced before the local Magistrate from Pune to Bhopal. One need not be Argus-eyed to perceive the same. Its visibility is as clear as the cloudless noon day. It would not be erroneous to say that the enthusiastic investigating agency had totally forgotten the golden words of Benjamin Disraeli:

‘I repeat ... that all power is a trust—that we are accountable for its exercise—that, from the people and for the people, all springs and all must exist.’

24. We are compelled to say so as liberty which is basically the splendour of beauty of life and bliss of growth, cannot be allowed to be frozen in such a contrived winter. That would tantamount to comatosing of liberty which is the strongest pillar of democracy.”

After so holding, the Court referred to the concept of public law remedy and awarded Rs 5,00,000 (Rupees five lakhs only) towards compensation to each of the petitioners to be paid by the State within a stipulated time.

**56.** In the instant case, it is luminescent that the appellant has suffered grave injury to her mental health. The said injury is in continuance. It is a sad thing that despite the prompt attempt made by this Court to get her examined so that she need not undergo the anguish of bearing a child because she is a victim of rape, it could not be so done as the medical report clearly stated that there was risk to the life of the victim. Therefore, we are inclined to think that the continuance of the injury creates a dent in the mind and the appellant is compelled to suffer the same. One may have courage or cultivate courage to face a situation, but the shock of rape is bound to chain and enslave her with the trauma she has faced and cataclysm that she has to go through. Her condition cannot be reversed. The situation as is unredeemable. But a pregnant one, she has to be compensated so that she lives her life with dignity and the authorities of the State who were negligent would understand that truancy has no space in a situation of the present kind. What is needed is promptitude.

**57.** This Court had earlier directed that she should be paid compensation under the Victims Compensation Scheme as framed under Section 357-A of the Code of Criminal Procedure. She has been paid Rs 3,00,000 as she has been a victim of rape. It may be clearly stated that grant of compensation for the negligence and the suffering for which the authorities of the State are responsible is different as it comes within the public law remedy and it has a different compartment. Keeping in view the mental injury that the victim has to suffer, we are disposed to think that the appellant should get a sum of Rs 10,00,000 (Rupees ten lakhs only) as compensation from the State and the same shall be kept in a fixed deposit in her name so that she may enjoy the interest. We have so directed as we want that money to be properly kept and appropriately utilised. It may also be required for child's future. That apart, it is directed that the child to be born shall be given proper treatment and nutrition by the State and if any medical aid is necessary, it shall also be provided. If there will be any future grievance, liberty is granted to the appellant to approach the High Court under Article 226 of the Constitution of India after the birth of the child.

**58.** Having said so, it is necessary to state that the learned Single Judge should have been more alive to the provisions of the Act and the necessity of consent only of the appellant in the facts of the case. There was no reason whatsoever to implead the husband and father of the appellant. We say so as it is beyond an iota of doubt that the appellant was a destitute, a victim of rape and further she was staying in a shelter home. Calling for a medical report was justified but to delay it further was not at all warranted. It needs to be stated that the High Courts are required to be more sensitive while dealing with matters of the present nature.

**59.** We will be failing in our duty if we do not deal with the submission of the learned counsel for the State. According to her, the State should not be made liable because of the fault of the Court. The principle of *actus curiae neminem gravabit* basically means an act of the court shall prejudice no man. Though such a principle has been advanced yet the same is not applicable to the facts of the case at hand. In *A.R. Antulay v. R.S. Nayak* [A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602 : 1988 SCC (Cri) 372], Sabyasachi Mukharji, J. (as his Lordship then was), speaking for the majority for the Constitution Bench, quoted the following observation of Lord Cairns in *Rodger v. Comptoir D'Escompte de Paris* [Rodger v. Comptoir D'Escompte de Paris, (1871) LR 3 PC 465 : 17 ER 120] : (A.R. Antulay case [A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602 : 1988 SCC (Cri) 372], SCC p. 672, para 82)

“82. ... ‘Now, their Lordships are of opinion, that one of the first and highest duties of all courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression “the act of the Court” is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case. It is the duty of the aggregate of those tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court.’ (Rodger case [Rodger v. Comptoir D'Escompte de Paris, (1871) LR 3 PC 465 : 17 ER 120], ER p. 125)”

The aforesaid principle despite its broad connotation is not attracted to the obtaining factual matrix inasmuch as we have granted compensation because of the delay caused by the authorities of PMCH.

**60.** Before parting with the case, we must note that India has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1993 and is under an international obligation to ensure that the right of a woman in her reproductive choices is protected. Article 11 of the said Convention provides that all State parties shall ensure the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. Article 12 of the Convention stipulates that State parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on the basis of equality of men and women, accesses to health care services, including those related to family planning.

**61.** The legislative intention of the 1971 Act and the decision in *Suchita Srivastava* [Suchita Srivastava v. State (UT of Chandigarh), (2009) 9 SCC 1 : (2009) 3 SCC (Civ) 570] prominently emphasise on personal autonomy of a pregnant woman to terminate the pregnancy in terms of Section 3 of the Act. Recently, Parliament has passed the Mental Healthcare Act, 2017 which has received the assent of the President on 7-4-2017. The said Act shall come into force on the date of notification in the Official Gazette by the Central Government or on the date of completion of the period of nine months from 7-4-2017. We are referring to the same only to highlight the legislative concern in this regard. It has to be borne in mind that element of time is extremely significant in a case of pregnancy as every day matters and, therefore, the hospitals should be absolutely careful and treating physicians should be well advised to conduct themselves with accentuated sensitivity so that the rights of a woman are not hindered. The fundamental concept relating to bodily integrity, personal autonomy and sovereignty over her body have to be given requisite respect while taking the decision and the concept of consent by a guardian in the case of minor should not be overemphasized.

**62.** In view of the aforesaid analysis, the appeal is allowed to the extent indicated above and the order passed by the High Court is set aside except for the direction pertaining to investigation carried out on the basis of the FIR lodged by the appellant. There shall be no order as to costs.”

## Endnotes

- 1 See Chapter II, Rights of Persons with Disabilities Act, 2016.
- 2 Section 10, Rights of Persons with Disabilities Act, 2016.
- 3 Cases dealing with termination of pregnancies where fetal impairment was an issue are discussed in Chapter 5, “Medical Termination of Pregnancy.”
- 4 (2009) 9 SCC 1.
- 5 (2018) 11 SCC 572.
- 6 U.N. Office of the High Commissioner for Human Rights, “Status of Ratification Interactive Dashboard—India,” <http://indicators.ohchr.org/>.
- 7 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained in U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001), Arts. 3-4.*
- 8 *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.



# CHAPTER EIGHT

# REPRODUCTIVE RIGHTS OF INCARCERATED PERSONS

The Supreme Court in *Sunil Batra v. Delhi Administration* had noted that the Fundamental Rights of a prisoner “[do] not part company with the prisoner at the gates”<sup>1</sup> of the prison. The Court, in multiple judgments over the years, has reiterated this approach and safeguarded the Fundamental Rights of prisoners. Over the last decade, reproductive rights of incarcerated prisoners have also gained prominence. A number of issues have arisen before courts with respect to reproductive rights of incarcerated persons. In this section, we discuss cases pertaining to:

- Medical Termination of Pregnancy During Incarceration
- Special Provisions for Pregnant Women in Prisons
- Right to Procreation and Conjugal Visits

## Medical Termination of Pregnancy During Incarceration

The Medical Termination of Pregnancy Act 1971 (MTP Act) applies to all women including women prisoners. However, in reality, incarcerated women have faced additional limits on access to abortion. In this context, cases have been filed by women prisoners (or people on their behalf) to safeguard reproductive rights during incarceration.

In *Hallo Bi v. State of Madhya Pradesh*,<sup>2</sup> an undertrial woman prisoner filed a writ petition before the Madhya Pradesh High Court seeking directions to the State to permit her to terminate her pregnancy. She alleged that the pregnancy was due to forced prostitution. Although the MTP Act does not require judicial approval for MTP in any case, Hallo Bi’s request for termination of pregnancy was forwarded by the jail authorities to the Chief Judicial Magistrate, who rejected it. The writ petition hence came to be filed. The High Court in permitting the woman to terminate her pregnancy relied on the Supreme Court’s judgment in *Suchita Srivastava v. Chandigarh Administration*,<sup>3</sup> which had held that a woman’s right to make reproductive choices is a dimension of personal liberty guaranteed under Article 21 of the Indian Constitution. The Court held that “forced prostitution” amounted to rape, and hence was covered within one of the conditions stipulated by Section 3 of the MTP Act for termination of pregnancy.

The Bombay High Court recognized that it was unnecessary to seek permission from an external board, be it of jail authorities or prison officials, to adhere to the request of an incarcerated woman to terminate her pregnancy. In *High Court on Its Own Motion v. State of Maharashtra*,<sup>4</sup> the Court noted that pregnant women form a common category which includes pregnant women prisoners. The Court found that all pregnant women have a fundamental right to reproductive choice under Article 21 of the Indian Constitution which includes the right to terminate pregnancy. The Court directed that every woman prisoner of reproductive age should be administered a urine pregnancy test on admission to the prison and if she is found to be pregnant, the medical officer should inform the woman of her option to terminate her pregnancy under the MTP Act. It held that once a pregnant woman prisoner indicates her wish to terminate pregnancy, she should be immediately referred to a hospital and all assistance should be provided to terminate her pregnancy. It recognized that a woman’s decision to terminate her pregnancy is not a frivolous one but is a “carefully considered” decision. It also recognized the need to expand Explanation 2 to Section 3 of the MTP Act to cover not only married couples, but also any couple living together like a married couple. In its holding, the High Court held that the right of a woman to decide whether to be, or not to be a mother is derived from the human right to live with dignity, which is guaranteed under Article 21 of the Constitution. Further, relying on international human rights law, the Court noted that human rights are vested in a person only on birth, and an unborn foetus does not have human rights. It thus recognized the bodily autonomy of a woman, and that she is the person whose rights are paramount in the context of deciding on whether to procreate, and whether to continue or terminate a pregnancy.

## Special Provisions for Pregnant Women in Prisons

In *R. D. Upadhyay v. State of Andhra Pradesh*,<sup>5</sup> the Supreme Court issued guidelines with respect to the treatment of pregnant women incarcerated in prisons. The guidelines deal with medical facilities to be provided to pregnant women prisoners, dietary needs of pregnant women and their children, measures for childbirth (noting that as far as possible the woman should be released on bail so that she can deliver outside the prison) and keeping children in prison.

The Gujarat High Court in *State of Gujarat v. Jadav @ Jatin Bhagvanbhai Prajapati & Ors.*,<sup>6</sup> implemented one of the guidelines in *R.D. Upadhyay* in relation to granting bail to pregnant women to deliver their children outside the prison. After convicting the woman accused, on being informed that she was pregnant, the Court suspended her sentence and granted her bail for eleven months. Thus, it provided her time not only to deliver her child outside the prison environment and while not in custody, but also to provide care to the child in the initial months. The Court also directed the jail authorities to permit the woman to keep her children with her in the prison until they reached the age stipulated by the relevant Jail Manual.

## Right to Procreation and Conjugal Visits

Over the last few years, incarcerated persons have approached courts seeking recognition and enforcement of their conjugal rights. One such case is *Jasvir Singh v. State of Punjab*.<sup>7</sup> In this case, the Punjab and Haryana High Court was petitioned by a couple seeking enforcement of their right to have a conjugal life. The husband had been sentenced to death, and the wife to imprisonment for life. Relying also on international human rights norms, the Court held that the right to procreation and to conjugal visits is a component of the right to live with dignity, which is engrained within the right to life guaranteed by Article 21 of the Indian Constitution. It held that the right to procreation survives incarceration. It however noted that reasonable restrictions apply to the right to conjugal visits or procreation, and as a corollary, to artificial insemination. Hence, limitations could be placed in accordance with “procedure established by law.” The Court directed the State of Punjab to form a jail reforms committee with the mandate to formulate a scheme for conjugal visits for jail inmates.

A *habeas corpus* petition was filed before the Madras High Court by the wife of a life convict seeking leave for her husband for the purpose of fertility treatment. The High Court in *Mrs. Meharaj vs. The State & Ors.*,<sup>8</sup> in allowing the application, held that the wife had the right to procreate, and that such right is not extinguished by her spouse being imprisoned for life. It ruled that the wife has a legitimate expectation to have a child that cannot be denied.

## Related Human Rights Standards and Jurisprudence

Below is a selection of international and regional human rights standards and jurisprudence that explains states’ obligations concerning the reproductive rights of incarcerated persons.

The Government of India has committed itself to comply with the obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR).<sup>9</sup> Under international law all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.<sup>10</sup> The U.N. has repeatedly reiterated that incarcerated individuals retain their human rights as set out in human rights treaties, except for those limitations that are demonstrably necessitated by the fact of incarceration.<sup>11</sup> The Supreme Court has held that in light of the obligation to “foster respect for international law” in Article 51 (c) of the Indian Constitution “[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee”.<sup>12</sup>

### INTERNATIONAL TREATY STANDARDS

#### TREATIES

- **ICCPR, Articles 2, 3, 6(5), 7, 10, 23(1)-(2), 26** (providing that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person,” that the “essential aim” of the penitentiary system shall be prisoners’ “reformation and social rehabilitation,” and that the death penalty shall not be carried out on pregnant women; and protecting the right to life, to freedom from torture and ill treatment, to marry, to found a family, and to non-discrimination).
- **ICESCR, Articles 2, 3, 10, 12** (protecting the right to non-discrimination and equality, to a family and to “special protection” for women for a “reasonable period” before and after childbirth, and guaranteeing the right to the highest attainable standard of physical and mental health without discrimination).

- **CEDAW, Articles 10(h), 12(1), 14(2)-(b), 16(e)** (outlining women's right to family planning information, goods and services and to "decide 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").

## SELECTED GENERAL COMMENTS

- **Human Rights Committee, General Comment No. 36 (2018) on article 6 of the ICCPR, on the right to life**, U.N. Doc. CCPR/C/GC/36 (2018), paras. 8, 25, 48-49 (delineating women's right to abortion and pregnancy-related care while imprisoned or detained, outlining States' heightened duty of care to protect the right to health of persons who are deprived of liberty, and prohibiting the use of the death penalty on pregnant women and parents of very young or dependent children).
- **Human Rights Committee, General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)**, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 15 (with respect to ICCPR articles 7 and 10, requiring States parties to ensure that women deprived of liberty enjoy equal rights to men, particularly including access to conjugal and family visits, medical and health care, and respect for their dignity, in particular during and following childbirth).
- **Human Rights Committee, General Recommendation No. 21: Article 10 (Humane treatment of persons deprived of their liberty)** (1992), para. 3 (highlighting States' positive obligation to persons deprived of liberty to guarantee their dignity "under the same conditions as for that of free persons" apart from "the restrictions that are unavoidable in a closed environment," and that such persons are not "subjected to any hardship or constraint other than that resulting from the deprivation of liberty").
- **CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19**, U.N. Doc. CEDAW/C/GC/35 (2017), para. 38 (requiring all relevant personnel, including legal, education, social welfare and health personnel for persons deprived of liberty to receive "mandatory, recurrent and effective" training in the area of sexual and reproductive health and the prevention of gender-based violence).
- **Committee for Economic Social and Cultural Rights (CESCR), General Comment No. 22 (2016) on the right to sexual and reproductive health**, U.N. Doc. E/C.12/GC/22 (2016), paras. 31, 60 (highlighting State obligations to effectively monitor and regulate specific sexual and reproductive health-related sectors, and outlining that for "[p]risoners [...] [and others with] additional vulnerability by condition of their detention or legal status [...] the State [is required] to take particular steps to ensure their access to sexual and reproductive information, goods and health care.").
- **CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)**, U.N. Doc. E/C.12/2000/4 (2000), para. 34 (establishing that States must not impose discriminatory practices relating to women's health status and needs, including for women prisoners and detainees, by, e.g., "refrain[ing] from limiting access to contraceptives and other means of maintaining sexual and reproductive health, [and] from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information").

## UNITED NATIONS HUMAN RIGHTS EXPERT AND WORKING GROUP REPORTS

- **Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health**, U.N. Doc. A/HRC/38/36 (2018), paras. 28, 38, 71-72, 77-81, 98(c), 98(k) (underlining prisoners' and detainees' continued right to health care, including for women and adolescents; highlighting discrimination perpetuated in prison environments, including by denial of health care such as sexual health supplies or contraceptives; and outlining that for detained women, the lack of gender- and security-appropriate facilities, services and supplies, including pre-, peri- and post-natal care, violate women's rights to sexual and reproductive health and may amount to torture or ill-treatment).
- **Working Group on the Issue of Discrimination Against Women in Law and Practice (WGDAW), Report of the Working Group on the issue of discrimination against women in law and in practice**, U.N. Doc. A/HRC/32/44 (2016), paras. 17, 59-60 (highlighting that women deprived of liberty are particularly vulnerable to degrading treatment when seeking or receiving health care and frequently lack access to preventive services related to sexual and reproductive health).



- **Special Rapporteur on violence against women, its causes and consequences, *Pathways to, conditions and consequences of incarceration for women***, U.N. Doc. A/68/340 (2013), paras. 33-65 (describing common violations of women's sexual and reproductive health rights while detained or imprisoned, including exposure to sexual and gender-based violence and harassment, lack of appropriate care for pregnant women and women with children, and deprivation of hygienic conditions, nutrition, and feminine-specific health care).
- **Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (SR Torture), *Second Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak***, U.N. Doc. A/HRC/7/3 (2008), para. 41 (recommending that "measures of physical restraint should be avoided during delivery").
- **SR Torture, *Torture and other cruel, inhuman or degrading treatment or punishment: Report of the Special Rapporteur, Theo van Boven***, U.N. Doc. E/CN.4/2004/56 (2003), paras. 42, 55-64 (pointing to basic standards of medical care and protections against torture and degrading and inhumane treatment for prisoners and detainees, including the right to information and medical care relating to sexual and reproductive health).

## SELECTED REGIONAL CASE LAW

### EUROPEAN COURT OF HUMAN RIGHTS

- ***Dickson v. The United Kingdom*, Application No. 44362/04 (2007)**, paras. 28-36, 67-85 (where an imprisoned man and his wife were denied access to artificial insemination necessary for conception, finding a violation of the right to private and family life).

### INTER-AMERICAN COURT OF HUMAN RIGHTS

- ***Karina Montenegro et al. v. Ecuador*, Report No. 61/13, Petition 12.631, Friendly Settlement (2013)** (outlining the terms of a friendly settlement where, in express contravention of domestic law, four pregnant women in detention were obliged to give birth in prison and raise their babies there; requiring the State to provide compensation, training and resources to adapt the facilities for young children in conformity with the rights to personal integrity and to physical, moral, and psychological integrity, and with the obligation to eradicate violence against women).
- ***Miriam Beatriz Riquelme Ramírez v. Paraguay*, Report No. 25/13, Petition 1097-06, Friendly Settlement (2013)** (in a friendly settlement where a woman was held in preventive detention while she was breastfeeding, in violation of express provisions of domestic law, requiring the state to acknowledge responsibility and provide appropriate reparations for the "arbitrary denial of freedom" in violation of the rights to physical liberty and to judicial protection and of the child's right to protection).

# RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

## IN THE SUPREME COURT OF INDIA

**R. D. Upadhyay v. State of Andhra Pradesh**

**(2007) 15 SCC 337**

**Y.K. Sabharwal, C.J. and C.K. Thakker and P.K. Balasubramanyan, JJ.**

***A writ petition was filed by a non-governmental organization for issuance of guidelines with respect to developmental needs of children who were in jails, along with their mothers who were either undertrials or convicts. The writ petition also sought measures for improving conditions of children of women prisoners.***

**Sabharwal, C.J.:** “Concerned by the plight of the undertrial prisoners languishing in various jails in the country, various directions were issued by this Court from time to time. Presently, we are considering mainly the issue of directions for the development of children who are in jail with their mothers or who are in jail either as undertrial prisoners or convicts.

...

**45.** In light of various reports referred to above, affidavits of various State Governments, Union Territories, the Union of India and submissions made, we issue the following guidelines:

...

### 2. Pregnancy:

(a) Before sending a woman who is pregnant to a jail, the authorities concerned must ensure that the jail in question has the basic minimum facilities for child delivery as well as for providing prenatal and post-natal care for both, the mother and the child.

(b) When a woman prisoner is found or suspected to be pregnant at the time of her admission or at any time thereafter, the lady Medical Officer shall report the fact to the Superintendent. As soon as possible, arrangement shall be made to get such prisoner medically examined at the female wing of the District Government Hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery and so on. After ascertaining the necessary particulars, a report shall be sent to the Inspector General of Prisons, stating the date of admission, term of sentence, date of release, duration of pregnancy, possible date of delivery and so on.

(c) Gynaecological examination of female prisoners shall be performed in the District Government Hospital. Proper prenatal and post-natal care shall be provided to the prisoner as per medical advice.

### 3. Childbirth in prison:

(a) As far as possible and provided she has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. Only exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility.

(b) Births in prison, when they occur, shall be registered in the local birth registration office. But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned.

(c) As far as circumstances permit, all facilities for the naming rites of children born in prison shall be extended.

### 4. Female prisoners and their children:

(a) Female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years.

(b) No female prisoner shall be allowed to keep a child who has completed the age of six years. Upon reaching the age of six years, the child shall be handed over to a suitable surrogate as per the wishes of the female prisoner or shall be sent to a suitable institution run by the Social Welfare Department. As far as possible, the child shall not be transferred to an institution outside the town or city where the prison is located in order to minimise undue hardships on both mother and child due to physical distance.

(c) Such children shall be kept in protective custody until their mother is released or the child attains such age as to earn his/her own livelihood.

(d) Children kept under the protective custody in a home of the Department of Social Welfare shall be allowed to meet their mother at least once a week. The Director, Social Welfare Department, shall ensure that such children are brought to the prison for this purpose on the date fixed by the Superintendent of Prisons.

(e) When a female prisoner dies and leaves behind a child, the Superintendent shall inform the District Magistrate concerned and he shall arrange for the proper care of the child. Should the relative(s) concerned be unwilling to support the child, the District Magistrate shall either place the child in an approved institution/home run by the State Social Welfare Department or hand the child over to a responsible person for care and maintenance.

...

#### 9. Diet:

Dietary scale for institutionalised infants/children prepared by Dr. A.M. Dwarkadas Motiwala, MD (Paediatrics) and Fellowship in Neonatology (USA) has been submitted by Mr Sanjay Parikh. The document submitted recommends exclusive breastfeeding on the demand of the baby day and night. If for some reason, the mother cannot feed the baby, undiluted fresh milk can be given to the baby.

The report also refers to the “Dietary Guidelines for Indians—A Manual”, published in 1998 by the National Institute of Nutrition, Council of Medical Research, Hyderabad, for a balanced diet for infants and children ranging from 6 months to 6 years of age. It recommends the following portions for children in the ages of 6-12 months, 1-3 years and 4-6 years, respectively: cereals and millets—45, 60-120 and 150-210 gm respectively; pulses—15, 30 and 45 gm respectively; milk—500 ml (unless breastfed, in which case 200 ml); roots and tubers—50, 50 and 100 gm respectively; green leafy vegetables—25, 50 and 50 gm respectively; other vegetables—25, 50 and 50 gm respectively; fruits—100 gm; sugar—25, 25 and 30 gm respectively; and fats/oils (visible)—10, 20 and 25 gm respectively. One portion of pulses may be exchanged with one portion (50 gm) of egg/meat/chicken/fish. It is essential that the above food groups be provided in the portions mentioned in order to ensure that both macronutrients and micronutrients are available to the child in adequate quantities.

10. Jail Manual and/or other relevant rules, regulations, instructions, etc. shall be suitably amended within three months so as to comply with the above directions. If in some jails, better facilities are being provided, same shall continue.

...

12. The State Legal Services Authorities shall take necessary measures to periodically inspect jails to monitor that the directions regarding children and mothers are complied with in letter and spirit...”

## IN THE HIGH COURT OF MADHYA PRADESH

**Hallo Bi @ Halima v. State of Madhya Pradesh**

**2013 Cri LJ 2868 (MP)**

**S.C. Sharma, J.**

***An incarcerated woman filed an application with the jail authorities requesting termination of her pregnancy. The jail authorities forwarded her application to a chief judicial magistrate who rejected her application. The woman then filed a petition in the High Court of Madhya Pradesh for issuance of directions to the concerned State authorities to permit her to terminate her pregnancy as her pregnancy was a result of forced prostitution. The issue before the Court was whether forced prostitution amounted to rape and thus whether the woman could terminate her pregnancy under Section 3(2)(ii) Explanation 1 of the MTP Act.***

**Sharma, J.:** “The petitioner before this Court, who is in Jail ... for an offence punishable under section 302 of the Indian Penal Code, has filed this present petition for issuance of an appropriate writ, order or direction directing the respondents to permit the petitioner to terminate her pregnancy.

**2.** The contention of the petitioner is that she was forced into prostitution by one Usman and on account of forced prostitution, she became pregnant. Petitioner has further stated that an application was submitted to the Jail Authorities for termination of pregnancy and the matter was forwarded to the Indore (sic) for grant of necessary permission and the CJM in a mechanical manner, on 14-12-2012 has rejected the petitioner's application for grant of termination of pregnancy.

**3.** Section 3 of The Medical Termination of Pregnancy Act, 1971 provides a medical opinion by a registered medical practitioner and, therefore, the matter was immediately referred to obtain an opinion from the Head of the Department, Gynaecology and Obstetrics, M.G.M. Medical College/M. Y. Hospital, Indore...

...

**5.** The petitioner was present before this Court on 15-1-2013 and the petitioner in open Court categorically stated that she was forced into prostitution, she was sold in the State of Rajasthan and on account of the forced prostitution, she has become pregnant. The petitioner has categorically stated in the open Court that she wants to terminate pregnancy and at the relevant point of time the medical examination took place she was nervous and scared of the surrounding environment as well as she was very tense. The observation has been made by the Doctor that she does not want to terminate the pregnancy. This Court, by way of abundant caution has requested respected lady Lawyers of this Court to interact with the petitioner and Ms. Meena Chaphekar and Mrs. Vinita Phaye, Advocates have interacted with the petitioner and have informed this Court that the petitioner wants to terminate the pregnancy. The first medical examination of the petitioner took place on 10-1-2013 and the age of the foetus was assessed at 11 weeks and 4 days and therefore, keeping in view Rule 3, clause (2), subclause (b), a report of two registered medical practitioners/ Government Doctors was required.

**6.** This Court has again referred the matter for medical opinion and now, today, a fresh report has been received. The report has been submitted on behalf of two Doctors posted at M.Y. Hospital, Indore and both are Gynaecologist. They have opined that the pregnancy can be terminated. The report has been received through Superintendent of Jail, District Jail, Indore and the same is taken on record.

**7.** Mrs. Vinita Phaye, learned counsel for the respondent-State has also argued before this Court that pregnancy can be terminated keeping in view section 3 of The Medical Termination of Pregnancy Act, 1971.

**8.** As statement was made by the petitioner in the open Court that she was subjected to forced sex/rape, she was also directed to submit an affidavit and she has submitted an affidavit dt. 15-1-2013. The affidavit reflects that she was subjected to forced sex. She has stated that she wants to terminate the pregnancy and does not want to give birth to the child. Thus, the petitioner has not only filed an affidavit, but had stated in open Court that she was subjected to forced sex and wants to terminate the pregnancy. The report as required under The Medical Termination of Pregnancy Act, 1971 is also in favour of the petitioner.

...

**12.** In the present case, the petitioner wants to abort the child and has challenged the order passed by the CJM, rejecting her prayer to abort the child. Section 3 provides for medical opinion of a registered medical practitioner and as the length of pregnancy is about 12 weeks, the matter was referred to M.Y. Hospital, Indore for obtaining medical opinion of two Doctors. Two lady Doctors including the Head of the Department, Gynaecology and Obstetrics, M.G.M. Medical College/M. Y. Hospital, Indore has categorically stated that pregnancy of the petitioner can be terminated vide report dt. 16-1-2013, meaning thereby the medical opinion to abort the child is in her favour.

**13.** ...The Medical Termination of Pregnancy Act, 1971 was enacted in 1971. The Medical Termination of Pregnancy Act, 1971 provides for abortion, in case of woman whose physical/mental health are endangered by the pregnancy, woman facing birth of a potentially handicapped or malform (sic) child, rape, pregnancy in unmarried girls under the age of 18, with the consent of guardian, pregnancies in lunatics, with the consent of a guardian, pregnancies which are result of failure in sterilization. This Act provides for termination of pregnancy in case of rape which is in fact, forced sex with the victim who was led into prostitution by use of force and, therefore, in the peculiar facts and circumstances of the case, keeping in view, the statement of the petitioner, the Act of 1971 does permit abortion in the peculiar facts and circumstances of the present case also. The Act of 1971 provides for a legal method of abortion in respect of cases mentioned in the Act. It is really shocking that in our country every year almost 11 million abortions takes place and 20000 women die every year due to abortion related complications. Most abortion related maternal deaths are attributable to illegal abortions and, therefore, The Medical Termination of Pregnancy Act, 1971 has authorised a procedures for abortion in respect of cases mentioned in the Act. It certainly provides for a safeguard to women to abort a child keeping in view the statutory provisions as contained under the Act. Pre-natal Test for determining the sex of the foetus, is a crime under the Indian laws and a punishment is also provided under various statutory provisions for termination of pregnancy and for determining the sex of foetus. However, the present case is having a distinguishing feature, the sex of the child has not been determined, foetus is on account of the forced prostitution, as alleged by the petitioner, and, therefore, case of the petitioner in respect of the abortion, is squarely covered under the Explanations where permission can be granted for abortion as per the statutory provisions as contained under The Medical Termination of Pregnancy Act, 1971.

...

**15.** The Medical Termination of Pregnancy Act, 1971 provides for termination of pregnancy on health grounds and in those cases where there is a danger to life or risk to physical or mental health of a woman and also on humanitarian ground where the pregnancy arises from sex crimes like rape or intercourse with lunatic woman etc...

**16.** Section 3 provides for Opinion from a registered Medical Practitioner where the length of pregnancy does not exceed 12 weeks and where the length of pregnancy exceed 12 weeks, from two medical practitioners and permission can be granted where pregnancy is alleged by the pregnant woman to have been caused by rape and the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of a pregnant woman. The Statement of Objects & Reasons for enacting the Act of 1971 was to help a victim of a sex crime like rape or intercourse with a lunatic woman also.

**17.** In the present case, the petitioner who was present in the Court was brave enough to state before everyone that she was forcibly forced into prostitution. She was sold for prostitution and every day she was subjected to forced prostitution/rape. Forced prostitution, in the considered opinion of this Court, virtually amounts to rape and, therefore, this Court is of the considered opinion, that the petitioner's case falls under Explanation 1 of section 3, clause (ii) of the Act of 1971.

**18.** We cannot force a victim of violent rape/forced sex to give birth to a child of a rapist. The anguish and the humiliation which the petitioner is suffering daily, will certainly cause a grave injury to her mental health. Not only this, the child will also suffer mental anguish in case the lady gives birth to a child.

**19.** The Apex Court in the case of *Suchita Srivastava v. Chandigarh Administration*, reported in (2009) 9 SCC 1, in paras, 20 to 27, 31 and 58 has held as under :—

“ ...

22. There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of

reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.

23. A perusal of the abovementioned provision makes it clear that ordinarily a pregnancy can be terminated only when a medical practitioner is satisfied that a '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 per section 3(2)(i)] or when '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' [as per section 3(2)(ii)]. While the satisfaction of one medical practitioner is required for terminating a pregnancy within twelve weeks of the gestation period, two medical practitioners must be satisfied about either of these grounds in order to terminate a pregnancy between twelve to twenty weeks of the gestation period.

...

25. In all such circumstances, the consent of the pregnant woman is an essential requirement for proceeding with the termination of pregnancy. This position has been unambiguously stated in section 3(4)(b) of the MTP Act, 1971.

..."

20. In the present case, the petitioner understands what pregnancy is. She has consented for abortion. The medical opinion is in her favour. She does not want to raise the child of a rapist and, therefore, the relief prayed for in the relief clause is granted to the petitioner directing the respondents to carry out the process of abortion immediately.

...

23. In the result, the writ petition is allowed. The petitioner is granted permission to abort the child keeping in view the statutory provisions as contained under The Medical Termination of Pregnancy Act, 1971. The Superintendent of District Jail, Indore is directed to admit the petitioner in M.Y. Hospital, Indore for terminating the pregnancy. It is needless to mention that the petitioner shall be provided with all medical assistance and care after the pregnancy is terminated, she will again be provided with all medical assistance by the respondent State. It is needless to mention that the Superintendent of District Jail, Indore after the pregnancy is terminated shall file status report to the Principal Registrar of this Court and for a further period 6 months, he will file a monthly status report in respect of health of the petitioner.

..."

## IN THE HIGH COURT OF PUNJAB AND HARYANA

**Jasvir Singh v. State of Punjab**

**2015 Cri LJ 2282 (P&H)**

**Surya Kant, J.**

*An incarcerated couple petitioned the Punjab and Haryana High Court seeking enforcement of their right to have a conjugal life under Article 21 of the Indian Constitution. The Court was asked to address three issues. The first issue was whether the right to procreation survives incarceration, and if so, whether such a right is traceable within the Constitutional framework. The second issue was whether penological interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration. The third issue was whether the 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in the alternate) and if so, whether all categories of convicts are entitled to such rights.*

**Kant, J.:** “(1) The petitioners are husband and wife, respectively. They were tried for an offence under Section 302/364-A/201/120-B IPC for kidnapping and brutally murdering a 16 year old minor for ransom. The trial court awarded them death sentence which was confirmed by this Court. The Hon'ble Supreme Court dismissed their Criminal Appeal No. 1396 of 2007 vide order dated January 25, 2010 but commuted the death sentence awarded to petitioner No. 2 (wife) into life imprisonment.

(2) The petitioners now seek enforcement of their perceived right to have conjugal life and procreate within the jail premises. The issues raised by them are indeed of paramount public importance. Equally significant are the related issues hovering around the concept of ‘reasonable restrictions’ or ‘the extent of suspension of some of the fundamental rights during incarceration’, ‘radical jail reforms’, ‘the status of prisoners as protected citizen’ within the Constitutional framework as well as the ‘international perspective on the right to conjugal life in the precincts of jail’, which too call for discussion.

(3) The petitioners are currently lodged in the Central Jail at Patiala in separate cells. They seek a command to the Jail authorities to allow them to stay together and resume their conjugal life for the sake of progeny and make all arrangements needed in this regard. The first petitioner is statedly the only son of his parents and 8 months into their marriage they got caught in the criminal case. The petitioners claim that their demand is not for personal sexual gratification. The petitioners are also open to ‘artificial insemination’.

(4) The petitioners' main plank is Article 21 of the Constitution. The ‘right to life’, they insist, has two essential ingredients, namely, (i) preservation of cell; and (ii) propagation of species of which sex life is a vital part. The decision in *State of Andhra Pradesh v. Chalaram Krishna Reddy* (2000) 5 SCC 712, is relied upon to urge that a prisoner whether convict, under-trial or a detainee, continues to enjoy the Fundamental Rights including ‘right to life’ which is one of the basic Human Rights. The petitioners also refer to the well regulated concept of ‘conjugal visitations’ successfully implemented in the advanced countries like the USA, Canada, Australia, UK, Brazil, Denmark and Russia etc.

(5) The State of Punjab has opposed the petitioners' prayer essentially on the plea that the Prisons Act, 1894 contains no provision to permit ‘conjugal visitation’; its Section 27 rather mandates proper segregation of male and female prisoners. Para 498 of the Punjab Jail Manual lays down the method for separation of male and female prisoners.

(6) Even ‘artificial insemination’ as a viable and alternative solution suggested by the petitioners, is not acceptable to the State of Punjab as according to its affidavit dated 20th November, 2010 “there is no such provision in the Prisons Act, 1894 and Punjab Jail Manual to allow the husband and wife convicts to be in the same cell in the jail or to allow for artificial insemination of the convicts...”.

...

(9) The following, amongst others, are the issues which have emerged for determination:-

i. Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?

ii. Whether penalogical (sic) interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?

iii. Whether ‘right to life’ and ‘personal liberty’ guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?

iv. If question No. (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

...

## ROLE OF JUDICIARY

(18) A prison in civil society is the place for enforceability of law. All governmental systems provide incarceration through a judicial order only. The prison or the protectees living there are thus instruments and subjects of justice delivery system. The Judiciary as the principal executor and promoter of the rule of law has to have major stakes in respect of the conditions prevailing in the prisons. The duty of the Courts towards jail reforms has become heavier than before after the enforcement of our Constitution as Article 21 guarantees dignified life to one and all including the prison-inmates.

...

(21) In his one of the many salutary and historical decision [*Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494 (popularly known as Sunil Batra-I)], Krishna Iyer, J considered the core issue, whether a prison ipso facto outlaw the rule of law, lock out the judicial process from the jail gates and declare a long holiday for human rights of convicts in confinement or the prison total eclipses judicial justice for those incarcerated under the orders of a judicial Court? The dictum very emphatically espoused the cause of jail-inmates holding that “Prisons are built with stones of Law’ (sang William Blake) and so, when human rights are hashed behind bars, constitutional justice impeaches such law. In this sense, courts which sign citizens into prisons have an onerous duty to ensure that, during detention and subject to the Constitution, freedom from torture belongs to the detenu.”

(22) **Sunil Batra-I**, amongst other things, ruled that the condemned prisoner (like Batra) shall be merely kept in custody and shall not be put to work like those sentenced to rigorous imprisonment. Such like convicts shall be entitled to amenities of ordinary inmates in the prison like games, books, newspapers, reasonably good food, the right to expression, artistic and other, and normal clothing and bedding. It was further held that condemned prisoners cannot be denied their right to eat, sleep, work or live together except on specific grounds warranting such a course etc. etc.

(23) **Sunil Batra-I** marched far ahead of its times in emphasising re-humanisation of the prisoners. It stated that “positive experiments in re-humanization-meditation, music, arts of self-expression, games, useful work with wages, prison festivals, sramdan and service-oriented activities, visits by and to families, even participative prison projects and controlled community life, are among the re-humanization strategies which need consideration. Social justice, in the prison context, has a functional versatility hardly explored.”

(24) The reforms in prison administration also caught attention in **Sunil Batra-I** which not only emphasized the need of legislative intervention for replacement of obsolete prison laws but also for the re-orientation and re-visitation of prison house and practices, for “no longer can the Constitution be curtailed off from the incarcerated community since pervasive social justice is a fighting faith with Indian humanity.” Thus, in the context of Section 30(2) of the Prison Act it was held that such prisoner is not to be completely segregated except in extreme cases of necessity which must be specifically made out.

(25) *Sunil Batra v. Delhi Administration*, (1980) 3 SCC 488 (known as Sunil Batra-II), phenomenally liberated the jail inmates from the atrocities inflicted through mental torture, psychic or physical pressure and it brought a catenation of radical changes in prison conditions like (i) Separation of under-trials from convicts in jails; (ii) Their right to invoke Article 21 of the Constitution; (iii) Separation of young inmates from adults; (iv) Liberal visits by family and friends of prisoners; (v) Ban on confinement in irons; (vi) The duties and obligations of the Courts with respect to rights of prisoners; and (vii) Re-defining the duties of District Magistrate etc.

(26) **Sunil Batra-II** delved deeper into the petrifying effects of loneliness of jail-inmates as is evident from the following passage:-

**“Visits to prisoners by family and friends are a solace in insulation; and only a dehumanised system can derive vicarious delight in depriving prison inmates of this humane amenity. Subject, of course, to search and discipline and other security criteria, the right to society of fellow-men, parents and other family members cannot be denied in the light of Art. 19 and its sweep.”**

(27) It further noticed that even as per the 1973 report of National Advisory Commission “prisoners should have a ‘right’ to visitation” and that “correctional officials should not merely tolerate visiting but should encourage it, particularly by families...” ‘...it also urged that corrections officials should not eavesdrop on conversations or otherwise interfere with the participants’ privacy”.

**Sunil Batra-II** very forcefully ruled that “we see no reason why the right to be visited under reasonable restrictions, should not claim current constitutional status. We hold, subject to considerations of security and discipline, that liberal visits by family members, close friends and legitimate callers, are part of the prisoners’ kit of rights and shall be respected.”

(28) Several maladies within the jail precincts including the victimization of young inmates at the hands of adults drew attention in **Sunil Batra-II**, prompting the Court to say that:-

**“In the package of benign changes needed in our prisons with a view to reduce tensions and raise the pace of rehabilitation, we have referred to acclimatization of the community life and elimination of sex vice vis a vis prisoner we have also referred to the unscientific mixing up in practice of under-trials, young offenders and long-term convicts. This point deserves serious attention.”**



(29) The research conducted by a British author on the pitiable jail conditions in developed nations, depicting psycho stress and pressure on the prisoners sentenced for long terms, overcrowding in an area of limited size, unisexual agglomeration, the clash of personalities and the conflict of interests, physical violence for settlement of dispute in common and the impact of such conditions on the young inmates, was noticed with approval by the Hon'ble Supreme Court in *Mithu v. State of Punjab*, (1983) 2 SCC 277.

(30) It would be equally apt at this stage to reproduce Section 27(2) & (3) of the Prisons Act:-

**“27. Separation of Prisoners.**- The requisitions of this Act with respect to the separation of prisoners are as follow:-

(1) xxx xxx xxx

(2) in a prison where male prisoners under the age of twenty-one are confined, means shall be provided for separating them altogether from the other prisoners and for separating those of them who have arrived at the age of puberty from those who have not;

(3) unconvicted criminal prisoners shall be kept apart from convicted criminal prisoners...”

(31) That the aforesaid provision was never put in practice and merely adorned the Statute Book was critically acknowledged by the Hon'ble Supreme Court in *Sunil Batra-II* when it said that **“the materials we have referred to earlier indicate slurring over this rule and its violation must be visited with judicial correction and punishment of the jail staff. Sex excesses and exploitative labour are the vices adolescents are subjected to by adults. The young inmates must be separated and freed from exploitation by adults. If Kuldip Nayar is right this rule is in cold storage. It is inhuman and unreasonable to throw young boys to the sex-starved adult prisoners or to run menial jobs for the affluent or tough prisoners. Article 19 then intervenes and shields.”**

...

(34) Though these decisions are truly milestones in the recognition and enforcement of prisoner's rights and prison reforms yet they are peripheral to the core issues directly canvassed before me. *Sunil Batra-II* does notice the prevalence of homosexuality or sexual abuse of underage inmates by their adult counter-parts but the question of 'conjugal visits' or 'right to procreation' to be the 'right to life' or 'personal liberty' of a jail inmate was not raised there. Albeit, the book “Rape In Prison” by Anthony M. Scacco, Jr. referred to in that decision does acknowledge that **“sex is unquestionably the most pertinent issue to the inmate's life behind bar... There is a great need to utilize the furlough system in corrections. Men with record showing good behavior should be released for weekends at home with their families and relatives”**.

(35) The Andhra Pradesh High Court in **PIL No. 251 of 2012** decided on 16th July, 2012 (Ms. G. Bhargava, President M/s Gareeb Guide (Voluntary Organisation) v. State of Andhra Pradesh) dealt with an identical issue as therein a direction was sought to take immediate steps and allow conjugal visits to spouses of prisoners in jails across the State of Andhra Pradesh. The Court rejected the claim observing that if conjugal visits are to be allowed keeping in view good behavior of the prisoners, “chances of the environment getting disturbed cannot be ruled out as it will have an adverse impact on the other inmates of the jail who have not been selected and extended such benefit...” and that “the issue raised in the writ petition being a policy decision is within the domain of the State...”. The Court further viewed that Chapter-IV of Andhra Pradesh Prison Rules, 1979 provide for the release of prisoners on furlough/leave and parole/emergency leave therefore “it is not that there is no provision in the Rules to release the prisoners to enable them to lead family life with their spouses when they are granted furlough/leave of course for a limited period.”.

...

(39) The United Nations' Basic Principles for the Treatment of Prisoners, 1990 states that **“except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights**, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.”

...

## AMERICAN VIEWPOINT

(50) Close to the facts of the case in hand, the United States Court of Appeal, Ninth Circuit, in *William Gerber v. Rodney Hickmen*, 291 F.3d 617 (2002), considered the claim of an inmate in the California State prison alleging that Mule Creek State Prison is violating his Constitutional right by not allowing him to provide his wife with a sperm specimen that she may use to be artificially inseminated. The convict was 41-years old and was serving sentence to a hundred years to life plus 11 years. His wife was 44 years' old and they wanted to have a baby as no parole date was set for the convict due to the length of his sentence, he wished to inseminate his wife artificially. The question that arose for consideration was whether right to procreate is fundamentally inconsistent with incarceration? The Court of Appeals, with a majority of 6-5, relied upon two previous decisions to hold that (i) **"many aspects of marriage that make it a basic civil right, such as cohabitation, sexual intercourse, and the bearing and rearing of children, are superseded by the fact of confinement"**; (ii) **"prisoners have no Constitutional right while incarcerated to contact visits or conjugal visits"**, and that keeping in view the nature and goals of a prison system, it would be a wholly unprecedented reading of the Constitution to **"command the warden to accommodate Gerber's request to artificially inseminate his wife as a matter of right"**. The Court of Appeals did not accept the oral argument on the effect of technological advancement on the issue and said that **"Our conclusion that the right to procreate is inconsistent with incarceration is not dependent on the science of artificial insemination, or on how easy or difficult it is to accomplish"**.

...

(52) Previously, in *Steven J. Goodwin v. CA Turner*, [908 F.2d 1395] (1990), the U.S. Court of Appeals, Eighth Circuit, considered the claim of a federal prisoner incarcerated in Missouri, to whom permission to give sperm to artificially inseminate his wife, was declined by the District Court. The Court of Appeals rejected Goodwin's argument that the prison regulation has a direct impact on his wife's right to procreate and viewed that "by its very nature, incarceration necessarily affects the prisoner's family". The other reasons assigned by the Court of Appeals while refusing Goodwin's prayer included that such a permission will have a significant impact on other inmates and the female inmates would have to be granted expanded medical services "thereby taking resources away from security and other legitimate penological interests".

## EUROPEAN VIEWPOINT

(53) *Dickson v. The United Kingdom* (Application No. 44362/04) - a decision dated 4th December, 2007 rendered by the Grand Chamber of the European Court of Human Rights has been cited with great force. That was a case where two British nationals sought permission for access to artificial insemination facilities. The first applicant was a murder convict and sentenced to life imprisonment. He had no children. He met the second applicant while she was also imprisoned. She had since been released. The applicants got married in 2001. As they wished to have a child, the first applicant applied for facilities for artificial insemination to which the second applicant also joined. They relied on the length of their relationship; first applicant's earliest expected date of release and the age of second applicant to urge that it was unlikely for them to have a child together without the use of artificial insemination facilities. The Secretary of State refused their application. Their challenge to that decision was turned down by the High Court as well.

(54) *Dickson(s)* alleged violation of Articles 8 & 12 of the European Convention on Human Rights which, inter alia, provides that (i) everyone has a right to his private and family life and (ii) that men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of that right.

(55) The Grand Chamber of ECHR held that Article 8 was applicable to the Applicants' complaint as the refusal of artificial insemination facilities concerned with private and family lives which notions incorporate the right to respect for their decision to become genetic parents. Before inferring the violation of Article 8 of the Convention, the fact "that more than half of the Contracting States allow for conjugal visits for prisoners (subject to a variety of different restrictions), a measure which could be seen as obviating the need for the authorities to provide additional facilities for artificial insemination", was duly noticed. The Court further expressed "...its approval for the evolution in several European countries towards conjugal visits, it has not yet interpreted the Convention as requiring Contracting States to make provision for such visits (see *Aliiev*, cited above, § 188). Accordingly, this is an area in which the Contracting States could enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals."

(56) The Court then awarded monetary compensation to the applicants on the strength of Article 41 of the Convention which enables it to afford just satisfaction to the injured party.

## SUBMISSIONS OF THE LD. AMICUS CURIAE

...

(58) It was urged that the State has denied the right to procreate to the petitioners only because such a right does not find any mention in the Rulebooks or Statutes. In the absence of such a right having been spelt out in a codified-law, it cannot be assumed that the petitioners' prayer contravenes any law. The denial of the right to procreate thus is alleged to be unreasonable, arbitrary as such a right not being violative of any rule or law, its denial amounts to be a monstrous violation of Article 21 of the Constitution.

(59) Ld. Amicus Curiae further submitted that this Court in exercise of its discretionary writ jurisdiction possesses ample powers to enforce the subject fundamental right and direct the Prison Authorities to allow conjugal visits for the sole purpose of procreation, as best as the circumstances permit, and if they find any difficulty and explain it with reasons then the petitioners may be allowed, at their expense, the option of artificial insemination...

(60) Ld. Amicus Curiae canvassed that the right to life includes right to 'create life' and 'procreate' and this fundamental right does not get suspended when a person is sentenced and awarded punishment thereby limiting him to stay in the jail. The law under which petitioners are sentenced and tried does not extinguish their rights under Article 21, till in a legal manner and as far the procedure established by law, the life of 1st petitioner is extinguished. His right to procreate cannot be taken away only because he has been sentenced and punished for some offence. There is no provision, explicit or implied, in any penal law and/or the Constitution that takes away the petitioners' right to decent life under the set circumstances, which squarely falls within the expanded scope of Article 21. The petitioners seeking to exercise their fundamental right to 'life and procreate' thus ought not to be denied. Petitioner No. 1 has been awarded death sentence and is undergoing punishment but his 'right to life' cannot be taken away till his execution. Until then the right to life includes all rights except the freedom to move which has been taken away by way of punishment of law.

...

## THE OTHER VIEWPOINT

(62) Learned counsel for the Complainant, contrarily, relied upon the dissenting opinion of Judges Wildhaber, Zupan i, Jungwiert, Gyulumyan and Myjer, in **Dickson** opining that no one can be heard to say "...that there is no right to conjugal visits in prisons, but that there is instead a right for the provision of artificial insemination facilities in prisons (this interpretation results implicitly from paragraphs 67-68, 74, 81 and 91). Not only is this contradictory..." The Minority further held that "the margin of appreciation of Member States is wider where there is no consensus within the States and where no core guarantees are restricted. States have direct knowledge of their society and its needs, which the Court does not have. Where they provide for an adequate legal basis, where the legal restrictions serve a legitimate aim and where there is room to balance different interests, the margin of appreciation of States should be recognized..." The learned Judges were also of the view that "...the Court might have wished to discuss the very low chances of a positive outcome of in vitro fertilization of women aged 45 (see Bradley J. Van Voorhis, "In Vitro Fertilization", New England Journal of Medicine 2007 (356): 4 pp. 379-386). The Court also fails to address the question whether all sorts of couples (for example, a man in prison and the woman outside, a woman in prison and the man outside, a homosexual couple with one of the partners in prison and the other outside) may request artificial insemination facilities for prisoners. We are of the opinion that in this respect too States should enjoy an important margin of appreciation..."

(63) In *R v. Secretary of State for Home Department*, [2001] EWCA Civ 472, the Supreme Court of Judicature (Civil Division), UK considered the claim of a convict-appellant who was serving life sentence for murder. He was aggrieved at the denial of access to facilities for artificial insemination of his wife. The Court considered the appellant's claim in the context of violation of Articles 8 & 12 of European Convention on Human Rights and after referring to the Strasbourg Jurisprudence and relevant decisions of the Commission, it summarized its conclusions as follows:-

"i) The qualifications on the right to respect for family life that are recognised by Article 8(2) apply equally to the Article 12 rights.

ii) Imprisonment is incompatible with the exercise of conjugal rights and consequently involves an interference with the right to respect for family life under Article 8 and with the right to found a family under Article 12.

iii) This restriction is ordinarily justifiable under the provisions of Article 8(2).

iv) In exceptional circumstances it may be necessary to relax the imposition of detention in order to avoid a disproportionate interference with a human right.

v) There is no case which indicates that a prisoner is entitled to assert the right to found a family by the provision of semen for the purpose of artificially inseminating his wife.”

(64) The Court nonetheless put a cautious note that the above-reproduced conclusions need not be construed to justify preventing a prisoner from inseminating his wife artificially or naturally. The Court was of the view that interference with fundamental human rights must always involve an exercise in proportionality.

(65) The Court in the above-cited case thereafter referred to the policy of the Secretary of the State and culled out three reasons for sustenance of the policy that restricts the provision of facilities for artificial insemination, namely, (i) it is an explicit consequence of incarceration that prisoners should not have the opportunity to beget children whilst serving their sentences, save when they are allowed to take temporary leave; (ii) there is likelihood of a serious and justified public concern if prisoners continue to have the opportunity to conceive children while serving sentences; and (iii) there are disadvantages of single parent families. The Court thus held that the refusal to permit the appellant the facilities to provide semen for artificial insemination of his wife was neither in breach of the convention nor unlawful or irrational.

## POLICIES FOR CONJUGAL/FAMILY VISITS ACROSS VARIOUS JURISDICTIONS

(66) Learned counsel for the complainant drew attention to policies for conjugal/family visits across various jurisdictions. In Canada, as per the Directive 770 dated 14/08/2008 issued by the Commissioner of the Correctional Service Canada, private family visit is allowed but these are subject to certain restrictions like:

### PRIVATE FAMILY VISITING

“22. Eligible inmates shall be offered the opportunity to participate in private family visiting. Private family visiting is intended to support the development and delivery of family programs in the institution and to provide inmates with the opportunity to use separate facilities where they may meet privately with their family to renew or continue personal relationships.

### ELIGIBILITY – INMATES

23. All inmates are eligible for private family visiting except those who are:

- a. assessed as being currently at risk of becoming involved in family violence;
- b. in receipt of unescorted temporary absences for family contact purposes; or
- c. in a Special Handling Unit or are awaiting decision or have been approved for transfer to a Special Handling Unit.

### ELIGIBILITY – VISITORS

24. Persons eligible to participate in private family visiting shall include spouse, common-law partner, children, parents, foster parents, siblings, grandparents, and persons with whom, in the opinion of the Institutional Head, the inmate has a close familial bond, provided they are not inmates. **Inmates are not eligible to participate in private family visits with other inmates.”**

(67) The policy in Australia's Capital Territory, namely, “Corrections Management (Private Family Visits) Policy 2009” provides that “prisoners are not eligible to participate in private family visits with other prisoners.”

## ACADEMIC RESEARCH AND OPINION ON CONJUGAL VISITS

(68) Learned Amicus Curiae referred to various scholarly articles, books and research papers, throwing invaluable light on the issue of conjugal visits/marital relationship of prisoners/human rights of prisoners. The article Marital Relationships of Prisoners in Twenty - Eight Countries by Prof. Ruth Shonle Cavan and Prof. Eugene S. Zemans, gives insight of the policies and practices followed in as many as 28 countries in Europe, Asia, Africa and American continents. According to this article “...in only a few countries are provisions for marital contacts extended equally to all categories of prisoners. The limitation may be because of the unreliability or dangerousness of the criminal; or marital contacts may have some connotation of a privilege to be granted only to cooperative and conforming prisoners. In either case, the practice of home leaves or of family residence in a penal colony is not carried out haphazardly but tends to be integrated into the total prison regime.. ..it is worth noting that in general the countries from which we received responses do not favour private or conjugal visits within the prison, with the exception of Mexico.”

(69) The other research paper authored way back in the year 1964 titled *Conjugal Visitations In Prisons - A Sociological Perspective*, is a study on the determination of changes of attitudes of prison administrators in USA towards the idea of conjugal visitations. The author concludes that “Conjugal visitations tend to magnify and accentuate problems relating to rehabilitation. It would appear that prison administrators are not in favour of conjugal visitations, foreign precedents to the contrary notwithstanding. This stand by prison administrators, however, is not without some foundation the attitude of the American public is characterised by apathy, un-familiarity, and disinterestedness in the problem as a whole...”.

(70) Yet another article *Attitudes toward Conjugal Visits for Prisoners* is a research compilation on conjugal visiting practices including those prevailing in Latin American countries like Brazil, Bolivia, Colombia, Chile etc. The practices in Canada and the California (USA) where conjugal visits had been started also found a mention there. After interviewing the Prison Administrators in California, the author found “deep cleavages and almost irreparable estrangement of wives and children toward the husband and father who is away in prison... it is our contention that we do not protect society by contributing to the dissolution of the family unit. Family visiting is an attempt by California prison administrators to provide an opportunity for the inmate to visit his wife and children in a relaxed normal-like family setting”.

(71) Learned Amicus Curiae referred to Nelson Mandela's autobiography *Long Walk to Freedom* wherein one of the tallest leaders of the world has described that Prison not only robs of one's freedom but it also attempts to take away one's identity as every inmate is asked to wear same uniform, eat the same food and follow the same schedule. The work of Sir Leon Radzinowicz and Joan King, titled **The Growth of Crime: The International Experience** especially the Chapter titled ‘Prisons in the Pillory’ has been usefully highlighted, where the authors while dealing with the issue of conjugal rights have strongly advocated the visits from wives and live-in relationship partners for long-term offenders as an effective solution to the problem of sexual tension and homosexual behavior amongst prisoners. The learned authors have backed with equal force that those prisoners who do not fall into the top security categories should be granted periodical home-leave as a better and more natural solution than conjugal visit in the unfamiliar and embarrassing atmosphere of a prison. In the case of maximum security prisoners, the authors have suggested a small scale experiment whereby selected prisoners with stable marriages could spend a day or weekend with their families in some kind of family hostel outside the prison walls as such a recourse will help maintain links and reduce tension.

(72) Learned Amicus Curiae also quoted an article by Professor Baroness Deech on **Human Rights and Welfare** (2009) which gives a meaningful insight of the case of Yigal Amir, who assassinated the Prime Minister of Israel in the year 1955. Under the Israeli law although the prisoners are allowed to marry and have children, the convict was denied such right due to the heinous nature of the crime. Having married by proxy, the couple petitioned for the right to consummate their marriage and the wife was allowed a conjugal visit in late 2006. The Courts held that the prisoners have these human rights. The said case underlines the severity of the crime to not be a disqualification in granting rights of procreation/ consummation as the same are “human rights”.

(73) Learned Amicus Curiae lastly referred to an academic paper written by Brenda V. Smith, *Analyzing Prison Sex: Reconciling Self-Expression with Safety*, Humans Rights Brief (2006) as it gives an overview of the issue ‘Human Rights Norms and Prison Sex’ across various jurisdictions. The article is extremely informative and states - “Many other countries permit sexual expression in institutional settings, define these visit under the rubric of either intimate or conjugal visits, and permit prisoners to have intimate and other contact with spouses, partners and family. For example, **Brazil** has implemented a “conjugal visit,” which allows prisoners to visit with family and friends without physical restriction, and an “intimate visit,” which allows prisoners to receive visits from their partners or spouses in individual prison cells. In the **Czech Republic**, the Director of prison may allow married couples to visit in rooms specifically designated for intimate contact. It also allows prisoners to receive visits from four close relatives at a time. In **Spain**, inmates who cannot leave the institution may receive conjugal/intimate visits once a month for one to three hours. Finally, **Denmark** has implemented a “prison leave” system for prisoners with sentences greater than five months. The leave can last from one day to an entire weekend. Denmark “see[s] leave as a helpful tool in maintaining a stable atmosphere in the prisons and furthermore by keeping contact with relatives outside it is believed that fewer prisoners try to escape”.

## THE PUNJAB GOOD CONDUCT PRISONERS (TEMPORARY RELEASE) ACT, 1962 AND THE STATE POLICY, INSTRUCTIONS FOR THE RELEASE OF CONVICTS ON PAROLE, FURLOUGH ETC.

(74) Coming back to the Indian scenario, it is intriguing to note that it was as far back as in the year 1926 that the Punjab Good Conduct Prisoners' Probational Release Act, 1926 was enacted with the Object that those prisoners whose antecedents or conduct while under restraint give promise that they will justify privilege of conditional release, with opportunities of earning their own livelihood and “**of having their families with them**”, could be released by the State Government, conditionally.

**(75)** The post-Independence era brought a new legislation known as the Punjab Good Conduct Prisoners (Temporary Release) Act, 1962. The Act was legislated keeping in view the recommendations of Jail Reforms Committee, for the grant of 'leave' on 'furlough' to certain categories of long-term prisoners and also to release them on 'parole'. Section 3(1) of the Act enables the State Government to release the prisoners temporarily for a specified period, if it is satisfied that:-

“(a) a member of the prisoner's family had died or is seriously ill; or

(b) the marriage of the prisoner's son or daughter is to be celebrated; or

(c) the temporary release of the prisoner is necessary for ploughing, sowing or harvesting or carrying on any other agricultural operation on his land and no friend of the prisoner or a member of the prisoner's family is prepared to help him in this behalf in his absence;

(d) it is desirable to do so for any other sufficient cause.”

...

**(77)** It may be seen from the words, expressions and phrases used by the Legislature in Section 3 of the 1962 Act that the necessity to keep a prisoner in contact with his/her family; societal expectations of his/her presence on certain occasions and the augmentation of sources of livelihood of the prisoner's family have been manifestly acknowledged. Further, sub-clause (d) of Section 3(1) is of such a wide amplitude that it can encompass any reasonable cause as a sufficient ground for the temporary release of a prisoner.

**(78)** From the conjoint reading of the 1962 Act, Rules and the Punjab Government policy, it is seen that these benefits are extendable to all the prisoners, subject to their good behavior while in jail, except those involved in heinous offences or whose temporary release is likely to endanger State security or public peace and order.

**(79)** Undeniably, the existing Statutes, Rules or Policy do not contain any express or implied provision to facilitate conjugal life or the opportunity for procreation to a prisoner even if he/she has neither committed 'heinous offence' nor such convict endangers 'State security or public peace and order'. Even the Jail Reforms Committees constituted from time to time have failed to delineate on the issue. The landmarks like **Sunil Batra-I & II** or the later decisions could not opine whether such right(s), to be or not to be read as a part of Article 21 of the Constitution, for no such issue was ever raised in those cases.

**(80)** The solitary purpose behind travelling into global case-law on the point in issue is to assimilate the broad consensus that has emerged on judicial platforms. It may be seen that from U.S. to Europe, the rights to conjugal visits, procreation or even artificial insemination facilities have been recognized only partially, being integrally embedded in Articles 8 & 12 of 'European Convention on Human Rights' or as the rights that are fundamental to the liberty and human dignity emanating from the Eighth Amendment, and further subject to the justifiable and proportionate restrictions.

**(81)** Reverting back to the question posed at the outset, there is no gainsaying that ordinarily the right to conjugal visits and procreation is a component of the right to live with dignity and is thus ingrained in the right to life and liberty guaranteed under Article 21 of our Constitution to which a very expansive, dynamic and vibrant meaning has been given by the Apex Court through several historical pronouncements.

**(82)** The right to conjugal visits or procreation or for that matter the right to secure artificial insemination as a supplement, are also, thus, subject to all those reasonable restrictions including public order, moral and ethical issues and budgetary constraints which ought to be read into the enjoyment of such like fundamental right within our Constitutional framework.

**(83)** Incarceration leads to suspension of some of the fundamental rights and is a legal impediment in giving effect to the right to conjugal visits or procreation. The said right inheres right to privacy, dignity, respect and free movements as well. Good behavior of the convict, unlikelihood of his/her endangering the State security, peace and harmony or the social and ethical order, financial and society security of the convict and his/her family etc. etc. are several other relevant factors to determine the extent and limitations for translating such a right into reality.

**(84)** An equally important and paramount issue is whether eligible convicts should have the facility of conjugal visits within the jail precincts or a provision like Section 3(1)(d) of the 1962 Act can be enlarged enough to serve as a regular measure for their temporary release on parole for such exclusive visits. The other question that needs simultaneous answer is as to whether these facilities be extended within or outside the precincts of jail to those hardened criminals also whose singular offence might have shaken the conscience of the society? The lack of unanimity in views even amongst the developed nations indeed keeps this riddle unsolved.

## CONCLUSION

**(85)** India is a multi-linguistic, multi-cultural nation. Most importantly it has multitudinous religions, their sects and branches. India has its own traditions, customs, social values, inhibitions and taboos. Those who are well-equipped and abreast of the facts and figures on the social, economic, educational, self-sustenance, gender free growth of the society or other related complexities, are the most suited to re-visit the legislative or executive policy regime and recommend the need-based changes keeping in view the futuristic priorities towards national cohesion. A society which is currently involved in academic and intellectual debates on 'gay-rights' or the recognition of 'third-gender', cannot shy away nor can it keep concealed under the carpet the pragmatic concept of conjugal visits of the jail inmates. To say it differently, time has come and before it is too late, the stake-holders must sit together and deliberate upon this crucial subject and take a holistic view.

**(86)** The criminologists have delineated the aim behind 'punishment' and have enlisted several achievable objects like retribution, prevention, protection of the public, reformation and rehabilitation of convicts. The growing trend is for reformation and rehabilitation, prevent recidivism and to encourage re-socialisation through the fostering of personal responsibility. The sentence period is thus divided in such a manner that in the early days of sentence, there is emphasis on punishment or retribution but the net-end goal to be achieved is re-socialisation. The revised concept of punishment has found universal acceptability amongst all civic societies who believe in governance by rule of law. The significance of provisions like 'parole', 'furlough' or 'temporary release' should, therefore, be mirrored as the backbone of penal jurisprudence achievable through reformatory concepts. If these age-old reprieving facilities are refurbished with the latest tools and designs, there can possibly be no reason as to why the authorities should shy away from releasing the convicts temporarily on 'parole', 'furlough' etc. for conjugal visitations/procreation.

**(87)** The legislative or executive, all policies, ought to remain vibrant and dynamic as the static or stale concepts cannot address all contemporary issues. Unfortunately, the in vogue executive policies on the rights of jail inmates are unevenly loaded with the pre-Independence mindset. The Punjab Jail Manual narrates the powers of jail staff and the obligations of convicts in such a tell-tale manner that the 'prisons' can be likened to the 'chambers of torture', as if Article 21 of the Constitution and dozens of human rights are still alien to prison-residents.

...

**(89)** There can be no quarrel and as rightly observed by AP High Court in *Ms. G. Bhargava* (supra) also that the issues like facilitation of conjugal visits of convicts for procreation essentially fall within the domain of policy makers and it has to be left to them to evolve an effective mechanism whether by way of legislation or through executive decision. However, what cannot be overlooked is that the convicts or other jail inmates are a class of persons who have been separated from society by the Courts in performance of their sovereign duties. Jails and other Correctional Centres are the extended limbs of justice delivery system as a measure for the enforcement of judicial verdicts. The management, conditions of living and future responsibilities of the inmates inside the jails etc., cannot be left to the sole desire or discretion of the executive. It is rather the responsibility of Courts to ensure that the rights of every resident of prison(s) or correctional home(s) are duly protected and irrespective of the financial constraints which is the oft-offered explanation by a State, the conditions of living, re-orientation or rehabilitation of the convicts is given effect under the direct supervision, command and control of the Courts.

**(90)** The directions for re-visiting the legislative or executive policy regime which are implicit in the observations made hereinabove are, however, subject to the caveat and conditions like

- (i) the gravity of the offence committed by a convict and its likely effect on the society in the event of temporary release;
- (i) likelihood of absconding in the case of offenders of heinous crimes;
- (ii) good behavior while in jail;
- (iii) duration of the actual sentence already undergone;
- (iv) the expected date of release on completion of a tenure sentence;
- (v) pre-conviction conduct of the convict; etc. etc.

**(91)** Owing to the neglected and limited infrastructure, causing overcrowding, lack of specialized services and above all the prevailing social norms and the societal expectations, it may not be conducive to create space for conjugal visits within the existing prisons. It can nevertheless be introduced on trial basis in Model Jails or Open Air-Free Jails in such

a manner that the independent family units of the 'convicts with good behavior' may live like in a small hamlet. For that purpose, as of now, a team comprising (i) District & Sessions Judge, (ii) Deputy Commissioner (iii) Superintendent of Jails can identify the places where such like practices can be introduced to begin with.

...

**(93)** It is directed that until the State of Punjab effectively addresses the issues either by way of appropriate legislation or through policy framework, the expression "any other sufficient cause" contained in Section 3(1)(d) of the 1962 Act shall treat the conjugal visits of a married and eligible convict as one of the valid and sufficient ground for the purpose of his/her temporary release on 'parole' or 'furlough' though subject to all those conditions as are prescribed under the Statute.

**(94)** Having held that, this Court cannot be oblivious of the fact that the cited decisions of various Courts across the globe voicing their opinion on the right of conjugal visits or artificial insemination of a convict may have some persuasive value in general but the jurisprudential principles expounded therein do not advance the petitioners' claim being vividly distinguishable, for the reasons that (i) the society, its fabric and pragmatic approach to allow or disallow certain events to happen in the case in hand are laid on entirely different foundations and thus no common pyramid can be structured; (ii) the circumstances which led to the petitioners' incarceration are far grave in nature and different from those where one of the spouse was totally innocent and possessory of all human rights without any curtailment unlike the instant case where both of them are convicts and undergoing death sentence and life conviction, respectively; (iii) even the most liberal view taken by some of the European or American Courts would not justify the claim put forth by the petitioners; and (iv) the existing infrastructure and overall environment do not support emergent measures; I, therefore, decline to issue any direction with reference to the claim put-forth by the petitioners.

**(95)** For the reasons assigned above, I sum up my conclusions and answer the questions as formulated in Para 9 of this order, in the following terms:-

**i. Question - (i) Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?**

Yes, the right to procreation survives incarceration. Such a right is traceable and squarely falls within the ambit of Article 21 of our Constitution read with the Universal Declaration of Human Rights.

**ii. Whether penological (sic) interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?**

The penological interest of the State ought to permit the creation of facilities for the exercise of right to procreation during incarceration, may be in a phased manner, as there is no inherent conflict between the right to procreate and incarceration, however, the same is subject to reasonable restrictions, social order and security concerns;

**iii. Whether 'right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?**

'Right to life' and 'personal liberty' guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate). However, the exercise of these rights are to be regulated by procedure established by law, and are the sole prerogative of the State.

**iv. If question No. (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?**

Ordinarily, all convicts, unless reasonably classified, are entitled to the right to procreation while incarcerated. Such a right, however, is to be regulated as per the policy established by the State which may deny the same to a class or category of convicts as the aforesaid right is not an absolute right and is subject to the penological interests of the State.

**(96)** In the light of the above discussion, the instant writ petition is disposed of with the following directions:-

i. the State of Punjab is directed to constitute the Jail Reforms Committee to be headed by a former Judge of the High Court. The other Members shall include a Social Scientist, an Expert in Jail Reformation and Prison Management amongst others;

ii. the Jail Reforms Committee shall formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and shall identify the categories of inmates entitled to such visits, keeping in mind the beneficial nature and reformatory goals of such facilities;



- iii. the said Committee shall also evaluate options of expanding the scope and reach of 'open prisons', where certain categories of convicts and their families can stay together for long periods, and recommend necessary infrastructure for actualizing the same;
- iv. the Jail Reforms Committee shall also consider making recommendations to facilitate the process of visitations, by considering best practices in the area of prison reforms from across jurisdictions, with special emphasis on the goals of reformation and rehabilitation of convicts and needs of the families of the convicts;
- v. the Jail Reforms Committee shall suggest ways and means of enhancing the facilities for frequent linkage and connectivity between the convict and his/her family members;
- vi. the Jail Reforms Committee shall prepare a long-term plan for modernization of the jail infrastructure consistent with the reforms to be carried out in terms of this order coupled with other necessary reforms;
- vii. the Jail Reforms Committee shall also recommend the desired amendments in the rules/policies to ensure the grant of parole, furlough for conjugal visits and the eligibility conditions for the grant of such relief;
- viii. the Jail Reforms Committee shall also classify the convicts who shall not be entitled to conjugal visits and determine whether the husband and wife who both stand convicted should, as a matter of policy be included in such a list, keeping in view the risk and danger of law and security, adverse social impact and multiple disadvantages to their child;
- ix. the Jail Reforms Committee shall make its recommendations within one year after visiting the major jail premises and it shall continue to monitor the infrastructural and other changes to be carried out in the existing jails and in the Prison Administration System as per its recommendations.
- x. the Jail Reforms Committee shall be allowed to make use of the services of the employees and officers of the State of Punjab, who is further directed to provide the requisite funds and infrastructure including proper office facilities, secretarial services, travel allowances and all necessary amenities and facilities, as required by the Jail Reforms Committee.

(97) Since the scope of this petition was enlarged in the larger public interest beyond the relief sought by the petitioners and the issues raised or answered are equally relevant keeping in view their *pari materia* Statute(s) or policies, it is directed that the directions issued hereinabove shall apply *mutatis mutandis* to the State of Haryana and Union Territory of Chandigarh as well.

(98) The petitioners - husband and wife, who are undergoing death sentence and life imprisonment, respectively, are not found entitled to any relief, as prayed for by them, for the reasons assigned in paras 91, 92 and especially in para 94 of this order. Their prayer is accordingly declined.

...

## IN THE HIGH COURT OF GUJARAT

**State of Gujarat v. Jadav @ Jatin Bhagvanbhai Prajapati & Ors.**  
**Criminal Appeal No. 652 of 2008, decided on February 01, 2016**  
**M.R. Shah and Z.K. Saiyed, JJ.**

***A woman, her brother, and parents were acquitted in a criminal case by the trial court. On appeal, the High Court convicted the accused persons. Leniency in sentencing was sought with respect to one of the convicts who was pregnant at the time of delivering the judgment.***

**Shah, J.:** "...

[3.0] Feeling aggrieved and dissatisfied with the impugned judgment and order of acquittal passed by the learned Additional City Sessions Judge (Fast Track Court No.2), Ahmedabad (hereinafter referred to as "learned trial Court") in Sessions Case No.16/2007 by which the learned trial Court has acquitted the respondents herein – original accused for the offences punishable under sections 498-A read with Section 114 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and sections 306, 304(B) (sic) read with Section 114 of the IPC and sections 3 and 7 of the Dowry Prohibition Act, the State has preferred the present Criminal Appeal.

...

[8.0] On setting aside the acquittal and convicting the original accused for the aforesaid offences, we have heard all the accused and the learned advocate appearing on behalf of the original accused on sentence. Shri Dipen Dave, learned advocate appearing for Shri Zala, learned advocate appearing on behalf of the original accused has stated that by now 9 years have passed from the date of incident and that even the original accused No.5 – Bhavnaben Bhagvanbhai Prajapati has married and at present is pregnant having pregnancy of 5 months and therefore, it is requested to take lenient view ...

...

[9.0] ...All the sentences to run concurrently. All the accused, except original accused No.5, be taken into custody to undergo the sentences as observed hereinabove. Original accused No.5 is hereby granted time to surrender up to 31.12.2016. Till then, she is ordered to be released on bail on her furnishing the personal bond of Rs.10,000/- to the satisfaction of the concerned trial Court. It is also observed and directed that on completion of the aforesaid period when original accused No.5 surrenders she may be permitted to carry both her kids and the jail authority is directed to provide full facilities to her and the kids.”

## IN THE HIGH COURT OF BOMBAY

### High Court on Its Own Motion v. State of Maharashtra

2017 Cri LJ 218 (Bom)

V.K. Tahilramani and Mridula Bhatkar, JJ.

***A judge, during her visit to a women's prison, received a requisition from a woman inmate for termination of her 16 weeks pregnancy. The medical officer of the jail informed the judge that the jail authorities had sent a proposal for termination of the woman's pregnancy to a hospital committee and such proposal was still pending before the committee. The judge brought the woman inmate's requisition and pending proposal to the notice of the High Court of Bombay. She sought issuance of directions to the hospital and the jail authorities for urgent action to be taken on the woman's requisition for termination of the woman's pregnancy. Noting that other female inmates are also facing similar problems in accessing abortion services, the High Court took cognizance of the matter and treated it as a Public Interest Litigation. The Court examined the procedure followed in cases where medical termination of pregnancy is sought by a female prisoner.***

**Tahilramani, J.:** “The background of this PIL, coming before us, is that Ms. A.S. Shende, Judge, City Civil & Sessions Court, Greater Bombay visited Byculla District Prison on 25.4.2016 in view of directions of this Court. Generally women prisoners in Mumbai are kept in District Women Prison, Byculla, Mumbai. During the visit, one inmate/under-trial prisoner namely Shahana gave a requisition for obtaining permission to terminate her pregnancy. The requisition given by Shahana is part of this PIL. In the requisition, she has stated that she already has a baby who is five months old. The baby was suffering from convulsion/epilepsy, hernia, loose motion as well as fever. Shahana's health was also not good and she was suffering from repeated bleeding. Shahana was four months pregnant. Shahana stated that in all these circumstances, it was very difficult for her to maintain and take care of her five months old baby and herself and in addition, the baby which she was expecting, hence, she requested that she be allowed to medically terminate her pregnancy.

2. Ms. Shende, the learned Judge made inquiry with the Jail Superintendent as well as the Medical Officer attached to the jail. She was informed by the Medical Officer about the health condition of five months old baby of Shahana and pregnancy of Shahana. The medical officer also supported the contention of Shahana in respect of termination of pregnancy. Learned Judge Ms. Shende was further informed by the Medical Officer attached to jail that for obtaining permission for termination of pregnancy, a proposal has to be sent to the Committee which will take time, therefore, considering the state of health of the baby and the mother and the application given by Shahana, the learned City Civil & Sessions Judge thought it fit to forward all the papers including the application/requisition given by Shahana to the High Court for information and urgent action, by her letter dated 26.4.2016. Along with the letter, Ms. Shende sent requisition of Shahana along with her medical papers along with copy of application dated 21.3.2016 sent by the Superintendent, Mumbai District Women Prison, Byculla, Mumbai addressed to Sir J.J. Group of Hospitals, Mumbai for grant of permission for surgery/medical termination of pregnancy. The concern of the learned Judge was that though the letter dated 21.3.2016 was addressed to the hospital, till 26.4.2016, no medical termination of pregnancy was carried out. In

view of that, the learned Judge Ms. Shende requested for urgent directions to be given to Jail Authorities as well as Dean of J.J. Hospital to take immediate necessary action according to law. In view of this report, the Registry of this Court then sought following directions:-

A. Registry be permitted to forward the report of City Civil Judge, Mumbai dated 26.4.2016 with annexures to the Dean of Sir JJ Hospital for taking immediate needful action as permissible under law.

AND

B. Registry be permitted to inform Jail Superintendent, Mumbai District Women Prison, Byculla, Mumbai to immediately co-ordinate with the authority of Sir J.J. Hospital and to produce the concerned Under Trial Prisoner at Sir J.J. Hospital for giving immediate medical treatment including MTP as per medical advice and permissible under law.

AND

C. Registry be also permitted to inform the concerned City Civil & Sessions Judge to monitor the action taken by the Jail Authorities and Sir J.J. Hospital for avoiding delay as there is requirement of urgent steps to be taken by the Authorities in respect of Under Trial Prisoners.

OR

D. Your Lordship may issue any other appropriate directions as may be deemed fit.

**3.** The directions at 'A' to 'C' were approved and the matter was placed before the Hon'ble the then Chief Justice who directed that this matter be treated as Suo Motu PIL and assigned the matter to this Bench. This is how this matter has come up before us as a number of female prisoners are faced with a similar situation.

**4.** Meanwhile as per the directions of the Jail Superintendent of Byculla Prison, Mumbai, under-trial prisoner Shahana was taken to the J.J. Hospital, Mumbai on 30.4.2016 for medical termination of her pregnancy. She was directed to be brought before the concerned unit of J.J. Hospital on 3.5.2016. Accordingly, she was brought to J.J. Hospital on 3.5.2016 and on that day itself, her pregnancy was medically terminated.

**5.** This Court appointed Advocate Ms. Manjiri Shah to assist this Court as amicus curiae in this matter. This Court also directed the learned APP to file an affidavit stating the procedure which is followed in case of Medical Termination of Pregnancy of a female prisoner. Pursuant to the said directions, learned APP tendered the affidavit of Dr. Khan Sayeed Ahmed, Medical Officer presently working at Byculla District Prison, Mumbai. In the affidavit, it is stated that Chapter XLI, at Page No. 607 of Maharashtra Prisons Manual deals with women prisoners. Rule 5 thereof deals with the facilities to women prisoners. Rule 6 deals with medical aid to women prisoners including cases of pregnancy. Rule 7 deals with pregnancy. Rule 8 deals with births in prison. In the said affidavit, it is further stated that records are being maintained by Prison Authorities and as soon as the prisoner viz. under-trial/onvicts (sic) are admitted to prisons/jails, entry is made in the register maintained by the Prison Authorities. The prisoners at the time of admission in the prison are medically examined. Female prisoners at the time of admission are examined and history about last menstrual period is taken down. Urine pregnancy test is also conducted. After conducting the test, if a woman prisoner is found to be pregnant, this fact is intimated to the Superintendent of the Jail and thereafter the woman prisoner is taken to the Government Hospital for further investigation, treatment and for registration of pregnancy in Government Hospital at the earliest.

**6.** On 29.8.2016, Advocate Ms. Manjiri Shah brought to our notice that an under-trial prisoner Anjali who was lodged at Thane Central Prison as under-trial prisoner F-346/16 was arrested on 25.6.2016 and she wanted to terminate her pregnancy, however, no steps were being taken in this regard. We then directed the Superintendent of Thane Central Prison to record the statement of under-trial prisoner F-346/16 (Anjali) and to produce it in the Court on the next date. Accordingly, the statement of under-trial prisoner F-346/16 was produced before us on the next date i.e on 30.8.2016. In her statement, she clearly stated that she wanted to terminate her pregnancy as it was not possible to continue the same for various reasons stated in her statement. We were also informed that the said prisoner had been referred to the Civil Hospital, Thane for medical tests including sonography and the report of the tests will be produced on the next date i.e 31.8.2016. On 31.8.2016, the medical reports of under-trial prisoner F-346/16 were produced before us. It showed that she was fifteen weeks pregnant as on 30.8.2016. The Medical Officer of Thane Central Prison who was present before the Court stated that in view of the statement of the said under-trial prisoner, the under-trial prisoner will be immediately referred to Thane Civil Hospital so that pregnancy can be terminated. As 3rd to 5th Sept. were holidays, we kept the matter on 6.9.2016 to find out the progress of the matter. On 6.9.2016, we were informed that prisoner was admitted in hospital on 3.9.2016 for medical termination of pregnancy and on 4.9.16, the pregnancy was medically terminated.

**7.** If a pregnancy is to be terminated, it is to be done strictly as per the norms provided in the Medical Termination of Pregnancy Act, 1971 (for short, 'The Act') especially Sections 3, 4 and 5...

**8.** Sections 3 and 5 of the Act are the only sections which allow termination of pregnancy. Section 5 can be invoked at any time if the registered medical practitioner is of the opinion in good faith that termination of pregnancy is immediately necessary to save the life of the pregnant woman irrespective of restriction of 12 or 20 weeks as mentioned in Section 3. Thus, Section 5 stands altogether on different footing. We are concerned with Section 3. Whether a woman can make her choice to continue with the pregnancy or to terminate it within a restricted period as contemplated in Section 3 of the Act.

**9.** In the affidavit of Dr. Khan Sayeed Ahmed, Medical Officer of Byculda District Prison, it is clearly stated that if a prisoner who is pregnant shows her willingness for termination of pregnancy, the norms set out in Section 3 of the Act are strictly followed and if the length of the pregnancy exceeds maximum of 20 weeks as stated in Section 3 of the Act, then Section 5 of the Act is followed.

**10.** It appears that earlier, there was some misconception that for obtaining permission for medical termination of pregnancy of a prisoner, the proposal has to be sent to a Committee. Referring the case to a Committee would entail delay in the termination of pregnancy. This delay in terminating the pregnancy could have some serious or unnecessary complications which may affect the pregnant lady adversely. However, on going through the Medical Termination of Pregnancy Act and the Rules, as well as the Prison Manual, we find that it is not necessary to refer the case of a pregnant prisoner who wants to terminate her pregnancy to a Committee. The Committee which is referred to under 2(e) of the Medication Termination of Pregnancy Rules 2003 and to which there is a reference in Section 4 of the Act is a Committee whose job is only to approve the place where a pregnancy can be terminated. A prisoner has to simply indicate that she wants to terminate her pregnancy as its continuance would cause grave injury to her physical and mental health. She would then be referred to the Government hospital and if her case was covered by Sections 3 or 5 of the Act, the pregnancy would be terminated.

**11.** Section 3(2) states that where the length of pregnancy does not exceed twelve weeks, it can be terminated by a registered medical practitioner if he is of the opinion that the case falls under Section 3(2)(a), (b)(i) or (ii). In case of termination of pregnancy exceeding twelve weeks and not exceeding 20 weeks, then same opinion but of not less than two registered medical practitioners is to be sought. The registered medical practitioners should opine that the continuance of pregnancy either would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health. Section 3(2)(b)(ii) pertains to the risk involved to the health of the child. The present case of medical termination of pregnancy is to be considered under Section 3(2)(b)(i) which allows the termination of pregnancy if there is risk to the life of the pregnant woman or of grave injury to her physical or mental health.

**12.** Besides physical injury, the legislature has widened the scope of the termination of pregnancy by including "a injury" to mental health of the pregnant woman. Thus, if continuance of pregnancy is harmful to the mental health of a pregnant woman, then that is a good and legal ground to allow termination if the pregnancy is not exceeding 20 weeks. Explanations 1 and 2 have stated the presumptions in respect of grave injury to mental health of the pregnant woman. The law-makers have considered and taken care of the mental condition of the pregnant woman. In the case of termination of pregnancy, the injury caused either to body or mind is considered. However, mental health can deteriorate if it is forced or unwanted pregnancy. Let us advert to Explanation 1. Under Explanation 1, if a woman is pregnant due to rape, then anguish caused by such pregnancy is to be presumed to constitute a grave injury to mental health of the pregnant woman. As per Explanation 2, if the pregnancy is accidental on account of failure of device or method used by married woman or her husband for the purpose of limiting the number of children, then the said pregnancy if unwanted, it may be presumed to constitute grave injury to mental health of the pregnant woman. These two explanations stating presumptions do not restrict the scope of the various other circumstances causing grave injury to mental health of woman who is pregnant. We do not want to deal with Explanation 1, as it is very specific about cases of rape and mental anguish to a woman in such cases is obvious. If pregnancy is due to rape, then there is bound to be complete mental break down of a victim. We need to interpret Explanation 2 which is restricted only to a married couple. However, today a man and a woman who are in live-in-relationship, cannot be covered under Explanation 2 whereas Explanation 2 should be read to mean any couple living together like a married couple.

**13.** A woman irrespective of her marital status can be pregnant either by choice or it can be an unwanted pregnancy. To be pregnant is a natural phenomenon for which woman and man both are responsible. Wanted pregnancy is shared equally, however, when it is an accident or unwanted, then the man may not be there to share the burden but it may only be the woman on whom the burden falls. Under such circumstances, a question arises why only a woman should suffer.

There are social, financial and other aspects immediately attached to the pregnancy of the woman and if pregnancy is unwanted, it can have serious repercussions. It undoubtedly affects her mental health. The law makers have taken care of helpless plight of a woman and have enacted Section 3(2)(b)(i) by incorporating the words “grave injury to her mental health”. It is mandatory on the registered medical practitioner while forming opinion of necessity of termination of pregnancy to take into account whether it is injurious to her physical or mental health. While doing so, the woman's actual or reasonable foreseeable environment may be taken into account.

**14.** 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. An abortion is a carefully considered decision taken by a woman who fears that the welfare of the child she already has, and of other members of the household that she is obliged to care for with limited financial and other resources, may be compromised by the birth of another child. These are decisions taken by responsible women who have few other options. They are women who would ideally have preferred to prevent an unwanted pregnancy, but were unable to do so. If a woman does not want to continue with the pregnancy, then forcing her to do so represents a violation of the woman's bodily integrity and aggravates her mental trauma which would be deleterious to her mental health.

**15.** According to international human rights law, a person is vested with human rights only at birth; an unborn foetus is not an entity with human rights. The pregnancy takes place within the body of a woman and has profound effects on her health, mental well-being and life. Thus, how she wants to deal with this pregnancy must be a decision she and she alone can make. The right to control their own body and fertility and motherhood choices should be left to the women alone. Let us not lose sight of the basic right of women: the right to autonomy and to decide what to do with their own bodies, including whether or not to get pregnant and stay pregnant.

**16.** Women in different situations have to go for termination of pregnancy. She may be a working woman or homemaker or she may be a prisoner, however, they all form one common category that they are pregnant women. They all have the same rights in relation to termination of pregnancy. As stated earlier, as per Prison Manual, for prisoners, there is provision for pregnant prisoners. Chapter XLI is on Women Prisoners. Rule 7 in said Chapter pertains to “Pregnancy of Women Prisoners, which is as follows:

When a woman prisoner (convict or undertrial) is found or suspected to be pregnant at the time of her admission or at any time thereafter, the Medical Officer shall report the fact to the Superintendent. As soon as possible arrangements shall be made to get such prisoner medically examined at the hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery etc. After ascertaining necessary particulars, a report shall be sent to the Dy. Inspector of General of Prisons, stating the date of her admission, term of sentence, the date of release, duration of pregnancy, probable date of delivery etc.

**17.** Rule 8 states about Births in prison. Rule 9 is in respect of children of women prisoners. However there is no provision specifically relating to termination of pregnancy of women prisoners either convict or under-trial.

**18.** When a woman prisoner is admitted in prison, she is medically examined, history of her last menstrual period is taken and urine pregnancy test is carried out. One register is maintained in which noting on these aspects is made including if she is pregnant and if pregnant, procedure stated in paragraph 5 above is followed. However, we understand that sometimes a convict or under-trial women prisoner may not be aware of her pregnancy and she may be unable to disclose the fact of pregnancy at the time of admission in the prison. Hence, medical check up of all the women prisoners who are of reproductive age should be done at least once every month for two months from their admission in jail to ascertain whether the woman is pregnant. Moreover, a woman prisoner if found pregnant should be informed by the Medical Officer attached to the prison that she can get the pregnancy terminated if it is such that it falls under Section 3(2)(a), (b)(i) or (ii). This onus is cast on the medical officer. If she wants to terminate the pregnancy, she should be sent to the civil hospital on an urgent basis to help her to terminate the pregnancy.

...

**21.** If a pregnant prisoner wants to terminate her pregnancy, then provision of section 3(2)(b)(i) or (ii) are applicable. She being a prisoner should not be treated differently than any other pregnant women. We, with all responsibility state that Section 3 of Medical Termination of Pregnancy Act bestows a very precious right to a pregnant woman to say no to motherhood. It is the right of a woman to be a mother so also it is the right of a woman not be a mother and her

wish has to be respected. This right emerges from her human right to live with dignity as a human being in the society and protected as a fundamental right under Article 21 of the Constitution of India with reasonable restrictions as contemplated under the Act. Human rights are natural rights and thus a woman has a natural right in relation to her body which includes her willingness to be a mother or her unwillingness to be a mother.

**22.** Section 3(2)(b)(i) is an extension of the human right of a woman and this needs to be protected. Woman owns her body and has right over it. Abortion is always a difficult and careful decision and woman alone should be the choice maker. A child when born and takes first breath, is a human entity and thus, unborn foetus cannot be put on a higher pedestal than the right of a living woman. Thus, fundamental right under Article 21 of Constitution of India protects life and personal liberty which covers women. This right of exercise of reproductive choice though is restricted by Medical Termination of Pregnancy Act, 1971, it also recognizes and protects her right to say no to the pregnancy if her mental or physical health is at stake. Thus, it is a regulated procedure.

**23.** We would like to refer to the decision of the Supreme Court in the case of *Suchita Srivastava v. Chandigarh Administration* where it is observed that there is no doubt that a woman's right to make reproductive choices is also a dimension of "personal liberty" as understood under Article 21 of the Constitution of India. It is important to recognize that reproductive choice can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected."

**24.** Advocate Ms. Manjiri Shah stated that she had a discussion with the Head of the Department of Gynaecology in J.J. Hospital where women prisoners in Mumbai are referred in cases of pregnancy. The Out Patient Department (O.P.D.) timings are 8.00 a.m. to 12.00 p.m and it was found that generally women prisoners were brought to the hospital at about 11.30 a.m. to 12.00 p.m., hence, on that day, though the woman prisoner is examined, it is not possible to carry out all the tests which are necessary in relation to the pregnancy. Therefore, it was felt that it would be advisable that the woman prisoner who is pregnant reaches the hospital at about 8.00 or 8.30 a.m. and after examination, the tests can be prescribed and carried out on the same day by the afternoon and the tests results would be received by the evening, hence, by the time, the woman prisoner went back to the prison, the entire tests and reports are ready due to which the next step can be decided and the next date of operation/medical procedure can be decided on that day itself.

**25.** In Mumbai, when the prisoners are to be taken to the Court or hospital, it is the job of L.A. Squad to escort them, however, it is seen that except in cases of dire medical emergency, the L.A. Squad gives preference to prisoners who are to be produced in the Court and sometimes, sufficient staff is not available to take the prisoners to the hospital. In case where there is no emergency, then that prisoner is not taken to the hospital on that day and may be taken to hospital after a day or two. In case of pregnant prisoner, if the pregnancy has to be terminated, normally it has to be done in 12 weeks as set out in Section 3(2)(a) or 20 weeks as set out in 3(2)(b) of the Act provided it falls under Section 3(2)(b)(i) or (ii). In cases of pregnancy, every day is important on account of growth of foetus. Once a woman prisoner is found to be pregnant and she indicates that she wants to terminate the pregnancy, she should be immediately referred to the hospital and it should be ensured that her pregnancy is terminated. The Jail Administration and Escort Division to ensure that as far as possible such lady prisoner reaches the hospital by 8.30 a.m. A female prisoner cannot have access to facility of medical termination of pregnancy if her case falls under Section 3 or 5 of the Act, therefore not providing her with the facility amounts to forcing a woman to continue with a pregnancy she does not want which by itself constitutes a grave injury to her mental health and as such would fall under Section 3(2)(b)(i) of the Act. Hence, such a pregnancy can be lawfully terminated.

...

**27.** In view of the above, directions are given as under:-

1. (i). Upon admission into a jail/prison, every woman prisoner of child bearing age shall undergo a Urine Pregnancy Test (UPT) within 5 days of being admitted to jail.

(ii) Every woman prisoner of child bearing age shall undergo a second UPT approximately 30 days after admission into jail/prison in case the UPT under 1(i) is not positive.

2. In case, the urine pregnancy test is positive, the Medical Officer shall inform the prisoner that she can get the pregnancy terminated if her case falls under Section 3 or 5 of The Medical Termination of Pregnancy Act.

3. If the prisoner indicates she wants to terminate the pregnancy, her statement should be recorded by the Jail Authority or Medical Officer to that effect and the record of the statement be maintained. A copy of that statement be forwarded with the prisoner when she is referred to the hospital.

4. If the prisoner indicates that she wants to terminate the pregnancy, the Medical Officer and Jail Superintendent shall ensure that woman prisoner is sent on urgent basis to the nearest Government Hospital to help her terminate the pregnancy. It is made clear that they shall not wait for any order of the Court if the case falls under Sections 3 or 5 of the Act.
  5. Every prison shall maintain "Prison OPD Register" where details of every prisoner examined either by the prison medical officer/doctor or visiting doctor are entered. Such register shall contain in brief (i) the name of the prisoner; (ii) convict or undertrial number, (iii) the medical complaint of the prisoner; (iv) the advice of the doctor (including referral of the patient to the nearest government Hospital) and (v) the date for follow up when necessary. The Prison OPD Register be produced for inspection of the Sessions Judge/Magistrate deputed to visit the prison.
  6. The Jail Superintendent and escort division to ensure that such prisoner as well as other prisoners needing medical treatment in a hospital are sent to the hospital as far as possible by 8:30 a.m. i.e when O.P.D opens.
  7. After discharge from the said hospital, the prison authorities shall take due care of the woman prisoner until she fully recovers from the medical termination of her pregnancy.
- ...

## IN THE HIGH COURT OF MADRAS AT MADURAI

**Mrs. Meharaj v. The State & Ors.**

**2018 SCC OnLine Mad 278**

**S. Vimala and T. Krishnavalli, JJ.**

***The wife of a detenu had filed an application with the State seeking leave for her husband for thirty days in order to undergo infertility treatment. The application had been rejected by the State. She then filed a habeas corpus petition in the High Court of Madras against this rejection order. The Court was called upon to adjudicate on whether prisoners are entitled to conjugal visits. It also ruled on the right to procreation of the spouse of an incarcerated prisoner.***

**Vimala, J. :** "...

**2.** This application has been filed by the wife of the detenu, namely, Siddique Ali @ Sulthan, aged 40 years, seeking to quash the impugned order of the third respondent dated 20.09.2017, declining leave for her husband and seeking a direction to the respondents to produce her husband/detenu, who is a life convict detained at Central Prison, Palayamkottai, before this Court and to grant him leave for 30 days to assist her in the infertility treatment to be undergone by her.

**3.** It is stated that previously, a Habeas Corpus Petition was filed before this Court in HCP(MD) No.1121/2017 praying to grant leave for 60 days to the detenu. This Court, by order dated 31.08.2017, had directed the respondents to take a decision for consideration of leave within a period of one week from the date of receipt of the copy of the order. By the letter dated 20.09.2017, the leave was declined by giving two reasons, namely,

- (i) neither the Inspector of Police nor the Probation Officer recommended the leave, and
- (ii) The personal life of the detenu will be put to danger. This order is under challenge in this application.

...

**5.** The initial conviction and consequent imprisonment, though is in accordance with law, whether the denial of leave for 30 days, during the period of incarceration would amount to illegal custody and thus bring the case of the petitioner within the category of Habeas Corpus is the issue that arose for consideration in this petition, which is answered by the dictum laid down in the case of Sunil Batra.

**6.** Therefore, it is clear that when the rights of the prisoner is not protected, this Court can exercise the writ jurisdiction, if the humanistic approach obscure the sense of realities.

...

**10.** The 2<sup>nd</sup> objection is that there is no provision under the Jail Manual for the grant of leave on the ground stated by the petitioner herein. Rule 20 of the Tamil Nadu Suspension of Sentence Rules, 1982, prescribes eight grounds, under which, the 7<sup>th</sup> ground is 'any other extraordinary reason'. Therefore, whether the claim made by the petitioner is an extraordinary reason or not should be considered. In the absence of any other rule, providing for release of prisoner for the purpose of procreation of a child with the available law, it must be interpreted that the request is covered under extraordinary reasons. Even assuming that this reason is not extraordinary, Article 21 of the Constitution of India would very much available for this Court to consider the claim made by the wife.

**11.** The wife / petitioner is aged 32. The prisoner is undergoing imprisonment (life) and he is in custody for a period of 18 years. The fact remains that they are not blessed with a child, may be because the husband is not at all living with his wife. The Doctor has given assurance to the wife that with the help of infertility treatment, it is possible to beget a child.

**12.** Man is a social animal. He needs a family as well as a society to live in. The man needs both to share his emotions and feelings. Being human beings, prisoners also would like to share their problems with their life partner as well as with the society. Just because, they are termed as prisoners, their right to dignity cannot be deprived.

**13.** Out of four theories of punishment, India has accepted the theory of reformation also. The concept of reformatory theory is best, as it says that the human being to be reformed would become the productive member of the society. If that is to be done, prisons have to be transformed as homes for the purpose of giving training morally as well as intellectually, so that the prisoners are denuded of the qualities of a criminal. The psychologists and psychiatrists believe that the frustration, tension, the ill feelings and the heart burnings can be reduced and a human being can be better constructed if they are allowed conjugal relationship even rarely. Therefore, while considering the merits and demerits of allowing conjugal visits or permitting leave for the purpose of artificial insemination, the advantages are more than the disadvantages.

**14.** Conjugal visit leads to strong family bonds and keep the family functional rather than the family becoming dysfunctional due to prolonged isolation and lack of sexual contact.

...

**16.** Conjugal visits of the spouse of the prisoners is also the right of the prisoner. This right is recognized at least in few countries of the world. When the prisons are overcrowded providing place for conjugal visits may be a problem, but the Government has to find out a solution. Today, conjugal visits are called extended family visits (or, alternately, family reunion visits). The official reason for these extended family visits is three-fold: to maintain the relationship between the prisoner and the members of his family, to reduce recidivism, and to motivate or to provide an incentive for the good behavior.

...

**18.** In 2015, Government of India passed legislation stating that conjugal visits are a right and therefore, it is not a privilege for married inmates. These inmates are also entitled, if they wish, to give their sperm to their spouse for artificial insemination.

**19.** Apart from that, even though the wife is not under incarceration, but a suffering person outside the prison on account of the marital relationship with the prisoner and her legitimate expectation to have a child cannot be declined.

...

**21.** Under the stated circumstances, this petition is disposed of and the convict prisoner, namely, Siddique Ali @ Sulthan, S/o. Deen (Convict No. 7368) is permitted to go on temporary leave initially for a period of two weeks, i.e. from 20.01.2018 to 03.02.2018...

...

**22.** It is made clear that if the preliminary investigation by the Doctors reveals that there is a possibility of getting a child and further treatment is necessary, then this Court will consider the extension of time by another two weeks. In case of further treatment, the petitioner shall make request to the jail authorities. The petitioner is also at liberty to move this Court as and when necessary. The expenses for escort shall be borne out by the State Government."



## Endnotes

- 1 2013 Cri LJ 2868 (M.P.).
- 2 (2009) 9 SCC 1. For excerpts, see Chapter 7, “Disability and Reproductive Rights.”
- 3 2017 Cri LJ 218 (Bom).
- 4 (2007) 15 SCC 337.
- 5 Criminal Appeal No. 652/2008, decided on Feb. 01, 2016 (High Court of Gujarat).
- 6 2015 Cri LJ 2282 (P&H).
- 7 2018 SCC OnLine Mad 278.
- 8 U.N. Office of the High Commissioner for Human Rights, “Status of Ratification Interactive Dashboard—India,” <http://indicators.ohchr.org/> [accessed Mar. 21, 2019].
- 9 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained in U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001), Arts. 3-4.*
- 10 United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N. Doc. A/RES/43/173 (1988), Principles 1, 3, 5, 24-26 (outlining that prisoners retain all human rights, including protections for pregnant women and nursing mothers); United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), U.N. Doc. A/RES/65/229 (2011), Annex at § I, paras. 5-6, 7(c)-(d), 10, § 2, para. 3, and § III, para. 2 (outlining best practices for health care services, including pre-, peri- and post-natal care, for women and girl prisoners and detainees); United Nations Basic Principles for the Treatment of Prisoners, U.N. Doc. A/RES/45/111 (1990), paras. 2, 5, 9 (“Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights” and other human rights treaties, including the rights to non-discrimination and to health); United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), U.N. Doc. A/RES/70/175 (2016), Rule 28 (updating the original rules from 1955 and outlining that “[i]n women’s prisons, there shall be special accommodation for all necessary prenatal and postnatal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the prison. If a child is born in prison, this fact shall not be mentioned in the birth certificate.”).
- 11 Vishaka v. State of Rajasthan, AIR 1997 SC 3011.



# CHAPTER NINE

# SEXUALITY AND REPRODUCTIVE DECISION-MAKING IN MATRIMONIAL LAWS

India's matrimonial laws touch on several aspects of sexuality and reproduction, including the role of sex and reproduction in marriage. In recent years, the Supreme Court of India has in a number of cases, recognized sexual and reproductive autonomy as a right of an individual.<sup>1</sup> In *Joseph Shine v. Union of India*,<sup>2</sup> the Supreme Court struck down a provision that criminalized adultery by a wife,<sup>3</sup> and in doing so recognized the sexual autonomy of a person within marriage in the following terms:

[There is an] assumption that a woman contracts away her sexual agency when entering a marriage. That a woman, by marriage, consents in advance to sexual relations with her husband ..... is offensive to liberty and dignity. Such a notion has no place in the constitutional order. Sexual autonomy constitutes an inviolable core of the dignity of every individual. At the heart of the constitutional rights guaranteed to every individual is a primacy of choice and the freedom to determine one's actions. Curtailing the sexual autonomy of a woman or presuming the lack of consent once she enters a marriage is antithetical to constitutional values...

This judgment has dwelt on the importance of sexual autonomy as a value which is integral to life and personal liberty under Article 21. ... Marriage – whether it be a sacrament or contract – does not result in ceding of the autonomy of one spouse to another.

Despite this judgment, challenges to sexual and reproductive autonomy emerge in India's matrimonial laws.<sup>4</sup> The following issues have arisen in the context of sexuality and reproductive-decision making within matrimonial laws:

- Denial of Sex Within Marriage as “Cruelty” and a Ground for Divorce
- Termination of Pregnancy Without Spousal Consent as “Cruelty” and a Ground for Divorce
- Restitution of Conjugal Rights: Implications on Rights to Sexual and Reproductive Autonomy and Health

## Denial of Sex Within Marriage as “Cruelty” and a Ground for Divorce

Divorce laws in India do not recognize no-fault grounds of divorce.<sup>5</sup> In contested cases, the party seeking divorce has to prove that the other party engaged in wrong-doing as defined in the grounds for divorce under the personal law governing that marriage. One such fault-based ground in various divorce laws is that of treating one's spouse with “cruelty.” For example, Section 13(1)(ia) of the Hindu Marriage Act, 1955, provides for cruelty as a ground for divorce. Courts have had to decide whether denial of sexual intercourse amounts to the “fault” of “cruelty” under Section 13(1)(ia) and consequently whether the spouse is entitled to a divorce on this ground.<sup>6</sup> In light of the Supreme Court's observations regarding sexual autonomy, including within marriage,<sup>7</sup> it is pertinent to ask whether terming denial of sex to a spouse as “cruelty” within marriage and therefore a ground for divorce, violates a person's sexual autonomy.

The Supreme Court's decision in *Samar Ghosh v. Jaya Ghosh*,<sup>8</sup> is the authoritative judgment on the issue of whether denial of sex amounts to “cruelty.” The Court, noting that a straitjacket definition could not be provided for what amounts to “mental cruelty” listed a few circumstances, which in its opinion amounted to such cruelty. Denial of sex by a spouse for a “considerable period” of time without any valid reasons was one ground. A unilateral decision by one of the spouses not to have children was another.

The decision of the Supreme Court in *Samar Ghosh* has often been cited and relied on thereafter in cases involving denial of sex by a spouse. The Supreme Court in *Vidhya Viswanathan v. Kartik Balakrishnan*,<sup>9</sup> held that not allowing one's spouse to have sexual intercourse for a “long period” of time without valid reasons would amount to “cruelty.” In *Shashi Bala v. Rajiv Arora*,<sup>10</sup> the Delhi High Court ruled that sexual relations between spouses is an important element of a marriage, without which the relationship would become insipid. It reiterated pronouncements of various courts to hold that sex is the foundation of a marriage and that marriage without sex is an anathema. Although it refused to quantify the number of times a couple should have sexual intercourse during a period of time, it cited *Samar Ghosh* to rule that

unilateral denial of sex by a spouse without reasonable grounds amounts to “mental cruelty.” In *Rajeev Kumar v. Vidya Devi*,<sup>11</sup> the Delhi High Court relying on *Vidhya Viswanathan* held that denying sexual intercourse for four and a half years amounted to “cruelty.”

Agreeing with the holding of the court in *Shashi Bala*, the Bombay High Court in *Reshma Rakesh Kadam v. Rakesh Vijay Kadam*,<sup>12</sup> ruled that sex plays an important role in the marital life of a couple. Consequently, avoiding sexual relations would amount to “cruelty.” The Madras High Court in *Krishnaraj v. Sathyapriya*,<sup>13</sup> however, ruled that if avoidance of sexual relations is after a considerable time of being married (in this case sixteen years), it cannot be considered to be “cruelty.” The Court ruled that if denial of sexual intercourse is soon after the marriage, it may be considered to be “cruelty,” but not otherwise.

In *Manju Thakur v. Raj Kumar*,<sup>14</sup> the Himachal Pradesh High Court ruled that sex is the purpose of marriage. On the facts of the case, it ruled that non-consummation of a marriage because of physical or psychological impotence is a ground for divorce. It further held that persistent refusal to consummate the marriage would lead to an inference that the spouse is incapable of having sexual intercourse. In *Sri Uma Mahesh v. Smt. Methravathi*,<sup>15</sup> the Karnataka High Court distinguished between impotence and sterility. It ruled that impotence means the inability to have sexual intercourse and not the inability to conceive. Inability to have sexual intercourse may lead to non-consummation of a marriage, and that can be held to be “mental cruelty.” However, inability to conceive due to a medical condition cannot be considered to be “cruelty” and, consequently, a ground for divorce.

## Termination of Pregnancy Without Spousal Consent as “Cruelty” and a Ground for Divorce

The Medical Termination of Pregnancy Act, 1971 (MTP Act) provides the legal framework governing termination of pregnancies, as well as the procedure to be followed before such termination. It does not require the doctor terminating the pregnancy to take the consent of the spouse, in case of married women. Despite this, the question of whether spousal consent is required for termination of pregnancy has arisen in many cases. For instance, in *Dr. Mangla Dogra v. Anil Kumar Sharma*,<sup>16</sup> the question before the Punjab and Haryana High Court was whether the express consent of the husband is required before his wife’s pregnancy is terminated. The court ruled that an unwanted pregnancy in the case of a married woman can be terminated as per Section 3(2) of the MTP Act. Section 3(4)(b) of the Act requires only the consent of the woman to be obtained. Consent of the husband is required by neither the MTP Act nor the MTP Rules. The court also recognized the reproductive choice of the wife and ruled that consent to sexual intercourse does not imply consent to give birth to a child conceived as a result. The woman, the court held, is the best judge to decide whether to continue or terminate the pregnancy. It ruled that the consent of the husband, either express or implied, is not required to terminate the pregnancy under the MTP Act. The husband filed an appeal in the Supreme Court against the decision of the High Court. The Supreme Court refused to entertain the appeal and dismissed it.<sup>17</sup> Consequently, the Court has approved the position taken by the Punjab and Haryana High Court that the consent of the husband is not required for a woman to terminate her pregnancy. More recently, the Supreme Court in *Z v. State of Bihar*,<sup>18</sup> ruled that only the consent of the woman is relevant under the MTP Act. The consent of the husband or father (in case of adult women) is not required.<sup>19</sup>

However, cases have arisen where courts have granted divorce on the ground that termination of pregnancy without the consent of the husband amounts to “cruelty.”<sup>20</sup>

## Restitution of Conjugal Rights: Implications on Rights to Sexual and Reproductive Autonomy and Health

Under the Hindu Marriage Act, if a husband or a wife has “withdrawn from the society” of the other, without reasonable grounds, the other spouse may file an application before the court for restitution of conjugal rights.<sup>21</sup> If the court is satisfied of the truth of the allegations made, it may decree restitution of conjugal rights.

The Andhra Pradesh High Court in *T. Sareetha v. Venkata Subbaiah*,<sup>22</sup> struck down Section 9 of the Hindu Marriage Act, holding it to be unconstitutional. The Court ruled that a decree of restitution of conjugal rights implies enforcing marital intercourse. This would improperly transfer the choice of the person to have intercourse or not to the state, and at the same time transfer the choice of whether to procreate or not also to the state. The High Court held that the provision violates the right to sexual autonomy and bodily integrity of the individual to whom the decree is directed. In the case

of women, it also violates their reproductive autonomy. The Court ruled that Section 9 violated the right to privacy of the individual since it invaded their zone of intimate decisions. A decree of restitution of conjugal rights would imply forcing sex on an unwilling individual. It noted that such forced/coerced sex violates the fundamental rights of the person. Coerced sex could also lead to pregnancy, which would be a violation of the woman's reproductive autonomy. This, the Court held, violates the right to dignity and the right to privacy of the woman. Consequently, a decree of restitution of conjugal rights was said to offend the guarantees of life, personal liberty, and human dignity and decency under Articles 14, 19, and 21 of the Indian Constitution. The Court added that "state coercion" of this nature was ineffective in preserving or prolonging a matrimonial relationship.

This case was, however, overruled by the Supreme Court in **Saroj Rani v. Sudarshan Kumar Chadha**.<sup>23</sup> The Supreme Court held that the Andhra Pradesh High Court in **T. Sareetha** had misinterpreted the meaning of the term "conjugal." It held that the term pertains to the right of the spouses to the "society of the other." This right, it ruled, was inherent in the marriage itself. The Court held that Section 9 was only a codification of preexisting law and served a social purpose in ensuring that marriages do not break up. Hence, if understood in the "proper perspective," Section 9, the Court ruled, does not violate Articles 14 and 21 of the Indian Constitution. In doing so, the Court referenced, and agreed with the decision of a Single Judge of the Delhi High Court,<sup>24</sup> wherein the court had held that sexual intercourse, though an important element of a marriage, is not the ultimate goal of the marriage. It ruled that a court cannot enforce sexual intercourse. The remedy of restitution of conjugal rights, the Delhi High Court held, is to provide restitution for "cohabitation and consortium" and "not merely sexual intercourse."

A nine-judge bench of the Supreme Court in **Justice K.S. Puttaswamy — I v. Union of India**,<sup>25</sup> held that an individual's right to privacy is a fundamental right, guaranteed under Articles 19 and 21 of the Indian Constitution. The Court ruled that sexual and reproductive autonomy, and decisions relating to marriage and procreation, amongst others, form a part of the right to privacy and dignity. Further, in **Joseph Shine v. Union of India**,<sup>26</sup> the Supreme Court has recognized the right of a married woman to retain her sexual autonomy. Hence, it is conceivable that Section 9 of the Hindu Marriage Act may not survive a future constitutional challenge and that the Andhra Pradesh High Court's judgment in **T. Sareetha** may be revived.

## Related Human Rights Standards and Jurisprudence

Below is a selection of international and regional human rights standards and jurisprudence that explains states' obligations concerning women's sexual and reproductive rights in the context of marriage, including concerning criminalization of marital rape and ensuring reproductive autonomy to women regardless of marital status.

The Government of India has committed itself to comply with obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR).<sup>27</sup> Under international law, all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.<sup>28</sup> The Supreme Court has held that in light of the obligation to "foster respect for international law" in Article 51 (c) of the Indian Constitution "[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee."<sup>29</sup>

### INTERNATIONAL TREATY STANDARDS

#### TREATIES

- **CEDAW, Articles 1, 5(a), 12, 15(4), 16(1)** (prohibiting discrimination on the basis of marital status and within marriage; guaranteeing women's rights to health care, family planning information and services, and to decide the number and spacing of children; obligating elimination of practices based on stereotyped roles for men and women).
- **ICESCR, Article 10(1)** (protecting right to equality and affirming "marriage must be entered into with the free consent of the intending spouses").

- **ICCPR, Articles 17, 23** (protecting the rights to privacy and family life; affirming no marriage can be entered into without free and full consent, and to equality during and at the dissolution of marriage).

## SELECTED GENERAL COMMENTS

- **CEDAW Committee, *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19***, U.N. Doc. CEDAW/C/GC/35 (2017), paras. 15–21, 24–26, 29–33 (recognizing violence against women may constitute torture or ill-treatment, including rape and forced continuation of pregnancy, abortion, sterilization, and pregnancy; and affirming that marital rape must be criminalized).
- **CEDAW Committee, *General Recommendation No. 24 on Article 12 of the Convention (women and health)***, U.N. Doc. A/54/38/Rev.1 (1999), paras. 1–2, 12–15, 17, 21, 29 (recognizing reproductive health as part of the right to health, including ensuring family planning services without requiring third-party authorization; affirming that protection from violence is a component of the right to health).
- **CEDAW Committee, *General Recommendation No. 21: Equality in Marriage and Family Relations***, U.N. Doc. A/49/38 (1994), paras. 16–17, 22–40, 50 (outlining the key aspects of the right to equality in entering into, during, and at the dissolution of marriage).
- **Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 22 (2016) on the right to sexual and reproductive health***, U.N. Doc. E/C.12/GC/22 (2016), paras. 25–29, 41, 49 (recognizing the obligation to ensure women’s equal rights to sexual and reproductive health, including abortion, guarantee women’s autonomous consent to care, and ensure protection from marital rape).
- **Human Rights Committee, *General Comment No. 36 (2018) on article 6 of the ICCPR, on the right to life***, U.N. Doc. CCPR/C/GC/36 (2018), para. 8 (recognizing the right to life requires refraining from introducing new barriers and removing existing barriers to effective access to safe abortion).

## INQUIRIES AND INDIVIDUAL COMPLAINTS

- **CEDAW Committee, *Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women***, UN Doc. CEDAW/C/OP.8/PHL/1 (2015), paras. 41–43, 52(a)–(b) (recognizing that local policies limiting access to modern methods of contraceptives violate the obligation to eliminate discrimination against women in marriage and family relations by denying them independence and choice in determining the number and spacing of their children; also finding such policies reinforce discriminatory stereotypes of women as primarily mothers and childbearers; and urging the State to ensure women have information on and access to contraceptives regardless of marital status).

## UNITED NATIONS HUMAN RIGHTS EXPERT REPORTS

- **Special Rapporteur on violence against women, its causes and consequences, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy: Cultural practices in the family that are violent towards women***, U.N. Doc. E/CN.4/2002/83 (2002), paras. 99–104, 109–111, 119, 123–132 (describing how poor legislation on sexual activity can lead to the violation of women’s rights to sexual and reproductive health, such as unequal divorce laws for men and women and the failure to criminalize marital rape; and outlining State obligations to prevent and punish violence against women and to change customs that constitute or facilitate violence against women).
- **Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR Health), *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. E/CN.4/2004/49 (2004), paras. 24–30, 34, 39, 44, 53–56, 85 (recognizing that inequality within marriage, family life, and divorce can lead to violations of women’s right to sexual and reproductive health).
- **SR Health, *Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. A/64/272 (2009), paras. 54–60 (outlining that women’s autonomous consent in health care settings is fundamental to the right to sexual and reproductive health, that third-party consent requirements violate this right, and that “[r]eproductive freedom should never be limited by individuals or States as a family planning method”).

- **Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (SR Torture), *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*, U.N. Doc. A/HRC/7/3 (2008), paras. 44–49, 68, 70–71** (describing how domestic violence can amount to torture and outlining how State laws on marriage and divorce can contribute to gender-based violence, and thus to torture or ill treatment).

## SELECTED REGIONAL CASE LAW

### EUROPEAN COURT OF HUMAN RIGHTS

- ***S.W. v. United Kingdom, Application No. 20166/92 (1995)***, para. 44 (finding that criminalizing marital rape conforms with “respect for human dignity and human freedom” and holding that applicant’s conviction for marital rape did not violate his right to be free of arbitrary prosecution, conviction, or punishment).



# RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

## IN THE HIGH COURT OF ANDHRA PRADESH

**T. Sareetha v. T. Venkata Subbaiah**

**AIR 1983 AP 356**

**P.A. Choudary, J.**

***A husband filed a petition for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955. The suit succeeded in the lower court and the wife challenged the order of the lower court in a civil revision petition before the High Court asking it to decide upon the issue of whether Section 9 of the Hindu Marriage Act, 1955 was liable to be struck down as being violative of fundamental rights guaranteed under Articles 14, 19 and 21 of the Indian Constitution. It was contended that Section 9 violates the right to life, personal liberty, human dignity and decency.***

**Choudary, J.:** “This Civil Revision Petition is filed by Sareetha, a well-known film actress of the South Indian screen against an order passed by the learned Subordinate Judge, Cuddapah, overruling her objection raised to the enter training of an application filed by one Venkata Subbaiah, under Section 9 of the Hindu Marriage Act (hereinafter referred to as ‘the Act’) for restitution of conjugal rights with her.

2. Sareetha while studying in a high-school and then hardly aged about sixteen-years and staying with her parents at Madras, was alleged to have been given in marriage to the said Venkata Subbaiah, at Tirupathi on 13-12-1975. Almost immediately thereafter, they were separated from each other and have been continuously living apart from each other for these five-years and, more, Venkata Subbaiah had, therefore, filed under section 9 of the Act O.P. No. 1 of 1981 on the file of the Sub-Court, Cuddapah, for restitution of conjugal rights with Sareetha...

...

### PART II.

17. This leads me to the consideration of the other half of this case which raises an important constitutional question. Sareetha in her petition dated 31-8-1981 of which notice from this court had been duly given to and served upon the Attorney General of India, New Delhi, raised for the first time a question of constitutional validity of Section 9 of the Hindu Marriage Act. Through that petition, Sareetha claimed that Section 9 of the Act, “is liable to be struck down as violative of the fundamental rights in Part III of the Constitution of India, more particularly articles 14, 19 and 21 inasmuch as the statutory relief under the said provision, namely, restitution of conjugal rights offends the guarantee to life, personal liberty and human dignity and decency.” As the above contention of Sareetha involves the question of constitutional validity of Section 9 of the Act, authorising grant of curial relief of restitution of conjugal rights to a Hindu suitor, I read Section 9 of the Act in full and the relevant parts of its allied procedural provisions contained in Order 21 Rules 32 and 33 of the Civil Procedure Code.

### SECTION 9: RESTITUTION OF CONJUGAL RIGHTS:

“When either the husband or the wife has without reasonable excuse withdrawn from the society of the other, the aggrieved party may apply by petition to the District Court for restitution of conjugal rights and the court, on being satisfied the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation: Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.”

Order 21 Rule 32 of C.P.C. Decree for specific performance for restitution of conjugal rights, or for an injunction:

“(1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it the decree may be enforced (in the case of a decree for restitution of conjugal rights by the attachment of his property, or, in the case of a decree for the specific performance of a contract, or for an injunction) by his detention in the civil prison, or by the attachment of his property, or by both.

(2) .....

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for (six months) if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of proceeds the court may award, to the: decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree, and paid all costs of executing the same which he is bound to pay, or where, at the end of (six months) from the date of the attachment, on application to have the property sold has been made, or if made has been refused, the attachment shall cease.

Rule 33. Discretion of court in executing decrees for restitution of conjugal rights:

(1) Notwithstanding anything in R. 32, the court either at the time of passing a decree (against a husband) for the restitution of conjugal rights or at any time afterwards, may order that the decree (shall be executed in the manner provided in this rule.)

(2) Where the Court has made an order under sub-rule (1), it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction secure to the decree-holder such periodical payment.

(3) The court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.”

A combined reading of the above substantive and procedural provisions relating to the grant of relief of destitution (sic) of conjugal rights by court makes it clear that the decree for restitution of conjugal rights contemplated to be granted under Section 9 of the Act is intended by the statutory law to be enforced in species under O. 21 Rr. 32 and 33 by applying financial, sanctions against the disobeying party. Additionally always a court can enforce its decree through its contempt powers. The Judicial Committee of the Privy Council in *Moonshed Buzleo Rhueem v. Shumsoon Nissa Begum*, (1867) 11 Moo Ind App 551, held that a suit for restitution of conjugal rights filed by a Muslim husband was rightly filed as a suit for specific performance. It is on the same lines that Order 21 Rule 32 of the Code of Civil Procedure speaks of a decree granted for restitution of conjugal rights as a decree of specific performance of restitution of conjugal rights. Conjugal rights connote two ideas, (a) “the right which husband and wife have to each other's society” and (b) “marital intercourse.” (see The Dictionary of English Law by Earl Jowitt P. 453.) In *Wily v. Wily* (1918) P. 1 “an offer by the husband to live under the same roof with his wife, each party being free from molestation by the other was held not an offer of matrimonial cohabitation.” (see N.R. Raghavachariar's Hindu Law, 7th Edn. Vol. II P. 980. Gupte's Hindu Law of Marriage P. 181 and Derrett's Introduction to Modern Hindu Law Para 308). In other words, sexual cohabitation is an inseparable ingredient of a decree for restitution of conjugal rights. It follows, therefore, that a decree for restitution of conjugal rights passed by a civil court extends not only to the grant of relief to the decree-holder to the company of the other spouse, but also embraces the right to have marital intercourse with the other party. The consequences of the enforcement of such a decree are firstly to transfer the choice to have or not to have marital intercourse to the State from the concerned individual and secondly, to surrender the choice of the individual to allow or not to allow one's body to be used as a vehicle for another human being's creation to the State. Relief of restitution of conjugal rights fraught with such

serious consequences to the concerned, individual were granted under Section 9 of the Act enables the decree-holder through application of financial sanctions provided by Order 21 Rules 32 and 33 of C.P.C. to have sexual cohabitation with an unwilling party. Earlier such a decree could have been enforced against an unwilling party even by imprisonment in a civil prison. Now compliance of the unwilling party to such a decree is sought to be procured, by applying financial sanctions by attachment and sale of the property of the recalcitrant party. But the purpose of a decree for restitution of conjugal rights in the past as it is in the present remains the same which is to coerce through judicial process the unwilling party to have sex against that person's consent, and freewill with the decree-holder. There can be no doubt that a decree of restitution of conjugal rights thus enforced offends the inviolability of the body and the mind subjected to the decree and offends the integrity of such a person and invades the marital privacy and domestic intimacies of such a person. The uninhibited tragedy involved in granting a decree for restitution of conjugal rights is well illustrated by *Anna Saheb v. Tara Bai* (AIR 1970 Madh Pra 36). In that case, a Division Bench of the Madhya Pradesh High Court decreed the husband's suit for restitution of conjugal rights observing "but if the husband is not guilty of misconduct, a petition cannot be dismissed merely because the wife does not like her husband or does not want to live with him....." What could have happened to Tarabai thereafter may well be left to the reader's imagination. According to law, Tarabai could be forced to have sex with Anna Saheb against her will.

**18.** It cannot be denied that among the few points that distinguish human existence from that of animals, sexual autonomy an individual enjoys to choose his or her partner to a sexual act, is of primary importance. Sexual expression is so integral to one's personality that it is impossible to conceive of sexuality on any basis except on the basis of consensual participation of the opposite sexes. No relationship between man and woman is more rested on mutual consent and freewill and is more intimately and personally forged than sexual relationship. The famous legal definition of marriage given by Lord Penzance in *Hyde v. Hyde* (1866) LR IP & D 130 (Divorce Court), as a voluntary union between man and woman only highlights this aspect of free association. The ennobling quality of sex of which Havelock Ellis wrote in his *Studies on the Psychology of Sex* ensues out of this freedom of choice. He wrote that "the man experiences the highest unfolding of his creative powers not through asceticism but through sexual happiness." Bertrand Russell who ought to know, declared that:

"I have sought love, first, because it brings ecstasy-ecstasy so great that I would often have sacrificed all the rest of life for a few hours of this joy."

Forced sex, like all forced things, is a denial of all joy. Yet in conceivable cases, sex may statutorily be denied and even forbidden by law between specified groups of persons. But no positive act of sex can be forced upon the unwilling persons, because nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the law to a positive sex act. The restitution of conjugal rights by force of arms can be more and can be no less than what late Sri, the greatest of the Modern Telugu poets, described in his poem "Kavitha" as "Rakshasa Rathi". The act of sex requires primarily the participation of mind...Sex act therefore, can never be treated, as a mere act of body that can be ordered to obey by the State. The coercive act of the State compelling sexual cohabitation therefore, must be regarded as a great constraint and torture imposed on the mind of the unwilling party...In *Rusel v. Rusel* (1897 AC 395 Lord Herschell long-ago noted the barbarity of this judicial remedy. He observed, "I think the law of restitution of conjugal rights as administered in the courts did sometimes lead to results which I can only call barbarous."

**19.** There is even graver implications for the wife. An act of coerced sex is no less potent than an act of consensual sex in producing pregnancy and procreating offspring. The only difference lies in the fact that the latter is with her consent while the former is without her consent. In the process of making such a fateful choice as to when, where and how if at all she should beget, bear, deliver and rear a child, the wife consistent with her human dignity, should never be excluded, Conception and delivery of a child involves the most intimate use of her body. The marvel of creation takes place inside her body and the child that would be born is of her own flesh and blood. In a matter which is so intimately concerns her body and which is so vital for her life, a decree of restitution of conjugal rights totally excludes her.

**20.** The origin of this remedy for restitution of conjugal rights is not to be found in the British common law. It is the medieval Ecclesiastical Law of England which knows no matrimonial remedy of desertion that provided for this remedy which the Ecclesiastical courts and later ordinary courts enforced. But the British Law Commission, presided over by Mr. Justice Scarman, (as he then was) recommended recently on 9-7-1969 the abolition of this uncivilized remedy of restitution of conjugal rights. Accepting that recommendation of the British Law Commission, the British Parliament through Section 20 of the Matrimonial Proceedings and Property Act, 1970 abolished the right to claim restitution of conjugal rights in the English Courts...

But our ancient Hindu system of matrimonial law never recognised this institution of conjugal rights although it fully upheld the duty of the wife to surrender to her husband. In other words, the ancient Hindu Law treated the duty of the Hindu wife to abide by her husband only as an imperfect obligation incapable of being enforced against her will. It left the choice entirely to the free will of the wife. In *Bai Jiva v. Narsingh Lalbhai* (ILR (1927) 51 Bom 329 at p. 339) : (AIR 1927 Bom 264 at p. 268) a Division Bench of the Bombay High Court judicially noticed this fact in the following words:

“Hindu law itself, even while it lays down the duty of the wife of implicit obedience and return to her husband, has laid down no such sanction or procedure, as compulsion by the courts to force her to return against her will”

**21.** This could have been only because of its realisation that in a matter so intimately concerned the wife or the husband the parties are better left alone without State interference. What could happen to the fate of a person in the position of Tara Bai (the respondent in the abovementioned Madhya Pradesh Appeal) who was forced to go back to her husband even after declaration of dislike and abhorrence towards her husband could have been well considered by the ancient Hind (sic) Law...Section 9 of the Act had merely aped the British and mechanically reenacted that legal provision of the British Ecclesiastical origin. The plain question that arises is whether our Parliament now functioning under the constitutional constraints of the fundamental rights conceived and enacted for the preservation of human dignity and promotion of personal liberty, can legally impose sexual cohabitation between unwilling, opposite sexual partners even if it be during the matrimony of the parties.

**22.** The Hindu Marriage Act was enacted by our Parliament in the year 1955 and the legislative competence of the Parliament to enact Section 9 of the Act under Item 5 of the List III of the VII Schedule to the Constitution is undoubted. But the question is whether that provision runs foul of Part III of the Constitution. The petitioner attacks Section 9 of the Act on the ground that granting of restitution of conjugal rights violates the petitioner's rights guaranteed under Articles 14, 19 and 21 of Part III of our Constitution. Let us, therefore, first examine the content of Article 21. Article 21 of the Constitution guarantees right to life and personal liberty against the State action. Formulated in simple negative terms, its range of operation positively forbidding the State from depriving any person of his life or personal liberty except according to the procedure established by law is of far-reaching dimensions and of overwhelming constitutional significance. Article 21 prevents the State from treating the human life as that of any other animal. It is now well established by the decisions of the Supreme Court that the word ‘life’ occurring in the above Article 21 has spiritual significance as the word ‘life’ occurring in the famous 5th and 14th Amendments to the American Constitution does. In those constitutional provisions of the American Constitution, the ‘life’ is interpreted by Mr. Justice Field in his dissenting judgment in *Munn v. Illinois*, (1877) 24 L.Ed. p. 17 to mean and signify “more than a person's right to lead animal or vegetative existence”. Field J., said in the above *Munn's* case. “By the term ‘life’ as here used something more is meant than mere animal existence”. The contrast drawn by Field J., emphasising the difference between existence of a free willing human and that of an unfree animal was accepted by our Supreme Court first in *Kharak Singh v. State of U.P.* (1964) 1 SCR 332 : (AIR 1964 SC 1295) and next in *Govind v. State of M.P.* (1975) 3 SCR 946 : (1975) 2 SCC 148 : (AIR 1975 SC 1378), transforming Article 21 of our Constitution into a Charter for Civilization...

**23...** The centrepiece of the judgment in *Govind's* case (AIR 1975 SC 1378) is to hold that right to privacy is part of Art. 21 of our Constitution and to stress its constitutional importance and to call for its protection. The learned Judge then examined the content of the right to privacy and observed that “any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing.” The learned Judge stressed the primordial importance of the right to privacy for human happiness and directed the courts not to reject the privacy-dignity claims brought before them except where the countervailing State interests are shown to have overwhelming importance...

**24.** However, it must be admitted that the concept of right to privacy does not lend itself to easy logical definition... The difficulty arises out of the fact that this concept is not unitary concept but is multidimensional susceptible more for enumeration than definition. But it can be confidently asserted that any plausible definition of right to privacy is bound to take human body as its first and most basic reference for control over personal identity. Such a definition is bound to include body's inviolability and integrity and intimacy of personal identity, including marital privacy. A few representative samples would bear this out. Gaiety defined privacy as “an autonomy or control over the intimacies of personal identity.” Richard B. Packer in his “A Definition of Privacy”, quoted in “Philosophy and Public Affairs” (1975 Vol. 4 No. 4 P. 295-314 wrote:

“.....privacy is control over when and by whom the various parts of us can be sensed by others. By “sensed” is meant simply seen, heard, touched, smelled or tasted.”

Gary L. Bostwick, writing in *California Law Review*, Vol. 64 P. 1447 suggests that “privacy” is divisible into three components, (a) repose, (b) sanctuary and (c) intimate decisions. Of these three components, he holds, that the last one is an eminently more dynamic privacy concept as compared to repose and sanctuary (P. 1466). Prof. Tribe in his *American Constitutional Law*, P. 921, stressed another fundamental facet of the right to privacy problem. He wrote, *inter alia*,

“Of all decisions a person makes about his or her body, the most profound and intimate relates to two sets of questions: first, whether, when, and how one’s body is to become the vehicle for another human being’s creation.”

**25.** Applying these definitional aids to our discussion, it cannot but be admitted that a decree for restitution of conjugal rights constitutes the grossest form of violation of an individual’s right to privacy. Applying Prof. Tribe’s definition of right to privacy, it must be said, that the decree for restitution of conjugal rights denies the woman her free choice whether, when and how her body is to become the vehicle for the procreation of another human being. Applying Parker’s definition, it must be said that a decree for restitution of conjugal rights deprives a woman of control over her choice as to when and by whom the various parts of her body should be allowed to be sensed. Applying the tests of Gaiety and Bostwick, it must be said, that the woman loses her control over her most intimate decisions. Clearly, therefore, the right to privacy guaranteed by Art. 21 of our Constitution is flagrantly violated by a decree of restitution of conjugal rights.

...

**28.** [C]ases of the American Supreme Court clearly establish the proposition that the reproductive choice is fundamental to an individual’s right to privacy. They uphold the individual’s reproductive autonomy against the State intrusion and forbid the State from usurping that right without overwhelming social justification. That this right belongs even to a married woman is clear from Justice Brennan’s opinion quoted above. A wife who is keeping away from her husband, because of permanent or even temporary estrangement cannot be forced, without violating her right to privacy to bear a child by her husband. During a time when she is probably contemplating an action for divorce, the use and enforcement of Section 9 of the Act against the estranged wife can irretrievably alter her position by bringing about forcible conception permanently ruining her mind, body and life and everything connected with it. During a moment’s duration the entire life-style would be altered and would even be destroyed without her consent. If that situation made possible by this matrimonial remedy is not to be a violation of individual dignity and right to privacy guaranteed by our Constitution and more particularly Art. 21, it is not conceivable what else could be a violation of Article 21 of our Constitution.

**29.** Examining the validity of S. 9 of the Act in the light of the above discussion, it should be held, that a court decree enforcing restitution of conjugal right constitutes the starkest form of governmental invasion of personal identity and individual’s zone of intimate decisions. The victim is stripped of its control over the various parts of its body subjected to the humiliating sexual molestation accompanied by a forcible loss of the precious right to decide when if at all her body should be allowed to be used to give birth to another human being. Clearly the victim loses its autonomy of control over intimacies of personal identity. Above all, the decree for restitution of conjugal rights makes the unwilling victim’s body a soulless and a joyless vehicle for bringing into existence another human being. In other words, pregnancy would be foisted on her by the State and against her will. There can therefore be little doubt that such a law violates the right to privacy and human dignity guaranteed by and contained in Article 21 of our Constitution. It is of constitutional significance to note that the ancient Hindu society and its culture never approved such a forcible marital intercourse. Our ancient law-givers refused to recognize any State interests in forcing unwilling sexual cohabitation between the husband and wife although they held the duty of the wife to surrender to the husband almost absolute. Recently, the British Law Commission headed by Mr. Justice Scarman also found no superior State interests implicated in retaining this remedy on the British Statute Book. It is wholly without any social purpose. State coercion of this nature can neither prolong nor preserve the voluntary union of husband and wife in matrimony. Neither State coercion can soften the ruffled feelings nor clear the misunderstandings between the parties. Force can only beget force as action can only produce counter-action. The only usefulness in obtaining a decree for restitution of conjugal rights consists in providing evidence for subsequent action for divorce. But this usefulness of the remedy which can be obtained only at enormous expense to human dignity cannot be counted, as outweighing the interests in upholding the right to privacy... It is therefore, legitimate to conclude that there are no overwhelming State interests that would justify the sacrificing of the individual’s precious constitutional right to privacy.

**30.** Duncan Derrett in his “Modern Hindu Law” para 306 however, while approving the abolition of this remedy in England advocated for somewhat strange reasons the continuance of this remedy in India. He wrote that “..... The practical utility of the remedy is little in contemporary England”. He, however says, that:

“In India, where spouses separate at times due to misunderstandings, failure of mutual communication, or the intrigues of relatives, the remedy of restitution is still of considerable value, especially when coupled with the right under Section 491 of the Criminal Procedure Code to recover (under certain circumstances) custody of a minor bride, and in the light of the rule that where restitution has been ordered a decree for separate maintenance cannot, without proof of new facts, issue in favour of the respondent.”

With respect, I am unable to agree with this recommendation. Firstly, Derrett did, not examine the matter from the constitutional point of view of right to privacy guaranteed by Art. 21 of the Constitution. Restitution of conjugal rights is an instance of punishing a criminal without a victim. Secondly, his remedy of restitution of conjugal rights is not only excessive but is also inappropriate...I therefore hold that there are no overwhelming State interests to justify the subordination of the valuable right to privacy to any State interests.

**31.** On the basis of my findings that Section 9 of the Hindu Marriage Act providing for the remedy of restitution of conjugal rights violates the right to privacy guaranteed by Art. 21 of the Constitution, I will have to hold that Section 9 of the Hindu Marriage Act is constitutionally void. Any statutory provision that abridges any of the rights guaranteed by Part III of the Constitution will have to be declared void in terms of Article 13 of the Constitution.

...

**34.** In *Mithu v. State of Punjab* (supra) the Supreme Court went even farthest where it struck down S. 303 I.P.C. on the ground that Section violated not only Article 14 but even Article 21. The Supreme Court while approvingly referring to the above quotations observed in *Mithu's* case that:

“these decisions have expanded the scope of Article 21 in a significant way and it is now too late in the day to contend that it is for the legislature to prescribe the procedure and for the Courts to follow it: that it is for the legislature to provide the punishment and for the courts to impose it.”

Explaining the scope of expansion which Article 21 has undergone by reason of Bank Nationalisation case (AIR 1970 SC 564) and Maneka Gandhi's case (AIR 1978 SC 597) the Supreme Court in *Mithu's* case (AIR 1983 SC 473) declared:

“if a law were to provide that the offence of theft will be punishable with the penalty of the cutting of hands, the law will be bad as violating Article 21. A savage sentence is anathema to the civilized jurisprudence of Article 21.”

In *Mithu's* case the Supreme Court implied that imposition of death sentence even under Section 302 I.P.C. would have been held in *Bachan Singh's* case (AIR 1980 SC 898) invalid and ultra vires of the protection guaranteed by Article 21 if the Parliament had not provided for alternative sentences of life imprisonment and death sentence but provided for only a mandatory death sentence. A mandatory death sentence would then have been shot down by the civilized jurisprudence of Article 21. Now savagery of a death sentence is more an attribute of substantive law. In *Mithu's* case (AIR 1983 SC 473), Chinnappa Reddy, J., ascribed the whole of his concurrence to Article 21. The reasoning of our Supreme Court in *Mithu's* case comes very close to the reasoning adopted by the American Supreme Court in cases like *Lambert v. California* (1957)2 L.Ed. 2d 228 decided, upon the basis of substantive due process clause. In *Lambert v. California* (supra) the American Supreme Court invalidating a State criminal law held that:

“where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process.”

After *Mithu's* case, it is not easy to assert that Article 21 is confined any longer to procedural protection only. Procedure and substance of law now co-mingle and overlap each other, to such a degree rendering that a finding of any law that can competently establish a valid procedure for the enforcement of a savage punishment impossible.

**35.** ...The constitutional doctrine of privacy is not only life giving but also is life-saving. It gives spiritual meaning to life which Sankara described as emanation of Brahman and saves such a life from “inhuman and degrading treatment” of forcible sexual cohabitation. (Art. 5 of the Universal Declaration of Human Rights.)...Nothing much that is reasonable, in my opinion, can be urged in support of this barbarous remedy that forces sex at least upon one of the unwilling parties.

**36.** Following the reasoning adopted in the above Mithu's case, Section 9 of the Hindu Marriage Act, should be declared as unconstitutional, for the reason that the remedy of restitution of conjugal rights provided for by that Section is a savage and barbarous remedy, violating the right to privacy and human dignity guaranteed by Article 21 of our Constitution.

**37.** The Constitutional validity of Section 9 of the Act when examined on the touch-stone of equal protection of laws also leads to a conclusion of its invalidity. This is so because of two reasons. Firstly, Section 9 of the Act does not satisfy the traditional classification test. Secondly, it fails to pass the test of minimum rationality required of any State Law.

**38.** Of course Section 9 of the Act does not in form offend the classification test. It makes no discrimination between a husband and wife. On the other hand, by making the remedy of restitution of conjugal rights equally available both to wife and husband, it apparently satisfies the equality test. But the requirements of equal protection of laws contained in Article 14 of the Constitution are not met with that apparent though majestic equality at which Anatole France mocked. Our Supreme Court declared that:

"Bare equality of treatment regardless of the inequality of realities is neither justice nor homage to the constitutional principle." (see *M. Match Works v. Asst. Collector* AIR 1974 SC 497 at 503).

The question is how this remedy works in life terms. In our social reality, this matrimonial remedy is found used almost exclusively by the husband and is rarely resorted to by the wife. A passage in Gupte's 'Hindu Law in British India' page 929, (second edition) attests to this fact. The learned author recorded that although "the rights and duties which marriage creates may be enforced by either spouse against the other and not exclusively by the husband against the wife; a suit for restitution by the wife is rare."

The reason for this mainly lies in the fact of the differences between the man and the woman. By enforcing a decree for restitution of conjugal rights the life pattern of the wife is likely to be altered irretrievably whereas the husband's can remain almost as it was before. This is so because it is the wife who has to beget and bear a child. This practical but the inevitable consequence of the enforcement of this remedy cripples the wife's future plans of life and prevents her from using that self-destructive remedy. Thus the use of remedy of restitution of conjugal rights in reality becomes partial and one-sided and available only to the husband. The pledge of equal protection of laws is thus inherently incapable of being fulfilled by this matrimonial remedy in our Hindu society. As a result this remedy works in practice only as an engine of oppression to be operated by the husband for the benefit of the husband against the wife. By treating the wife and the husband who are inherently unequal as equals, Section 9 of the Act offends the rule of equal protection of laws. For that reason the formal equality that Section 9 of the Act ensures cannot be accepted as constitutional. Section 9 of the Act should therefore be struck down as violative of Article 14 of the Constitution.

**39.** Section 9 of the Act has also to be examined for its constitutional validity from the point of view of the test of minimum rationality. The American Constitutional writers and court decisions on the equality clause of the American 14th Amendment recognize the inadequacies of the mere classification theory of minimum rationality not merely as an additional test to the above theory of classification but even as basic to the whole of the 14th Amendment...Our Supreme Court had accepted the theory of minimum rationality in *E.P. Royappa v. Tamil Nadu* (1974) 2 SCR 348, at p. 386 : (AIR 1974. SC 555 at pp. 583-4) in the following words:—

"From a positivistic point of view equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14." ..... They require that State action must be based on valent relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality."

But our Supreme Court called the test as test of arbitrariness and followed it in the subsequent decisions...The theory of minimum rationality test which is heavily criticised by Seervai in his latest Constitutional Law, 3rd Edition page 272 is described by Prof. Tribe as requiring all legislation to have "a legislative public purpose or set of purposes based on some conception of general good." (see his American Constitutional Law page 995.) Examined from this point of view, it is clear that whether or not Section 9 of the Hindu Marriage Act suffers from the vice of over-classification as suggested in the preceding paragraph it promotes no legitimate public purpose based on any conception of the general good. It has already been shown that Section 9 of the Act does not subserve any social good. Section 9 must therefore be held to be arbitrary and void as offending Art. 14 of the Constitution,

**40.** In the view I have taken of the constitutional validity of Section 9 of the Hindu Marriage Act, I declare that Section 9 is null and void...

..."

## IN THE SUPREME COURT OF INDIA

**Saroj Rani v. Sudarshan Kumar Chadha**

**(1984) 4 SCC 90**

**S. Murtaza Fazal Ali and Sabyasachi Mukharji, JJ.**

***A petition filed by the wife for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955 succeeded in the trial court. The High Court upheld the decision of the trial court. The main question raised in the wife's appeal before the Supreme Court was whether Section 9 was violative of fundamental rights and was liable to be struck down as held by the Andhra Pradesh High Court in the T. Sareetha case.***

**Mukharji, J.:** "The parties herein were married at Jullundur city according to Hindu Vedic rites on or about January 24, 1975...It is...alleged that on May 16, 1977, the respondent husband turned the appellant out of his house and withdrew himself from her society...On October 17, 1977, the wife-appellant filed a suit against the husband respondent herein under Section 9 of the Hindu Marriage Act, 1955 hereinafter referred to as the said Act for restitution of conjugal rights.

2. ...On March 28, 1978, a consent decree was passed by the learned Sub-Judge First Class for restitution of conjugal rights... It was alleged by the petitioner-wife that the appellant had gone to the house of the respondent and lived with him for two days as husband and wife. This fact has been disbelieved by all the courts. The courts have come to the conclusion and that conclusion is not challenged before us that there has been no cohabitation after the passing of the decree for restitution of conjugal rights.

3. On April 19, 1979, the respondent husband filed a petition under Section 13 of the said Act against the appellant for divorce on the ground that one year had passed from the date of the decree for restitution of conjugal rights, but no actual cohabitation had taken place between the parties...

4. The learned District Judge on October 15, 1979 dismissed the petition of the husband for divorce...[O]n the question of relief the learned Judge was of the view that in view of the provisions of Section 23 of the said Act and in view of the fact that the previous decree was a consent decree and at that time there was no provision like provision of Section 13-B of the said Act i.e. "divorce by mutual consent", the learned Judge was of the view that as the decree for restitution of conjugal rights was passed by the consent of the parties, the husband was not entitled to a decree for divorce.

5. Being aggrieved by the said decision, there was an appeal before the High Court of Punjab and Haryana...

6. ...[T]he learned Judge expressed the view that the decree for restitution of conjugal rights could not be passed with the consent of the parties and therefore being a collusive one disentitled the husband to a decree for divorce. This view was taken by the learned trial Judge relying on a previous decision of the High Court. Mr Justice Goyal of the High Court felt that this view required reconsideration and he therefore referred the matter to the Chief Justice for constitution of a Division Bench of the High Court for the consideration of this question.

7. The matter thereafter came up before a Division Bench of Punjab and Haryana High Court and Chief Justice Sandhawalia for the said Court on consideration of different authorities came to the conclusion that a consent decree could not be termed to be a collusive decree so as to disentitle the petitioner to decree for restitution of conjugal rights...

...

10. Our attention, however, was drawn to a decision of a learned Single Judge of the Andhra Pradesh High Court in the case of *T. Sareetha v. T. Venkata Subbaiah* [AIR 1983 AP 356 : (1983) 2 APLJ (HC) 37 : (1983) 2 Andh LT 47 : 1983 Hindu LR 658] . In the said decision the learned Judge has observed that the remedy of restitution of conjugal rights provided for by Section 9 of the said Act was a savage and barbarous remedy violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution. Hence, according to the learned Judge, Section 9 was constitutionally void. Any statutory provision that abridged the rights guaranteed by Part III of the Constitution would have to be declared void in terms of Article 13 of the Constitution. According to the said learned Judge, Article 21 guaranteed right to life and personal liberty against the State action. Formulated in simple negative terms, its range of operation positively forbidding the State from depriving any person of his life or personal liberty except according to the procedure established by law was of far-reaching dimensions and of overwhelming constitutional significance. Learned Judge observed that a decree for restitution of conjugal rights constituted the grossest form of violation of any individual's right to privacy. According to the learned Judge, it denied the woman her free choice whether, when and how her body was to become the vehicle for the procreation of another human being. A decree for restitution of conjugal rights deprived, according to the learned



Judge, a woman of control over her choice as and when and by whom the various parts of her body should be allowed to be sensed. The woman loses her control over her most intimate decisions. The learned Judge therefore was of the view that the right to privacy guaranteed by Article 21 was flagrantly violated by a decree for restitution of conjugal rights. The learned Judge was of the view that a wife who was keeping away from her husband because of permanent or even temporary estrangement cannot be forced, without violating her right to privacy to bear a child by her husband. During a time when she was probably contemplating an action for divorce, the use and enforcement of Section 9 of the said Act against the estranged wife could irretrievably alter her position by bringing about forcible conception permanently ruining her mind, body and life and everything connected with it. The learned Judge was therefore clearly of the view that Section 9 of the said Act violated Article 21 of the Constitution. He referred to the Scarman Commission's report in England recommending its abolition. The learned Judge was also of the view that Section 9 of the said Act, promoted no legitimate public purpose based on any conception of the general good. It did not therefore subserve any social good. Section 9 of the said Act was, therefore, held to be arbitrary and void as offending Article 14 of the Constitution. Learned Judge further observed that though Section 9 of the said Act did not in form offend the classification test, inasmuch as it made no discrimination between a husband and wife, on the other hand, by making the remedy of restitution of conjugal rights equally available both to wife and husband, it apparently satisfied the equality test. But bare equality of treatment regardless of the inequality of realities was neither justice nor homage to the constitutional principles...The learned Judge, however, was of the opinion based on how this remedy worked in life that in our social reality, the matrimonial remedy was found used almost exclusively by the husband and was rarely resorted to by the wife.

11. The learned Judge noticed and that is a very significant point that decree for restitution of conjugal rights can only be enforced under Order 21, Rule 32 of Code of Civil Procedure. He also referred to certain trend in the American law and came to the conclusion that Section 9 of the said Act was null and void. The above view of the learned Single Judge of Andhra Pradesh was dissented from in a decision of the learned Single Judge of the Delhi High Court in the case of *Harvinder Kaur v. Harmander Singh Choudhry* [AIR 1984 Del 66]. In the said decision, the learned Judge of the Delhi High Court expressed the view that Section 9 of the said Act was not violative of Articles 14 and 21 of the Constitution. The learned Judge noted that the object of restitution decree was to bring about cohabitation between the estranged parties so that they could live together in the matrimonial home in amity. The leading idea of Section 9 was to preserve the marriage. From the definition of cohabitation and consortium, it appeared to the learned Judge that sexual intercourse was one of the elements that went to make up the marriage, but that was not the summum bonum. The courts do not and cannot enforce sexual intercourse. Sexual relations constituted an important element in the conception of marriage, but it was also true that these did not constitute its whole content nor could the remaining aspects of matrimonial consortium be said to be wholly unsubstantial or of trivial character. The remedy of restitution aimed at cohabitation and consortium and not merely at sexual intercourse. The learned Judge expressed the view that the restitution decree did not enforce sexual intercourse. It was a fallacy to hold that the restitution of conjugal rights constituted "the starkest form of governmental invasion" of "marital privacy".

12. This point namely validity of Section 9 of the said Act was not canvassed in the instant case in the courts below, counsel for the appellant, however, sought to urge this point before us as a legal proposition. We have allowed him to do so.

13. Having considered the views of the learned Single Judge of the Andhra Pradesh High Court and that of learned Single Judge of Delhi High Court, we prefer to accept on this aspect namely on the validity of Section 9 of the said Act the views of the learned Single Judge of the Delhi High Court. It may be mentioned that conjugal rights may be viewed in its proper perspective by keeping in mind the dictionary meaning of the expression "conjugal". *Shorter Oxford English Dictionary*, Third Edn., Vol. I, p. 371 notes the meaning of "conjugal" as "of or pertaining to marriage or to husband and wife in their relations to each other". In the *Dictionary of English Law*, 1959 Edn. at p. 453, Earl Jowitt defines "conjugal rights" thus:

"The right which husband and wife have to each other's society and marital intercourse. The suit for restitution of conjugal rights is a matrimonial suit, cognisable in the Divorce Court, which is brought whenever either the husband or the wife lives separate from the other without any sufficient reason, in which case the court will decree restitution of conjugal rights (Matrimonial Causes Act, 1950, Section 15), but will not enforce it by attachment, substituting however for attachment, if the wife be the petitioner, an order for periodical payments by the husband to the wife (Section 22).

Conjugal rights cannot be enforced by the act of either party, and a husband cannot seize and detain his wife by force (*R. v. Jackson* [(1891) 1 QB 671 : 60 LJ QB 346 : 64 LT 679 : 39 WR 407 (CA)] )."

14. In India it may be borne in mind that conjugal rights i.e. right of the husband or the wife to the society of the other spouse is not merely creature of the statute. Such a right is inherent in the very institution of marriage itself. See in this connection *Mulla's Hindu Law* — Fifteenth Edn., p. 567, para 443. There are sufficient safeguards in Section 9 to prevent it from being a tyranny. The importance of the concept of conjugal rights can be viewed in the light of Law Commission — Seventy-first Report on the Hindu Marriage Act, 1955 — “Irretrievable Breakdown of Marriage as a Ground of Divorce”, para 6.5 where it is stated thus:

“Moreover, the essence of marriage is a sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life, an experience of the joy that comes from enjoying, in common, things of the matter and of the spirit and from showering love and affection on one's offspring. Living together is a symbol of such sharing in all its aspects. Living apart is a symbol indicating the negation of such sharing. It is indicative of a disruption of the essence of marriage — ‘breakdown’ — and if it continues for a fairly long period, it would indicate destruction of the essence of marriage — ‘irretrievable breakdown’.

15. Section 9 is only a codification of pre-existing law. Rule 32 of Order 21 of the Code of Civil Procedure deals with decree for specific performance for restitution of conjugal rights or for an injunction...

16. It is significant to note that unlike a decree of specific performance of contract, for restitution of conjugal rights, the sanction is provided by court where the disobedience to such a decree is wilful i.e. is deliberate, in spite of the opportunities and there are no other impediments, might be enforced by attachment of property. So the only sanction is by attachment of property against disobedience of a decree for restitution of conjugal rights where the disobedience follows as a result of a wilful conduct i.e. where conditions are there for a wife or a husband to obey the decree for restitution of conjugal rights but disobeys the same in spite of such conditions, then only financial sanction, provided he or she has properties to be attached, is provided for. This is so as an inducement by the court in appropriate case when the court has decreed restitution for conjugal rights and that the court can only decree if there is no just reason for not passing decree for restitution of conjugal rights to offer inducement for the husband or wife to live together in order to give them an opportunity to settle up the matter amicably. It serves a social purpose as an aid to the prevention of break-up of marriage. It cannot be viewed in the manner the learned Single Judge of Andhra Pradesh High Court has viewed it and we are therefore unable to accept the position that Section 9 of the said Act is violative of Article 14 or Article 21 of the Constitution if the purpose of the decree for restitution of conjugal rights in the said Act is understood in its proper perspective and if the method of its execution in cases of disobedience is kept in view.

...

## IN THE SUPREME COURT OF INDIA

**Samar Ghosh v. Jaya Ghosh**

**(2007) 4 SCC 511**

**B.N. Agrawal, P.P. Naolekar and Dalveer Bhandari, JJ.**

***The husband filed a petition for divorce on the ground of cruelty. He contended that soon after they got married, his wife unilaterally decided that they would not have a child, and refused to cohabit with him. He argued that this amounted to “mental cruelty,” and he was hence entitled to divorce. The suit succeeded in the trial court but the divorce decree was reversed by the High Court on appeal filed by the wife. The husband filed an appeal in the Supreme Court asking it to decide whether the acts of the wife such as unilateral decision to not have children and not live with her husband amounted to “mental cruelty.”***

**Bhandari, J.:** “This is yet another unfortunate matrimonial dispute which has shattered the twenty-two year old matrimonial bond between the parties. The appellant and the respondent are senior officials of the Indian Administrative Service, for short “IAS”. The appellant and the respondent were married on 13-12-1984 at Calcutta under the Special Marriage Act, 1954. The respondent was a divorcee and had a female child from her first marriage. The custody of the said child was given to her by the District Court of Patna where the respondent had obtained a decree of divorce against her first husband, Debashish Gupta, who was also an IAS officer.

...

**3.** ...According to the appellant, soon after the marriage, the respondent asked the appellant not to interfere with her career. She had also unilaterally declared her decision not to give birth to a child for two years and the appellant should not be inquisitive about her child and he should try to keep himself aloof from her as far as possible. According to the appellant, there was imposition of rationing in emotions in the arena of love, affection, future planning and normal human relations though he tried hard to reconcile himself to the situation created by the respondent.

**4...** According to the appellant, he felt like a stranger in his own family. The respondent unilaterally declared that she would not have any child and it was her firm decision. The appellant felt that his marriage with the respondent was merely an eyewash because immediately after the marriage, serious matrimonial problems developed between them which kept growing.

...

**10.** Admittedly, the appellant and the respondent have been living separately since 27-8-1990. The appellant further stated that the respondent refused cohabitation and also stopped sharing bed with him without any justification. Her unilateral decision not to have any child also caused mental cruelty to the appellant. The appellant was not permitted to even show his normal affection to the daughter of the respondent although he was a loving father to the child. The appellant also asserted that the respondent desired sadistic pleasure at the discomfiture and plight of the appellant which eventually affected his health and mental peace. In these circumstances, the appellant has prayed that it would not be possible to continue the marriage with the respondent and he eventually filed a suit for the grant of divorce.

...

**23.** The trial court, after analysing the entire pleadings and evidence on record, came to the conclusion that the following facts led to mental cruelty:

1. The respondent's refusal to cohabit with the appellant.
2. The respondent's unilateral decision not to have children after the marriage ...

**24.** The learned Additional District Judge came to the finding that the appellant had succeeded in proving the case of mental cruelty against the respondent, therefore, the decree was granted by the order dated 19-12-1996 and the marriage between the parties was dissolved.

**25.** The respondent, aggrieved by the said judgment of the learned Additional District Judge, filed an appeal before the High Court. The Division Bench of the High Court vide judgment dated 20-5-2003 reversed the judgment of the Additional District Judge on the ground that the appellant has not been able to prove the allegation of mental cruelty. The findings of the High Court, in brief, are recapitulated as under:

- I. The High Court arrived at the finding that it was certainly within the right of the respondent wife having such a high status in life to decide when she would like to have a child after marriage.
- II. The High Court also held that the appellant had failed to disclose in the pleadings when the respondent took the final decision of not having a child.
- III. The High Court held that the appellant also failed to give the approximate date when the respondent conveyed this decision to the appellant.
- IV. The High Court held that the appellant started living with the respondent, therefore, that amounted to condonation of the acts of cruelty.
- V. The High Court disbelieved the appellant on the issue of the respondent's refusing to cohabit with him, because he failed to give the date, month or the year when the respondent conveyed this decision to him.
- VI. The High Court held that the appellant's and the respondent's sleeping in separate rooms did not lead to the conclusion that they did not cohabit.
- VII. The High Court also observed that it was quite proper for the respondent with such high status and having one daughter by her previous husband, not to sleep in the same bed with the appellant.

...

**27.** The finding of the Division Bench of the High Court is that, considering the position and status of the respondent, it was within the right of the respondent to decide when she would have the child after the marriage. Such a vital decision cannot be taken unilaterally after marriage by the respondent and if taken unilaterally, it may amount to mental cruelty to the appellant.

**28.** The finding of the High Court that the appellant started living with the respondent amounted to condonation of the act of cruelty is unsustainable in law.

...

**30.** The High Court has seriously erred in not appreciating the evidence on record in a proper perspective. The respondent's refusal to cohabit has been proved beyond doubt. The High Court's finding that the husband and wife might be sleeping in separate rooms did not lead to a conclusion that they did not cohabit and to justify this by saying that the respondent was highly educated and holding a high post was entirely unsustainable. Once the respondent accepted to become the wife of the appellant, she had to respect the marital bond and discharge the obligations of marital life.

...

**37.** The learned Additional District Judge decreed the appellant's suit on the ground of mental cruelty. We deem it appropriate to analyse whether the High Court was justified in reversing the judgment of the learned Additional District Judge in view of the law declared by a catena of cases. We deem it appropriate to deal with the decided cases.

...

**98.** On proper analysis and scrutiny of the judgments of this Court and other courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of "mental cruelty" within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

**99.** Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

**100.** Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

**101.** No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

...

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

...

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

...

- (xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.
- (xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.
- (xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

...

**102.** When we take into consideration aforementioned factors along with an important circumstance that the parties are admittedly living separately for more than sixteen-and-a-half years (since 27-8-1990) the irresistible conclusion would be that matrimonial bond has been ruptured beyond repair because of the mental cruelty caused by the respondent.

...

**104.** In the backdrop of the spirit of a number of decided cases, the learned Additional District Judge was fully justified in decreeing the appellant's suit for divorce. In our view, in a case of this nature, no other logical view is possible.

..."

## IN THE HIGH COURT OF PUNJAB AND HARYANA

**Dr. Mangla Dogra & Ors. v. Anil Kumar Malhotra & Ors.**<sup>30</sup>

**ILR (2012) 2 P&H 446**

**Jitender Chauhan, J.**

***A civil suit was filed by a husband against his wife, her family and her doctors for recovery of damages on account of mental pain and agony suffered due to termination of his wife's pregnancy in the absence of any medical requirement and without obtaining his consent. The Civil Court rejected the claim of the doctors and family members that the suit was not maintainable. In these revision petitions before the High Court, the issue was whether the express consent of the husband is required for terminating a pregnancy once consent of the wife has been obtained and provisions of the MTP Act are complied with. Further, if such consent of the husband is required, whether the husband is entitled to damages in case such termination is carried out without his consent.***

**Chauhan, J.:** "This judgment of mine shall dispose of two Civil Revision Nos. 6337 of 2011 (titled "*Dr. Mangla Dogra v. Anil Kumar Malhotra*"); and 6017 of 2011, titled ("*Ajay Kumar Pasricha v. Anil Kumar Malhotra*") which have been directed against the order dated 20.8.2011, passed by Civil Judge (Junior Division) Chandigarh, vide which the application filed by the petitioners under Order 7 Rule 11 Civil Procedure Code was dismissed.

**2.** The facts giving rise to these Civil Revisions originated from a matrimonial dispute between respondent No. 1 Anil Kumar Malhotra and respondent No. 2, Seema Malhotra. The marriage between the parties was solemnized on 17.4.1994. Out of the wedlock, a male child was born on 14.2.1995. The parties resided at Panipat. Due to the hostilities and strained relations between the parties, Seema Malhotra along with her minor son had been staying with her parents at Chandigarh since 1999... Respondent No. 1, Seema Malhotra filed an application under section 125 Cr.P.C claiming maintenance from the husband, Anil Kumar Malhotra. On 9.11.2002, during the pendency of the application under section 125 Cr. P. C, with the efforts of the Lok Adalat, Chandigarh, she agreed to accompany the husband... On 2.1.2003, Anil Kumar Malhotra came to know that Seema Malhotra had conceived. The wife-Seema Malhotra did not want to continue with the pregnancy and she wanted to get the foetus aborted, as despite their living together, the differences between them persisted. It was the case of the husband-respondent No. 1 that on the pretext of getting herself medically examined, the wife went to Dr. (Mrs.) Riru Prabhakar, Prabhakar Hospital, Panipat. However, she was adamant to get the foetus aborted but the husband refused. On 3.1.2003, she contacted her mother at Chandigarh. On the advice of her mother, she along with her husband and son came to Chandigarh. On 4.1.2003, they went to General Hospital, Sector 16, Chandigarh. The husband refused to sign the papers giving his consent to terminate the pregnancy. The husband filed a suit for mandatory injunction restraining the wife from getting the foetus aborted. That suit was withdrawn in September, 2003, as the respondent No. 2 underwent MTP (Medical Termination of Pregnancy)

at Nagpal Hospital, Sector 19, Chandigarh. The MTP was done by Dr. Mangla Dogra assisted by Dr. Sukhbir Grewal as Anesthetist. The husband-respondent No. 1 filed a civil suit for the recovery of Rs. 30 lacs towards damages on account of mental pain, agony and harassment against the wife, Seema Malhotra, her parents, brother, Dr. Mangla Dogra and Dr. Sukhbir Grewal for getting the pregnancy terminated (sic) illegally. The ground taken in the suit is that the specific consent of respondent No. 1, being father of the yet to be born child, was not obtained and the MTP was done in connivance with respondents No. 2 to 6. All the respondents are jointly and severally responsible for conducting the illegal act of termination of pregnancy without any medical requirement...

...

6. Defendant No. 1 informed the doctor that she did not want to continue with the pregnancy as this was an unwanted pregnancy and on examination by defendant No. 5, it was found that pregnancy was less than 12 weeks old, the defendant No. 5 after getting due consent from defendant No. 1, terminated the pregnancy. Under Section 3(4)(b) of the Act, only the consent of the pregnant woman undergoing the termination of pregnancy is required. An unwanted pregnancy as per Explanation II to Section 3(2) of the Act is a grave injury to the physical or mental health of the woman. The defendant No. 5 and 6 have conducted the abortion strictly in accordance with the provisions of the Act and they have no connivance with defendant Nos. 2 to 4 in any manner, whatsoever, as alleged by the plaintiff-respondent No. 1.

...

8. Reply to the application under Order 7 Rule 11 CPC was filed by the husband, plaintiff-respondent No. 1 on the ground that the defendant No. 1 has undergone MTP with active connivance of defendants No. 5 and 6, so they are the necessary parties to the suit. It was further stated that the foetus could not have been aborted unless it was essential in view of the health of the woman. Further, specific consent of the father of yet to be born child is required, despite the fact that there was no medical problem to the pregnant woman. When the consent of the father was not obtained, it amounts to cruelty on the father. No document has been placed on record showing that there was immediate need to do the MTP and that too with the consent of single parent, i.e. mother only. It was alleged that the sole motive of defendants No. 5 & 6 was to mint money.

9. The Ld. Civil Judge, (Jr. Division) Chandigarh, after perusing the record, dismissed the application vide order dated 20.8.2011. Para Nos. 4 to 10 of the same reads as under:—

“4. I have perused the plaint and have also perused the concerned Medical Termination of Pregnancy Act, 1971. The present suit is a suit for recovery of damages for mental agony and pain caused to the plaintiff/respondent by illegal termination of pregnancy undertaken by defendant No. 1 with active connivance with defendants No. 2 to 6 and it is stated in para No. 13 of the plaint that the foetus could not have been aborted unless it was essential in law in view of the health of the respondent and further the consent of the father of the child was not taken and the applicants No. 5 & 6 in connivance with defendants No. 2 to 4 have conducted the abortion of foetus of respondent No. 1 on 4.1.2003. It is further in para No. 5 that the applicants No. 5 & 6 actually conducted the abortion when there was no such need and further no consent of plaintiff/respondent being father of the child was taken in this regard.

5. Section 3 of the Medical Termination of Pregnancy Act provides the situation under which the pregnancy may be terminated by a registered medical practitioner. It provides that the pregnancy may be terminated where the length of the pregnancy does not exceed 12 weeks and when such medical practitioner is of the opinion formed in good faith that continuance of the pregnancy would involve a great risk to the life of the pregnant woman or grave injury to her physical or mental health. Explanation No. 1 & 2 provides the nature of grave injury which is required to be there in case valid termination is to be done.

6. In the present case, the plea forwarded by the applicants No. 5 & 6 is that defendant No. 1 duly consented to termination of her pregnancy and that foetus was less than 12 weeks old and further defendant No. 1 did not want to continue such pregnancy as it was unwanted pregnancy caused due to failure of contraceptive. But at this stage, the applicants/defendants No. 5 & 6 have failed to produce on record any record of theirs by way of which they can, prima-facie, prove that the foetus which they operated was less than 12 weeks and they had formed the opinion that continuance of pregnancy is going to cause great risk to the life of pregnant woman and is going to cause injury to her physical or mental health. Further, there is no proof of the fact at this stage that the pregnancy was caused due to failure of any contraceptive etc.

...Accordingly, the present application filed under Order 7 Rule 1] CPC is hereby dismissed.”

10. Aggrieved against the same, the petitioners have preferred these revisions.

...

14. I have heard the learned counsel for the parties and perused the record with their able assistance.

15. In order to appreciate the rival submissions, a reading of the relevant provisions of The Medical Termination of Pregnancy Act, 1971 (No. 34 of 1971) would be necessary.

“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 the 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 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.

Explanation I. 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 II. 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 a pregnancy would involve such risk of injury to the health as is mentioned in subsection (2), account may be taken of the pregnant woman actuals 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 (mentally ill person), shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

16. The question arising for consideration in these revisions is “whether the express consent of the husband is required for unwanted pregnancy to be terminated by a wife?”

17. This is the most unfortunate case where a husband has brought privileged acts and conducts of husband and wife in the court. The relation between the husband and wife became sour in the year 1999, when the wife started residing with her parents at Chandigarh. It is an admitted fact that on 09.11.2002, during proceedings under section 125 of the Code of Criminal Procedure, with the efforts of the Lok Adalat, Chandigarh, the wife agreed to accompany the husband and started residing with her, under one roof. Naturally, they have cohabited as husband and wife while residing together. Besides love and affection, physical intimacy is one of the key elements of a happy matrimonial life. In the present case, the wife knew her conjugal duties towards her husband. Consequently, if the wife has consented to matrimonial sex and created sexual relations with her own husband, it does not mean that she has consented to conceive a child. It is the free will of the wife to give birth to a child or not. The husband cannot compel her to conceive and give birth to his child. Mere consent to conjugal rights does not mean consent to give birth to a child for her husband. The wife did so in order to strengthen the matrimonial ties. On 02.01.2003, admittedly the husband and wife came to know that the wife was pregnant from her husband. She did not want to give birth to a child and showing unwillingness, got her pregnancy terminated in January, 2003, from the petitioners in Civil Revision No. 6337 of 2011 who are authorized to do so under the Act.

18. The argument of the Ld. counsel for the husband/respondent has to be rejected in view of the medical termination of pregnancy Rules, 1975. Rule 8 provides as under:—

“ 8. Form of Consent-The consent referred to in sub section (4) of Section 3 shall be given in Form C.”

**Form C is prescribed as under:—**

## FORM C

(see rule 8)

I .....daughter/wife of ..... Aged..... about years of .....  
 (here state the permanent address)..... at present residing .....at do hereby give  
 my consent of the termination of my pregnancy at .....  
 .....  
 .....

(State of name of place where the pregnancy is terminated)

.....

Signature

Place .....

Date .....

**19.** This form is to be signed by the wife only, showing her willingness to have the pregnancy terminated or aborted. The Medical Termination of Pregnancy Act, 1971 (34 of 1971), nowhere provides for the express or implied consent of the husband. The wife is the best judge and is to see whether she wants to continue the pregnancy or to get it aborted. The husband has unsuccessfully brought an action for perpetual injunction restraining the wife to get the pregnancy terminated, but the suit was dismissed as withdrawn.

**20.** When the husband has no right to compel her wife not to get the pregnancy terminated, he has no right to sue her (sic) wife for compensation. The husband also has no cause of action against her wife on this account. Keeping in view the strained relations between the husband and wife, the decision of the wife to get the termination of unwanted foetus was right. It was not the act of termination of pregnancy, due to which relation became sour, but the relations between the husband and the wife were already strained. So, keeping in view the legal position, it is held that no express or implied consent of the husband is required for getting the pregnancy terminated under the Act.

**21.** Now the next question arises for consideration is as to whether the husband has any cause of action or right to sue against the medical practitioners, for getting the pregnancy terminated under the Act. Section 8 of the Act provides as under:—

**“8. Protection of action taken in good faith-No suit or other legal proceeding shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything - which is in good faith done or intended to be done under this Act.”**

**22.** It is a personal right of a woman to give birth to a child, but it is not the right of a husband to compel her wife to give birth to a child for the husband. No doubt the judicial precedents are there, where the courts have considered the termination of pregnancy by the wife as mental cruelty and gave divorce to the husband on this ground, keeping in view the unique facts and circumstances of the case. But, in the case in hand, the parties have a son born on 14.02.1995. The relations of the parties became strained and in the year 1999 the wife started living separately from her husband at Chandigarh. At the time of the second conception the age of the son was about eight years, who is with the mother/wife. Nobody can interfere in the personal decision of the wife to carry on or abort her pregnancy which may be due to the reason that an effort to live together under one roof has failed and that their son was of eight years. She approached the petitioners, who are admittedly an authorized hospital to have the pregnancy terminated. A woman is not a machine in which raw material is put and a finished product comes out. She should be mentally prepared to conceive, continue the same and give birth to a child. The unwanted pregnancy would naturally affect the mental health of the pregnant women. When the husband/plaintiff, came to know that his wife was pregnant from his loins, it was his duty to convince his wife to continue with the pregnancy, but his coming to the court by filing a Civil Suit for permanent injunction restraining the wife from getting the pregnancy terminated was a shameful act on his part...The act of the medical practitioners (herein the Revision petitioners) was perfectly legal. No offence or tortuous act was committed by the medical practitioners. So it is held that the act of the medical practitioners Dr. Mangla Dogra and Dr. Sukhbir Grewal, in Civil Revision No. 633 7 of 2011 was legal and justified. The plaintiff/husband has failed to bring any document on record to show that the act of the medical practitioners was illegal or unjustified and thus they are liable to pay the damages. The act of the medical practitioners can not be termed as unethical.



**23.** Now, this Court is going to decide whether the impugned order dated 20.08.2011 **Annexure P-5**, whereby the application filed by the Revision petitioners under order 7 Rule 11 read with section 151 of the Code of Civil Procedure, for rejection of the plaint, qua the medical practitioners was illegal, erroneous, without jurisdiction, miscarriage of justice and that the court has not exercised its powers in rejecting the plaint qua them.

...

**27.** The Medical Termination of Pregnancy Act 1971 does not empower the husband, far less his relations, to prevent the concerned woman from causing abortion if her case is covered under section 3 of that Act. Under section 312 of the Indian Penal Code, 1860 causing miscarriage is a penal offence. Relevant civil law has since been embodied in the Act legalising termination of pregnancy under certain circumstances. Since law is liberal for effecting such termination, the Act does not lay down any provision on husband's consent in any situation.

...

**30.** Keeping in view the above discussion, it is held that no cause of action accrued to the plaintiff-husband against the present petitioners, in Civil Revision No. 6337 of 2011 and No. 6017 of 2011. They are not necessary and proper parties in the suit and the suit qua them appears to have been filed with ulterior motive best known to the husband/plaintiff. The continuation of the Civil Suit against these petitioners would amount to the abuse of process of law and miscarriage of justice and this Court would not feel hesitate to come to the rescue of the petitioners.

..."

## IN THE HIGH COURT OF DELHI

**Shashi Bala v. Rajiv Arora**

**(2012) 188 DLT 1**

**Kailash Gambhir, J.**

***A husband filed a suit in the trial court for divorce on the ground of mental cruelty, alleging that his wife did not permit consummation of the marriage on the wedding night. He also alleged that she had sex with him only 10-15 times within the first five months of their marriage. The wife denied the allegations and filed a counter claim for restitution of conjugal rights. The trial court decided in the favour of the husband and decreed for dissolution of marriage. In this appeal, the High Court addressed the issue of whether denial of sex amounts to "cruelty."***

**Gambhir, J.:** "By this appeal filed under section 28 of the Hindu Marriage Act, 1955 the appellant seeks to challenge the impugned order and decree dated 12.2.2001 passed by the learned Trial Court whereby a decree of divorce in favour of the respondent husband under Section 13(i)(a) of the Hindu Marriage Act was granted and the counter claim filed by the appellant seeking a decree for restitution of conjugal rights under Section 9 of the Hindu Marriage Act was dismissed.

**2.** Brief facts of the case relevant for deciding the present appeal is that the marriage between the parties was solemnized on 17.2.1991 according to Hindu rites and ceremonies. It was stated by the husband in his divorce petition that after the solemnization of the marriage, right from the inception, the attitude of the appellant was indifferent and she complained that the marriage had not been solemnized with a man of her taste. As per the respondent husband, the appellant had refused to participate in the traditional ceremony of dud-mundri by saying that she did not like all this but without disclosing any reasons. As per the respondent, the appellant also did not take any interest in the dinner which was served on the wedding night i.e. 18.2.1991. It is also the case of the respondent that when both of them went to their bedroom around 11.30 p.m. the appellant was not responsive and she did not allow the respondent to have sexual intercourse with her. The respondent has alleged that it is only on 25.2.1991, that he was allowed to have sexual intercourse with the appellant for the first time, but again the appellant remained unresponsive and such conduct of the appellant caused mental cruelty to the respondent... It is also the case of the respondent that he had sexual intercourse with the appellant only for about 10-15 times during her stay with him for a period of about 5 months... Based on these allegations the respondent husband claimed the decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act.

3. In the written statement filed by the appellant wife, she denied all the abovesaid allegations leveled by the respondent husband... She also denied the allegation of non-consummation of the marriage on the wedding night. The appellant took a stand that right from the wedding night i.e. 18.2.1991 the parties had normal physical relationship with each other...The appellant denied that she had sexual relationship with the respondent only 10-15 times or she had refused to have sex with the respondent...

...

5. After taking into consideration the pleadings of the parties, the learned Trial Court found that the refusal of the appellant wife to participate in the "Dud Mundari ceremony" and thereafter "Chudha ceremony", which were customary rituals in the family of the respondent husband caused embarrassment and humiliation to the respondent and such acts on the part of the appellant amounted to cruelty. The learned Trial Court also found that in the span of one year and two months of the married life, the parties had sex only for about 10-15 times and also denial of the appellant for sexual relationship on the very first night of the marriage is a grave act of cruelty as healthy sexual relationship is one of the basic ingredients of a happy marriage...Accordingly, the learned trial court granted a decree of divorce in favour of the respondent and against the appellant and consequently also dismissed her counter claim for restitution of conjugal rights.

...

9. Cruelty as a ground for divorce is nowhere defined in the Hindu Marriage Act as it is not capable of precise definition. There cannot be any straitjacket formula for determining whether there is cruelty or not and each case depends on its own facts and circumstances. What may be cruelty in one case may not be cruelty in other and the parameter to judge cruelty as developed through judicial pronouncements is that when the conduct complained of is such that it is impossible for the parties to stay with each other without mental agony, torture and stress. It has to be something much more than the ordinary wear and tear of married life. The conduct complained of should be grave and weighty and touch a pitch of severity to satisfy the conscience of the court that the parties cannot live together with each other anymore without mental agony, distress and torture. The main grievance of the respondent herein is the denial of the appellant to have normal sexual relationship with the respondent. As per the case of the respondent, during the short period of 5 months he had sexual intercourse with the appellant only 10-15 time while the plea taken by the appellant is that she had never denied sex to the respondent. The courts have through various judicial pronouncements taken a view that sex is the foundation of marriage and marriage without sex is an anathema. The Division Bench of this Court in the celebrated pronouncement of *Mrs. Rita Nijhawan v. Mr. Bal Kishan Nijhawan* AIR 1973 Delhi 200 held as under:

"In these days it would be unthinkable proposition to suggest that the wife is not an active participant in the sexual life and therefore, the sexual weakness of the husband which denied normal sexual pleasure to the wife is of no consequence and therefore cannot amount to cruelty. Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favorable influence on a woman's mind and body, the result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifies woman's brain, develops her character and trebles her vitality. It must be recognised that nothing is more fatal to marriage than disappointments in sexual intercourse."

The learned Trial Court referred to the judgment of this court in the case of *Shankuntla Kumari v. Om Prakash Ghai* AIR 1983 Delhi 53 wherein it was held that:

"(25) A normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious marriage. If this is not possible due to ill health on the part of one of the spouses, it may or may not amount to cruelty depending on the circumstances of the case. But willful denial of sexual relationship by a spouse when the other spouse is anxious for it, would amount to mental cruelty, especially when the parties are young and newly married."

Hence, it is evident from the aforesaid that willful denial of sexual intercourse without reasonable cause would amount to cruelty. In the authoritative pronouncement of the Hon'ble Supreme Court in *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 511, the Hon'ble Supreme Court took into account the parameters of cruelty as a ground for divorce in various countries and then laid down illustrations, though not exhaustive, which would amount to cruelty. It would be relevant to refer to the following para 101(xii) wherein it was held as under:—

"(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty."

Although it is difficult to exactly lay down as to how many times any healthy couple should have sexual intercourse in a particular period of time as it is not a mechanical but a mutual act, however, there cannot be any two ways about the fact that marriage without sex will be an insipid relation. Frequency of sex cannot be the only parameter to assess the success or failure of a marriage as it differs from couple to couple as to how much importance they attach to sexual relation vis a vis emotional relation. There may be cases where one partner to the marriage may be over sexual and the other partner may not have desire to the same level, but otherwise is fully potent. Marriage is an institution through which a man and a woman enter into a sacred bond and to state that sexual relationship is the mainstay or the motive to be achieved through marriage would be making a mockery of this pious institution. By getting married, a couple agrees to share their lives together with all its moments of joy, happiness and sorrow and the sexual relationship between them brings them close and intimate by which their marital bond is reinforced and fortified. There may not be sexual compatibility of a couple right from inception of the relationship and depending upon physical, emotional, psychological and social factors, the compatibility between some couples may be there from the beginning and amongst some may come later. Undoubtedly, a normal and healthy couple should indulge into regular sexual relationship but there may be exceptions to this and what may be normal for some may not be normal for others as it would depend upon various factors such nature of job, stress levels, social and educational background, mood patterns, physical well being etc. Indisputably, there has to be a healthy sexual relationship between a normal couple, but what is normal cannot be put down in black and white.

10. Adverting back to the facts of the present case...[t]he case of the respondent is that he had sex with the appellant only for about 10-15 times in a span of five months of married life and that he was denied sexual relationship on the very first night of their marriage and denial of sex at the wedding night caused great mental cruelty to him. The respondent husband also stated that he was allowed to have sexual intercourse by the appellant for the first time only on 25.2.1991. The appellant wife has denied the said allegations of the respondent husband and in defence stated that she was having normal sexual relationship with her husband and even had sexual intercourse on the wedding night. The learned Trial Court after analyzing the evidence adduced by both the parties found the version of the appellant untrustworthy and unreliable while that of the respondent, much more credible and trustworthy. The appellant on one hand took a stand that on 18.2.1991 the atmosphere on that night was very tense so much so that, both the parties could not sleep and speak to each other and she did not even take proper food and the whole night there was tension between the parties and the atmosphere was fully charged, but at the same time in the cross-examination of PW 2 the suggestion was made by counsel that the appellant touched the feet of the respondent when he entered the room on the said wedding night and she also admitted that her husband had never taken liquor in her presence and he had never come to her in drunken state. It would be appropriate to reproduce para 55 of the Trial Court judgment to bring to surface the said contradiction on the part of the appellant.

“55. From the evidence on record, it is gathered that on the wedding night i.e. on 18.2.91 a “Dud Mundari” ceremony was to be performed but the respondent wife refused to participate in the same. This version of PW 2 has been fully corroborated by his father PW 3. The husband i.e. Rajiv Arora, had entered by both PW 2 and RW 1. RW 1 in her cross-examination has stated that their marriage had been consummated on that very night and her husband had come to her and she did not have to persuade the petitioner. On the other hand the petitioner has stated that their marriage could not be consummated on their wedding night and he had sex with his wife for the first time only on 25.2.91. RW 1 in her cross-examination has stated that the atmosphere that night was very tense and both the parties could not sleep and they did not speak to each other and her husband had grievance about the insufficient dowry which had been given in the marriage. RW 1 has also admitted that on 18.2.91, she did not take proper food as she was not feeling well. This version of RW 1 that she did not take food that night is corroborated by the version of PW 1 who has stated that on the wedding night at the time when the dinner was served the attitude of the respondent was indifferent and she did not take any dinner but she took only a little sweet.”

11. In matrimonial cases, more often than not it is a challenging task to ascertain as to which party is telling truth as usually it is the oral evidence of one party against the oral evidence of the other. What happens in the four walls of the matrimonial home and what goes on inside the bed room of the couple is either known to the couple themselves or at the most to the members of the family, who are either residing there or in whose presence any incident takes place. Whether the couple has had sex and how many times or have had not had sex and what are the reasons; whether it is due to the denial or refusal on the part of the wife or of the husband can only be established through the creditworthiness of the testimonies of the parties themselves. Consequently, the absence of proper rebuttal or failure of not putting one's case forward would certainly lead to acceptance of testimony of that witness whose deposition remains unchallenged.

In the present case, the testimony of the respondent that the appellant was never responsive and was like a dead wood when he had sexual intercourse with her remained un rebutted. It is not thus that the respondent had sex with her wife only about 10-15 times from the date of his marriage within a period of five months, but the cruel act of the appellant of denying sex to the respondent especially on the very first night and then not to actively participate in the sex even for the said limited period for which no contrary suggestion was given by the appellant to the respondent in his cross-examination... Thus, taking into account the conduct of the appellant in totality, this court is of the view that the same amounts to causing mental cruelty to the respondent.

12. Before parting with the judgment, this court would like to observe that the sex starved marriages are becoming an undeniable epidemic as the urban living conditions today mount an unprecedented pressure on couples. The sanctity of sexual relationship and its role in reinvigorating the bond of marriage is getting diluted and as a consequence more and more couples are seeking divorce due to sexual incompatibility and absence of sexual satisfaction. As already stated above, to quantify as to how many times a healthy couple should have sexual intercourse is not for this court to say as some couples can feel wholly inadequate and others just fine without enough sex. "That the twain shall become one flesh, so that they are no more twain but one" is the real purpose of marriage and sexual intercourse is a means, and an integral one of achieving this oneness in marriage.

13...The present appeal filed by the appellant is devoid of any merits and the same is hereby dismissed."

## IN THE HIGH COURT OF KARNATAKA

**Sri. Uma Mahesh v. Smt. Methravathi**

**AIR 2013 Kar 41**

**N.K. Patil and B.V. Pinto, JJ.**

***A husband filed a petition for divorce on grounds of cruelty and desertion stating that his wife was suffering from a serious physical disorder pertaining to her reproductive system and could not conceive. He further alleged that there was no cohabitation between them as she deserted him. The wife went on to prove through a medical opinion that she was capable of conceiving and that it was the husband who refused to cohabit with her. The divorce petition was rejected in the family court and the main issue raised in the appeal before the High Court by the husband was whether the wife was impotent and infertile and if yes, whether it was a valid ground of mental cruelty entitling the husband to a decree of divorce.***

**Patil and Pinto, JJ.:** "This appeal arises out of the impugned judgment and order dated 18th December 2010, passed in M.C. No. 241/2008, by the learned judge, Family Court, Mysore, dismissing the petition filed by appellant, under Section 13(1)(1-a) and (1-b) of Hindu Marriage Act, on grounds of cruelty and desertion.

2. The brief facts of the case on hand as set out in the petition are that, the appellant and respondent are husband and wife and their marriage was solemnized on 4th May 2003... as per the Hindu customs prevailing in their community. Thereafter, the respondent joined the company of the appellant and they lived together as husband and wife in the matrimonial home. The respondent lived with the appellant, till about two and a half years prior to filing of the petition.

3. Be that as it may, it is the specific case of the appellant that, when the respondent failed to beget children, she deserted him on her own will and volition and started staying in the house of her Parents...and never bothered to return to the matrimonial home to lead marital life with him. It is the further case of the appellant that his wife is suffering from serious physical disorder pertaining to her reproductive system and in fact, she was subjected to thorough medical check-up and investigation by expert Doctors and according to the opinion of the Doctors, the respondent is unable to bear children and she is not exhibiting any signs of attaining age of puberty and not undergoing regular menstrual cycle every month. It is the allegation of the appellant that though the respondent and her Parents were aware of the inherent defect suffered by the respondent, they have played fraud on him and through mis-representation and suppression of the fact that, she had not attained puberty and not undergoing monthly menstrual cycle, performed her marriage with him, and thereby cheated him... In fact, a panchayat was also convened in this regard and according to the appellant, the panchayatdars and other close relatives who were present in the panchayath have taken the respondent and her family members to task for having suppressed the inherent defect from which the respondent is suffering from and for performing her marriage with the appellant, by suppressing the said inherent defect. The appellant's further case is that the respondent and her mother

suffered humiliation in the presence of the panchayatdars and having admitted the fact that her daughter had not attained puberty and not undergoing monthly menstrual cycle, admitted that she has suppressed that fact, while performing the marriage of the respondent with the appellant. Further, the mother of the respondent took the respondent to her house on the date of the panchayat itself i.e. during December 2005 and since then, the respondent is staying with her mother in the house of her Parents and there is no sort of any cohabitation between him and the respondent since then and the marital relationship between him and the respondent has been broken down, irretrievably and there is no chance and possibility of reunion or resumption of the marital relationship between them.

4....According to [the appellant], the respondent has (sic) left his house about 2½ years ago from the date of the petition, and she is staying away from him thereby she is also guilty of committing the matrimonial offence of desertion and also that of cruelty. Hence, he was constrained to file (sic) a petition seeking the relief of decree of divorce from the respondent/wife, both on the ground of cruelty and desertion...

5. Upon notice to the respondent, she contested the petition and filed her objections, opposing the prayer sought in the petition. She admitted her marriage with the appellant, but denied all other allegations made against her, more Particularly (sic) the allegation that, she has not attained puberty and not undergoing periodical menstrual cycle. According to her, after the marriage she joined the appellant and started residing with him in the matrimonial home. But the appellant and his family members started demanding her for payment of additional dowry and started harassing her and ill-treating her and since she refused to comply with their illegal demand for additional dowry, the appellant and his Parents (sic) have driven her out of their house by making use of the fact that, she did not conceive even after leading marital life with the appellant for about three and a half years. Further, it is her specific contention that, at the beginning, she was suffering from some minor medical problem regarding menstrual cycle and during November, 2005, the appellant himself took her to B.G.S. Appolo Hospital and subjected her to medical examination by Dr. Anish Behl, who diagnosed the problem that she is suffering from premature ovarian failure and provided her necessary medication. She has further taken up a contention that after about six months, she was again subjected to medical examination by Dr. Sudha Rao of Harsha Hospital and Dr. Sudha Rao, having thoroughly examined her, has issued a Certificate, opining that, the respondent is fully cured and she is getting her regular menstrual cycle and there are chances of good conception, It is the further contention of the respondent that. (sic) Dr. Sudha Rao gave her opinion on 24th May 2006 and during that period, she and the appellant were living together, by leading the marital life. According to her, subsequent to the opinion tendered by Dr. Sudha Rao and on coming to know that, she is not suffering from any inherent defect and she started getting her regular menstrual cycle, the appellant in order to get rid of her, started making allegations against her that she is unable to conceive and she is incapable of begetting children, since she is suffering from serious physical disorder pertaining to reproductive system. In spite of having the report given by Dr. Sudha Rao from Harsha Hospital, before whom the appellant himself has taken her for investigation and medical checkup, the appellant started making allegations that, her marriage with him was performed by suppressing this fact in order to make out a ground to obtain divorce from her. According to the respondent, she is perfectly all right and she is not suffering from any inherent defect as per the opinion tendered by Dr. Sudha Rao of Harsha Hospital and according to Dr. Sudha Rao, she is capable of begetting children. But the appellant himself since withdrawn from her society and refused to cohabit with her, she could not conceive. That itself cannot make a ground and further she has denied about holding of the alleged panchayat by the appellant and the members of the panchayat allegedly took the mother of the respondent to task and also denied the allegation that her mother took her back to her house and since then she is residing in her Parents' house...

6. During pendency of the matter, after going through the pleadings of both Parties, the learned Judge, Family Court has referred the matter for conciliation and several sincere efforts were made by the Conciliators. As per the report of the conciliators, the conciliation failed as the husband of the respondent, i.e. The appellant has refused to take his wife back to the matrimonial home, but insisted on divorce only on the ground of her infertility problem...Because of the stubborn stand taken by the appellant, the conciliation failed and the case was taken up for trial...

Thereafter, after hearing the learned counsel for the Parties and on the basis of the pleadings, the Family Court framed necessary points for consideration, which are as follows:

1] Whether the petitioner/husband proves that, the respondent/wife has subjected him to cruelty by her willful conduct of harassment thereby committed the matrimonial offence of cruelty and on that ground he is entitled for a decree of divorce against her?

2] Whether the petitioner/husband further proves that, the respondent/wife has without reasonable excuse withdrawn herself from his society and having abandoned him. continued to stay in the house of her mother, thereby deserted him and hence he is entitled for a decree of divorce on the ground of desertion?

3] For what order?"

After careful evaluation of the oral evidence of PWs 1 and 2 and RW1 and RW2 and documentary evidence at Exs. P1 to P10 and Exs. R1 to R3, the Family Court, by assigning valid reasons and placing reliance on the judgment of the Apex Court and taking into consideration the conduct of the appellant and his family members, has answered the point Nos. 1 and 2 in the 'Negative' and point No. 3 as per the final order, and dismissed the petition filed by the appellant, for a decree of divorce. Being aggrieved by the said judgment and order passed by the Family Court, the appellant has come up in appeal before this Court, seeking to set aside the said judgment and to grant him the decree of divorce from the respondent.

...

7. The submission of the learned counsel appearing for the appellant, *Shri. v. Rangaramu*, at the outset is that, the Family Court has grossly erred in dismissing the petition filed by appellant for a decree of divorce, holding that appellant has failed to make out a case regarding the infertility in the respondent wife that she is not a position to conceive. To substantiate the said submission, he quipped to point out to the letters/opinions of Dr. Anish Behl, dated 26th November 2005 and Dr. Mala Dharmalingam dated 11th December 2004 as per Exs. P5 and P7 respectively, and submitted that the respondent has undergone detailed investigation by the Endocrinologist, to assist the fertility panel of the respondent wife. They have opined that the respondent has premature ovarian failure and the only way she can conceive is with IVF +donor eggs and therefore, it can be concluded that the ovaries of the respondent are not producing eggs, which are necessary to conceive and since she is suffering from premature ovarian failure, her ovaries are not in a position to produce eggs. This opinion expressed by the expert Doctors has not been looked into nor considered nor appreciated by the Family Court. By merely accepting the opinion of Dr. Sudha Rao, dated 24th May 2006, which discloses that she is getting regular periods and there are good chances of conception, as per Ex. R1, the Family Court has rejected the prayer of the appellant. But, it can be seen that the opinion given by Dr. Sudha Rao is only with respect to her menstrual cycle. Therefore, he submits that the said opinion itself is not sufficient to reject the prayer sought for by the appellant under Section 13(1)(1-a) and (1-b) of the Act. Further, he submits that the appellant has sought for a decree of divorce, on the ground of mental cruelty and desertion, for the reason that the respondent wife has left the house of the appellant on her own will and volition after two and half years and started to live with her Parents and therefore, the impugned judgment and order passed by the Family Court is liable to be set aside and the prayer sought in the petition for a decree of divorce may be granted.

8. As against this, Shri. P. Mahesha, learned counsel appearing for respondent/wife, inter alia, contended and substantiated the impugned judgment and order passed by Family Court, stating that the same is a well-considered, well founded, well reasoned judgment, inasmuch as the same is passed after critical evaluation of the oral and documentary evidence available on file and relying on the judgment of the Apex Court Further, he submits that the Family Court is also highly justified in dismissing the petition filed by appellant on false and frivolous allegations and assumptions and presumptions. Therefore, interference in the same is not justifiable.

9. After careful consideration of the submission of the learned counsel appearing for the Parties and after critical evaluation of the impugned judgment and order passed by the Family Court, the only point that arise for our consideration is as to:

Whether the appellant has made out a case for interference in the impugned judgment and order passed by the Family Court?

After careful perusal of the impugned judgment and order passed by the Family Court and on critical evaluation of the original records available on file, it is manifest on the face of the impugned judgment passed by the Family Court that, there is no error or material illegality as such committed by it in dismissing the petition filed by appellant for a decree of divorce...It is significant to note that the petition filed by appellant is for a decree of divorce on the ground of mental cruelty and desertion. From the pleadings and other relevant material available on file, it reveals that the appellant, after leading marital life for nearly one year and nine months, had himself taken the respondent/wife for medical check-up regarding some physical disorder pertaining to reproductive system. In this regard, the appellant has produced documentary evidence of Dr. Anish Behl, at Ex. P5 and of Dr. Mala Dharmalingam at Ex. P7. From a perusal of the said documents, it emerges that the respondent wife was being referred to Dr. Anish Behl of BGS Apollo Hospitals. Consultant Endocrinologist & Diabetologist and also Dr. Mala Dharmalingam, Professor & Endocrinologist, Endocrinology and Metabolism, M.S. Ramaiah Medical College. Dr. Mala Dharmalingam, after conducting various tests, has opined

that the respondent has premature ovarian failure. She can be put on OC and then planned assisted reproduction for pregnancy. This opinion is given during December 2004. Dr. Anish Behl, after detailed medical check-up and tests, has opined that the respondent wife has premature ovarian failure. She needs to be on OCPs. The only way she can conceive is with IVF + Donor eggs. This opinion is given during November 2005. Thereafter, it can be seen that Dr. Sudha Rao, Consulting Obstetrician & Gynecologist of Harsha Hospital, who appears to have referred the case of respondent to Dr. Mala Ramalingam and Dr. Anish Behl and after giving proper treatment to the respondent, has opined on 24th May 2006 that, the respondent is getting regular periods and there are good chances of conception. The said opinion of Dr. Sudha Rao is produced by respondent at Ex. R1. Therefore, having regard to the totality of the case, it can be concluded that as per the latest opinion given by Dr. Sudha Rao, the respondent is in fact, getting her regular periods and she has good chances of conception. In fact, it can also be seen that, the appellant has made all his sincere efforts to take respondent/wife for medical check-up and tried to give proper medication, to which, after some time, the respondent has shown positive response and accordingly, the latest report of Dr. Sudha Rao states that the respondent is getting her regular periods and there are good chances of conception.

**10.** The allegation of the appellant against the respondent wife is that, she has serious physical disorder pertaining to reproductive system, as per the opinions/letters written by Dr. Anish Behl and Dr. Mala Dharmalingam to Dr. Sudha Rao, wherein both the said Doctors have opined that the respondent has premature ovarian failure, she can be put on OC and then planned assisted reproduction for pregnancy and that the only way she can conceive is with IVF + Donor eggs. But it can be seen that the said defect is curable by giving due medication, which is evidence as per the opinion of Dr. Sudha Rao, at Ex. R1 who states that the respondent is getting her periods regularly and she has good chances of conception. The Family Court, in our view, has rightly taken note of this crucial aspect of the matter also and dismissed the petition filed by appellant. The medical disorder in a person cannot be treated to be mental cruelty or desertion. Further, the Family Court has observed that the appellant and respondent lived together as husband and wife for about one year and nine months and there was cohabitation between them. Except making the allegation of cruelty and desertion by the respondent wife, the appellant has not adduced any oral evidence of his family members to substantiate the same nor has established the same by adducing any Independent witnesses. The appellant himself has admitted in his cross-examination that, he led marital life with the respondent and they lived together as husband and wife for about one year nine months, after marriage. Therefore, we can easily come to the conclusion that the marriage was in fact, successful and consummated during the said period and there was no complaint whatsoever by the appellant about the respondent. Just because the respondent had some minor medical problem and was not immediately capable to conceive, it cannot be presumed that the said problem is a permanent one and on that ground, the appellant cannot take advantage of it and file the petition, for a decree of divorce on grounds of cruelty and desertion. Due some minor problem in the ovaries, the respondent was not able to conceive. But, as per the opinion of Dr. Sudha Rao, from 2006 onwards, the respondent is getting her regular periods and she has good chances of conception.

**11.** Further, it can be seen that the Family Court has gone in greater detail regarding the instances of mental cruelty, by relying upon the decision of the Hon'ble Apex Court and held that if there is refusal on the Part of the either spouse to have intercourse with other spouse for a considerable period, without there being any physical incapacity or valid reason, it may amount to mental cruelty to the other spouse. But, in the case on hand, it is undisputed inasmuch as the appellant himself has admitted even in his cross-examination that he led marital life with the respondent wife for about one year nine months after marriage. That means, the marriage between appellant and respondent consummated and they cohabited. Simply because the respondent was unable to conceive, may not be a ground for the appellant to urge that her inability to conceive amounted to mental cruelty. Admittedly, they led marital life for about one year nine months and never complained that she was unfit for sexual intercourse...Further, the appellant also never branded the respondent wife as an impotent person nor filed any petition seeking nullity of the marriage on the ground of her impotency. Therefore, the Family Court observed that mere barrenness and sterility would not amount to impotency. Impotence means incapacity for accomplishing the act of sexual intercourse. Impotency has to be distinguished from sterility associated with it. Further, the Family Court observed that even though the respondent was not able to conceive due to disfunction of the ovaries, the appellant was capable of having sexual intercourse, though not bearing children. By the use of the word 'impotency', the legislature did not intend to bring in the idea sterility or incapacity of conception. Impotency in this connection signifies incapacity to have normal sexual intercourse. Therefore, the Family Court came to the conclusion that even though the respondent wife appears to be having some problem of non-functional ovaries, there was no congenital abnormality of the vagina. Therefore, it cannot be held to be ground for divorce, on the ground of cruelty, as the respondent never denied the appellant the conjugal bliss and they led marital life for about one year nine months and absolutely there was no complaint against the respondent about her incapacity to provide him marital bliss.

12. Further, it can be seen that the allegation of the appellant is that, she was not getting her menstrual periods regularly and he took her to a gynecologist, since her menstrual cycle was not regular. But, after going through the Certificate issued by Dr. Sudha Rao, as per Ex. R1, it can be seen that, after proper medical treatment, the respondent is getting regular periods and there are good chances of conception. Therefore, the appellant cannot have any grievance regarding her irregular menstrual cycle also.

...

18. Thus, viewed from any angle, we are of the considered opinion that the Family Court, taking into consideration all the relevant aspects, has passed a well considered, well reasoned and well founded judgment. Hence, we are of the firm opinion that the appellant has failed to make out a case for granting a decree of divorce, by setting aside the impugned judgment and order and hence, there is no justification to grant the relief sought in the appeal, nor we find any error or illegality as such in the impugned judgment and order passed by the Family Court.

..."

## IN THE HIGH COURT OF BOMBAY

**Reshma Rakesh Kadam v. Rakesh Vijay Kadam**

**2013 SCC OnLine Bom 1546**

**V.K. Tahilramani and V.L. Achliya, JJ.**

***A husband filed a petition for a decree of divorce on the ground of cruelty as the wife avoided having physical relations with him. His wife also filed a petition in the family court for restitution of conjugal rights. The family court granted the decree of divorce and dismissed the wife's petition. She filed an appeal in the High Court. The court was asked to address the question of whether refusal to engage in sexual intercourse or the avoidance of the same by a spouse amounted to "mental cruelty."***

**Tahilramani, J.:** "1. The appellant has preferred this appeal against the common Judgment & Order dated 30.08.2012 passed by the Judge, Family Court at Bandra, Mumbai in Petition No. A-1525 of 2008 and Petition No. A-1192 of 2008. Petition No. A-1192 of 2008 was filed by the respondent-husband for decree of divorce on the ground of cruelty and desertion. The appellant-wife had filed Petition No. A-1525 of 2008 against the respondent-husband for decree of restitution of conjugal rights. By the said Judgment and Order, Petition No. A-1192 of 2008 filed by the respondent-husband came to be decreed and the marriage between the appellant and the respondent came to be dissolved by decree of divorce on the ground of cruelty. By the said Judgment and Order, Petition No. A-1525 of 2008 filed by the appellant-wife for restitution of conjugal rights was dismissed. Hereinafter, for the sake of convenience, the appellant will be referred as 'wife' and the respondent will be referred as 'husband'.

2. Some of the admitted facts are that the appellant and the respondent got married on 26.12.2005 according to Hindu rites and rituals. There is no issue born out of the said wedlock. The appellant-wife was residing with the respondent-husband in his joint family till November-December 2007. According to the husband, the wife left the house on 07.11.2007 whereas according to the wife, she was compelled to leave the matrimonial house on 06.12.2007 and not on 07.11.2007. It may be stated at this stage that though the husband had filed petition for divorce on the ground of cruelty and desertion, his petition for divorce was allowed only on the ground of cruelty. As far as the ground of desertion was concerned, the Family Court observed that...the pre-requisite condition of two years to get the decree of divorce on the ground of desertion is not satisfied.

3. The husband has given several instances of cruelty caused by the wife to him...

4. The second instance of cruelty stated by the husband is that on 31.12.2005, they left Mumbai and went for their honeymoon. During the honeymoon, his wife quarreled with him on small matters and harassed him and she did not cooperate during physical relations and avoided it on one or the other pretext. His evidence shows that the wife avoided sexual relations even thereafter. This important fact deposed by the husband was also not challenged in the cross-examination.

...



7. The evidence of the husband that she avoided physical relations with him, she quarreled and harassed him and threatened him to commit suicide, is sufficient to held (sic) that the husband was subjected to cruelty by the wife during the course of her stay with him. Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfillment. In *Parveen Mehta v. Inderjeet Mehta* (2002) 5 SCC 706 and in the case of *Shashi Bala v. Rajeev Arora* 1 DMC 721 Delhi High Court, it is held that, "Sex is the foundation of marriage and marriage without sex is an anathema. Willful denial of sexual intercourse without reasonable cause would amount to cruelty. A person enjoying normal health being deprived of normal cohabitation by spouse and thus undergoing anguish and frustration could be said to have been subjected to mental cruelty." Importantly, this fact was not at all challenged in the cross-examination of the husband.

8. The wife in her affidavit by way of examination in chief Exh. 20 stated that the husband had caused mental and physical cruelty to her during her stay with him, however, it is to be noted that she has not disclosed any details of the acts of cruelty caused to her in her evidence...

...

10. ...We do not find any reason to disbelieve the unchallenged evidence of the husband discussed above regarding the cruelty caused to him by the wife, hence, we are of the opinion that the Family Court was right in holding that the husband, by adducing cogent and satisfactory evidence, has proved that the wife has caused cruelty to him after solemnization of their marriage and as such, he is certainly entitled to have a decree of divorce on the ground of cruelty.

..."

## IN THE HIGH COURT OF HIMACHAL PRADESH

**Manju Thakur v. Raj Kumar**

**2014 SCC OnLine HP 3950**

**Tarlok Singh Chauhan, J.**

***A husband filed a petition for divorce on the ground of cruelty and desertion stating that the wife did not allow him to have marital intercourse with her. His further contention was that the marriage could not be consummated due to the conduct of the wife and that she suffered from mental and physical impotence. The suit succeeded in the district court and the main issue that came for consideration before the High Court was whether the wife was suffering from impotency and whether or not the marriage was consummated between the parties and if not, whether that amounted to "cruelty."***

**Chauhan, J.:** "The appellant is the wife and is aggrieved by the judgment and decree passed by the learned District Judge, Shimla, on 20.08.2011 in H.M.A. No. 4-S/3 of 2007 whereby the petition filed by the respondent for grant of a decree of divorce and also to declare the marriage between the parties annulled, has been allowed.

2. The facts as are necessary for the adjudication of the appeal may be noticed. The respondent preferred a petition under Sections 12(1)(a), 13(1)(ia) and (ib) of the Hindu Marriage, Act, 1955...Dowry less marriage had been performed in 'Butail Dharamshala', Shimla between the appellant and respondent in accordance with Hindu rites and rituals on 29.06.2002. After marriage, the appellant had accompanied the respondent to his house and had stayed there for about a month. During this period, the appellant did not allow the respondent access to her. The appellant did not agree for marital intercourse. After some time, the appellant left for house of her parents and had stayed with her parents for about 45 days and thereafter returned to the matrimonial house. Even after visiting her parents, appellant did not agree for marital intercourse and she had not been permitting the respondent even to touch her body. The appellant had been insisting for separate accommodation. Since the marriage could not be consummated due to the conduct of the appellant, the respondent had felt intense mental and physical pain, shock and suffering. The respondent had been in depression and had been so observed by his mother. The mother-in-law of the appellant had observed her unusual conduct and even she was not observed menstruating and when asked to go for a medical check up, the appellant had started picking up quarrel with the respondent and his mother. Respondent's mother was owner in possession of one old house at Ghanahatti and the parents of the appellant belonged to nearby area. With a view to carry on with his marriage, the respondent was directed to take the appellant to his house at Ghanahatti and even at Ghanahatti, the appellant did not permit the respondent to establish physical contact with her.

**3.** As per respondent, the appellant started inviting her parents, brothers, sisters and nephews to her house as a result of which the respondent was compelled to sleep in separate room. The appellant had been suffering from mental and physical impotency and she and her family members had not disclosed such disability prior to the marriage. The appellant had treated him with cruelty. The respondent could not consummate his marriage even though he had persuaded the appellant for the purposes a number of times. Respondent had suffered agony and mental as well as physical cruelty at the instance of the appellant...The marriage of the parties had irretrievably broken down. As per respondent, he was entitled to dissolution of marriage on the grounds of cruelty and desertion.

**4.** The appellant, who was the respondent below, had resisted the petition on the ground of maintainability in preliminary objections. In reply to paras on merits, the appellant admitted her marriage with the respondent on 29.06.2002 at Shimla. After marriage, the appellant had accompanied the respondent to his house and the marriage between the parties stood consummated. The appellant denied her suffering from mental and physical impotency. After staying for 1½ months with her husband, the appellant had left for the house of her parents. She had stayed there for sometime and had returned to the matrimonial house...

**5.** On the pleadings of the parties, the following issues were framed:-

- i). Whether the petitioner is entitled to decree of declaration under Section 12 of the Act, as prayed? OPP.
- ii) If issue No. (i) is not answered in affirmative, whether it is proved on record that the respondent has deserted the company of the husband without any reasonable cause, if so, its effect? OPP.
- iii) If issue No. (i) is not answered in affirmative, whether it is proved on record that the respondent/wife had treated the petitioner with cruelty, if so, its effect? OPP.
- iv) Whether the petition is not maintainable in the present form? OPR.
- v) Whether the petitioner has concealed material facts from the court, if so, its effect? OPR.
- vi) Relief.

**6.** After recording the evidence and evaluating the same, the learned Court below allowed the petition and annulled the marriage on the ground of impotency of the appellant under Section 12(1)(a) of the Hindu Marriage Act, 1955 (for short 'the Act') and further declared that the appellant herein had treated the respondent with cruelty and deserted him for over a period of two years prior to institution of the petition. Therefore, the marriage was dissolved under Section 13(1)(ia) and (ib) of the Act.

**7.** Aggrieved by the judgment and decree passed by the learned Court below, the appellant has filed the present appeal on the ground that the learned Court below has not correctly appreciated the provisions of law as well the oral and documentary evidence...

...

**9.** I have considered the rival submissions of the learned counsel for the parties and gone through the records of the case. It cannot be disputed that sex is one of the purposes of marriage. The institution of marriage believes in consummation of the same. Cohabitation is a corollary. After solemnization of marriage when either sides declare that marriage has not been consummated and cohabitation has not taken place, the very foundation of marriage is crumpled. The importance of active sexual life has been noticed by a Division Bench of the Delhi High Court in *Mrs. Rita Nijhawan v. Shri Balkishan Nijhawan* AIR 1973 Delhi 200 wherein it was observed as under:-

"22. In the present case the marriage took place in 1954. Barring the pregnancy in 1958 which according to the appellant was the result of part improvement right from the day of marriage till 1964, there has never been any normal sexual life, and the respondent has failed to give sexual satisfaction. The marriage has really been reduced to a shadow and a shell and the appellant has been suffering misery and frustration. In these days it would be unthinkable proposition to suggest that the wife is not an active participant in the sexual life and therefore, the sexual weakness of the husband which denied normal sexual pleasure to the wife is of no consequence and therefore, cannot amount to cruelty. Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that sexual activity in marriage has an extremely favourable influence on a woman's mind and body. The result being that if she does not get proper sexual

satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifies woman's brain, develops her character and trebles her vitality. It must be recognized that nothing is more fatal to marriage than disappointments in sexual intercourse.

23. The appellant is only in mid thirties. To force the appellant to this life of frustrating and unsatisfied sexual life which would inevitably damage her health both mental and physical is nothing but cruelty.....”

10. The aforesaid observations in Nijhawan's case (supra) were quoted with approval by the Hon'ble Supreme Court in *Vinita Saxena v. Pankaj Pandit* (2006) 3 SCC 778.

11. It is to be borne in mind that a normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious marriage. The importance of sex in a married life was emphasized by the Hon'ble Supreme Court in the celebrated judgment of *Dastane v. Dastane* AIR 1975 SC 1534 wherein it was observed that “sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfillment”.

...

19. Now, the first and foremost question which is required to be considered is as to whether the appellant was impotent or was suffering from impotency.

20. The word “impotency” has not been defined in the Hindu Marriage Act, 1955. But, it is a ground to avoid marriage if it is established that at the time of marriage either of spouses was incapable of effecting the consummation either due to structured defect in the organs of the generation rendering complete sexual intercourse impracticable or due to some other cause. The burden of proving impotency of the opposite side would lie on the person making such allegations in order to obtain a decree of nullity of marriage on the ground of impotency as enumerated under Section 12(1)(a) of the Act...The respondent was required to establish that the appellant was impotent at the time of marriage and continued to be so until the institution of the proceedings. However, it must be noted that when impotency is alleged as a ground to declare the marriage between the parties as nullity, it is then the evidence has to be adduced by the person making such allegations, particularly, in the form of expert medical testimony.

21. Impotency is ordinarily understood to mean an incapacity, physical or mental, which admits of neither copulation nor procreation. However, the capacity to copulate and the capacity to procreate are two different capacities and resultant incapacities are also different. It can, therefore, be said that impotency means an incapacity, physical or mental on the part of either spouse to copulate which incapacity is permanent and incurable.

22. In *Jayaraj Antony v. Mary Seeniammal*, AIR 1967 Mad 242 the Full Bench held impotency as incapacity of consummate marriage, which may be physical or psychological.

23. In *Digvijay Singh v. Pratap Kumari*, AIR 1970 SC 137: (1969) 2 SCC 279 the Hon'ble Supreme Court held:-

“A party is impotent if his mental or physical condition makes consummation of marriage a practical impossibility. The condition must be one, according to the statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings.”

24. Similarly, a Full Bench of the Delhi High Court in *Manjula and S. Desmukh v. Suresh Deshmukh* AIR 1979 Delhi 93 while deciding matrimonial reference has discussed ‘impotency’ as under:-

“19. Impotence is inability to consummate the marriage and to be a ground for nullity, such inability must exist at the time of marriage and continue to exist at the time of the institution of the suit.

For this purpose sexual intercourse has been defined as ordinary and complete intercourse, not partial and imperfect intercourse. If so imperfect as scarcely to be natural, it is no intercourse at all, but recent cases suggest that modern surgery has introduced the need of further scrutiny.

Though it has been held that full penetration without ejaculation on at least one occasion amounts to consummation, but more recently another judge decided that penetration for a short time without any ejaculation, did not amount to consummation. See *R. v. R.* (1952) 1 All. E.R. 1194 and *W (or se K) v. W*; (1967) 1 W.L.R. 1554 see *Latey on Divorce* (1973) 15th ed. P. 225.

20. Impotency means incapacity to consummate she marriage and not merely incapacity for procreation. The test is consummation and capacity to consummate.”

**25.** A Division Bench of Andhra Pradesh High Court in *Smt. Suvarna v. G.M. Achary*: held that impotency of spouse, in particular case, vis-à-vis, the other spouse is sufficient. Total impotency need not be proved.

**26.** Modi's Textbook on Medical Jurisprudence and Toxicology, Twenty-first Edition, deals with impotency in the following terms:-

"Impotence is defined as physical incapacity of accomplishing the sexual act, while sterility means inability for procreation of children. Impotence in males is the persistent inability to develop or maintain a penile erection sufficient to conclude coitus to orgasm and ejaculation. It should be remembered that the term impotence or sexual incapacity in forensic medicine connotes physical incapacity to accomplish the sex act.

Impotence has been described in Halsbury's Laws of England to be such a state of mental or physical condition which makes consummation of the marriage a practical impossibility.

An impotent individual need not necessarily be sterile, nor a sterile individual impotent, though both conditions may sometimes be combined in the same individual."

**27.** There is yet another aspect of impotency which is termed as relative impotency which prescribes that a person suffering from no handicap whatsoever still feels inhibited or incompetent vis-à-vis the particular sexual partner.

**28.** Therefore, while dealing with a case of impotency the paramount consideration is not only physical incapacity which the Courts are guided but another important fact which is often ignored that the non consummation of marriage could be due to several other circumstances which drives to a situation whereby both the spouses though physically and mentally potent in the normal sense find it impossible to achieve a satisfactory sexual relationship.

**29.** The respondent has stated that the appellant had been suffering from mental and physical impotency because they had tried to consummate the marriage but without any success. The appellant, on the other hand, had refuted the charges of impotency.

**30.** On 19.11.2007, the respondent herein preferred an application under Section 151 CPC whereby he had asked for medical examination of the appellant on the ground that this would establish that she was impotent and there had been non consummation of marriage. The appellant had resisted her medical examination and had stated that she had not been suffering from mental or physical impotency and that the marriage between the parties had been consummated.

**31.** This application was, however, allowed and the appellant was ordered to be examined by a Medical Board. Even the respondent was directed to go in for medical examination. The Medical Officer had reported the respondent to be fit for cohabitation and it was found that he was not suffering from any mental or physical disability rendering marital intercourse impracticable.

...

**33.** In her cross-examination, Dr. Rita Mittal had explained that impotency was of two types (i) physical (ii) psychogenic and claimed that psychogenic impotency could not be judged merely by physical examination as the same required a detailed study of the patient after obtaining history. It was also claimed that vaginismus means sudden involuntary contraction of the vaginal muscles. However, she had stated that at the time of physical examination of the appellant, she had not found such features in her but could not rule out that such state of affairs could possibly appear at the time of sexual activity. It was also explained that if vaginismus occurs during the course of sexual activity, it becomes quite painful to the female as a result of which she avoids sexual intercourse. She admitted that there could be many other causes for the rupture of hymen other than the sexual intercourse. The witness admitted that she could not say with certainty as to whether rupture of the hymen in the case of the appellant was due to coitus or otherwise.

**34.** What appears from the statement of the Medical Officer is that that the appellant had congenital deformity as the opening of her vagina was too small to allow healthy and complete sexual intercourse and that may be the reason that she had avoided consummation of marriage. On the other hand, as noticed above, the respondent had been found medically fit for cohabitation.

**35.** It has come on record that the appellant had been given sufficient time and an environ to consummate the marriage at Shimla and then at Ghanahatti, but, one pretext or the other, the appellant appears to have avoided consummation.

...

**37.** One fact which clearly emerges from the reply filed by the appellant is that the marriage at least till the date of filing of the reply on 05.12.2007 had not been consummated or else the appellant would not have made such averments and asked for the medical examination of the respondent. Therefore, in this background, the respondent is right in contending that he has not been provided physical access by the appellant and the marriage has not been consummated.

**38.** It further appears from the record that there has been resistance on the part of the appellant to ward off the attempt of the respondent to have sexual intercourse which can be attributed to be due to the impotency of the wife. The refusal on the part of the wife can give rise to an inference of impotency which may be caused due to variety of reasons like nervousness, hysteria or even invincible repugnancy to the act of consummation resulting in the paralysis of the will. It may also happen that the wife may only be impotent qua the husband and it is not necessary then to establish that the wife is impotent genetically or physically because it is enough that she is impotent qua her husband. Though the burden of proving the plea of impotency is on the person, who alleges the same, but then in so far the present case is concerned, there is evidence that the appellant was not responsive in the matter of sexual relationship for a fairly long period. One must, therefore, assume want or desire and intention on the part of the unresponsive spouse to consummate the marriage. This will go a long way in proving the fact of impotency on the part of the wife. In fact, even persistent refusal to consummate the marriage would lead to an inference of incapacity to have sexual intercourse. Frigidity on the part of spouse to the physical act as in this case is also a form of impotency.

**39.** Admittedly, the appellant had left the house of the respondent on 13.09.2003 and, therefore, keeping in view the contents of the reply dated 05.12.2007 (supra), it can safely be concluded that till and so long the appellant resided in the house of the respondent, the marriage has not been consummated.

...

**41.** ...It cannot be disputed that willful denial of sexual relationship by a spouse would amount to cruelty. What is cruelty has been succinctly explained by the Hon'ble Supreme Court in Vinita Saxena's case (supra) wherein it was held as under:-

"Legal proposition on the aspect of cruelty

...

36. The legal concept of cruelty which is not defined by the statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relation must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complaints, accusations or taunts. It may be mental such as indifference and frigidity towards the wife, denial of a company to her, hatred and abhorrence for wife, or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellant's side, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure.

...

**42.** In *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 511, the Hon'ble Supreme Court gave a treatise on the subject of cruelty after examining the amplitude of cruelty in different countries and after taking into consideration their judicial trends, the Court also laid down broad parameters which may be relevant in dealing with the case of mental cruelty and the illustrative instances that may constitute mental cruelty which are as under:-

"101. ...

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

...

43. In *A v. B* 1996 AIHC 1727, a learned Single Judge of the Kerala High Court held that “refusal on the part of a spouse to indulge in normal sexual intercourse amounts to cruelty”.

44. In *Prem Prakash v. Smt. Sarla* AIR 1989 Madhya Pradesh 326, the Full Bench of the Madhya Pradesh High Court held that “sex plays important role in a matrimonial life and cannot be separated from other factors leading to a successful married life. Therefore, conduct of the husband or wife which renders the continuous of cohabitation and performance of conjugal duties impossible, amounts to such cruelty”.

45. In *Shakuntla Kumari v. Om Prakash Ghai* AIR 1981 Delhi 53, it was held that “a normal and healthy sexual relationship is one of the basic ingredients of a happy and harmonious marriage. If this is not possible due to ill health on the part of one of the spouses, it may or may not amount to cruelty depending on the circumstances of the case, but willful denial of sexual relationship by a spouse when the other spouse is anxious for it, would amount to cruelty, especially when the parties are young and newly married”.

46. Coming to the facts of the case, it has been duly proved on record that the appellant was not responding to the advances of the respondent whereby the respondent had felt intense physical and mental pain, shock and suffering. In fact, the very denial of sex by the appellant amounts to mental cruelty in terms of Section 13(1)(i-a) of the Act. This was so held by the Hon'ble Supreme Court in *Shobha Rani v. Madhukar Reddi* (1988) 1 SCC 105 reiterated in *Sanat Kumar Agarwal v. Nandini Agarwal* AIR 1990 SC 594.

47. Therefore, for all the reasons discussed above, I find no merit in the appeal and the same is dismissed, leaving the parties to bear their own costs.”

## IN THE SUPREME COURT OF INDIA

**Vidhya Viswanathan v. Kartik Balakrishnan**  
(2014) 15 SCC 21

**Sudhansu Jyoti Mukhopadhyaya and Prafulla C. Pant, JJ.**

***A husband filed a petition for divorce on grounds of cruelty, alleging amongst other things that his wife did not allow him to consummate the marriage. The wife denied all allegations and filed a counterclaim for restitution of conjugal rights. The trial court dismissed the husband's petition and allowed the counterclaim of the wife. On appeal, the Madras High Court allowed the divorce petition on the grounds of cruelty. Thereafter, the wife filed a special leave petition challenging the High Court's conclusion that her acts amounted to “cruelty.”***

**Pant, J.:** “Leave granted. This appeal is directed against the judgment and order dated 13-2-2012 passed in *Karthik Balakrishnan v. Vidhya Viswanathan* [*Karthik Balakrishnan v. Vidhya Viswanathan*, Civil Misc. Appeal No. 2862 of 2011, order dated 13-2-2012 (Mad)] whereby the said Court has allowed the appeal filed by the husband under Section 19 of the Family Courts Act, 1986, and dissolved the marriage between the parties.

2. Brief facts of the case are that the appellant, Vidhya Viswanathan got married to the respondent, Karthik Balakrishnan on 6-4-2005 in Chennai following the Hindu rites. After the marriage, the couple went to London where the respondent (husband) was working, and they lived there for some eight months. In December 2005, the appellant and the respondent came back to India. However, the respondent went back to England all alone, and his wife did not go there though her husband had purchased a return ticket for her. On 13-9-2008, the husband filed a petition under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 for dissolution of marriage. It is pleaded by the respondent (husband) that while the appellant was with him in London, she used to insult him. It is alleged by him that at times she used to get violent and hysterical. The husband further pleaded that even after his best efforts, the appellant did not allow him to consummate the marriage.

3. It is further stated that in November 2005 i.e. about seven months after the marriage the wife (the present appellant) fell sick and she was taken to a Medical Specialist who diagnosed that she was suffering from tuberculosis. According to the husband, he provided the best possible treatment to his wife. After the couple came back to India in December 2005,

the wife stayed back in Chennai and continued her treatment. It is alleged by the present respondent (husband) that his wife used to send him e-mails which were derogatory and in bad taste. It is also alleged by the respondent that his wife refused to join his company even after his best efforts. With the above pleadings, the present respondent filed a petition for divorce before the Family Court, Chennai on the ground of cruelty.

4. The appellant contested the divorce petition and filed her written statement. She denied the allegations made against her. She stated that she went with her husband to London with great expectations. She alleged that her husband and his mother did not treat her well. She admitted that she came back with her husband to India in December 2005. She further pleaded that though the respondent purchased the return ticket for her but he himself instructed her not to return to England without his permission. It is also stated by her that marriage could not be consummated for the reason that her husband wanted to have children after one or two years of marriage. She did not deny having sent e-mails but stated that she only responded to the respondent as he wanted divorce decree based on her consent. She admitted that she received legal notice from her husband but stated that the allegations therein are false. She prayed for counterclaim directing the respondent to restore the conjugal rights between the parties.

5. On the basis of the pleadings of the parties, the trial court framed the following issues:

“(1) Whether the petitioner husband is entitled for divorce on the ground of cruelty?

(2) Whether the respondent wife is entitled for conjugal rights as prayed for in the counterclaim?”

The parties led their oral and documentary evidence before the trial court. The First Additional Family Court at Chennai, after hearing the parties vide its judgment and order dated 11-8-2011, dismissed the petition for divorce, and allowed the counterclaim of the wife.

6. Aggrieved by the said judgment and order, the husband (Karthik Balakrishnan) filed an appeal (CMA No. 2862 of 2011 with MP No. 1 of 2011) before the High Court. The High Court after hearing the parties, allowed the appeal and set aside the judgment and order dated 11-8-2011 passed by the trial court. The High Court allowed the divorce petition, and dissolved the marriage between the parties. Hence, this appeal with special leave petition before this Court.

7. We have heard the learned counsel for the parties, and perused the papers on record.

8. Admittedly, the appellant got married to the respondent on 6-4-2005. It is also admitted that there is no issue born from the wedlock. This Court has now to examine whether the High Court has rightly come to the conclusion or not that the husband was treated with cruelty by the wife, if so, is he entitled to decree of divorce?

9. On going through the evidence on record, we find that the husband (the petitioner before the trial court), in his evidence has narrated in detail, the incidents of alleged cruelty suffered by him. The relevant paragraphs from the statement of the husband are being reproduced below:

...

(10) ... the respondent did not show any intention at all in consummating the marriage. The respondent evinced no interest in having physical contact with me. At times, I myself had tried to have sexual relationship with the respondent as a normal husband would do. However, since the respondent showed no intention, I convinced myself that she would mend her ways. However, there was no attitudinal change in her life.

...

PW 1, Karthik Balakrishnan (husband) who made the above statement, was subjected to lengthy cross-examination but nothing has come out which creates doubt in his testimony.

10. The appellant Vidhya Viswanathan had also filed her evidence before the trial court, in the form of an affidavit, and she also got herself cross-examined as DW 1. She denied the allegations made by her husband but in cross-examination she admits that the marriage was not consummated. The relevant portion from her cross-examination is being reproduced below:

“... It is wrong to state that normally I used to hit the petitioner with my legs and wake him up and that I used to throw the objects on the petitioner and that through this I had harassed the petitioner physically and mentally. If it is asked that whether the marriage was consummated, no it is not. The petitioner said that we can beget the child after one or two years. I and the petitioner were close.

As the petitioner joined the new job he was under stress and tension. The petitioner had thyroid infection frequently. The petitioner said that the starting of the matrimonial life shall be postponed. It was not taken as an issue. After 8 months of the marriage, I became ill. Hence, I came to Chennai. It is wrong to state that there is no connection between thyroid infection, and the physical relationship and that I am adducing falsely.

...

Before my husband could file this case, I did not file any case for the restitution of conjugal rights. It is wrong to state that as I had no intention to live together, I did not file such a case."

**11.** The High Court while rejecting the explanation given by the wife as to why the marriage was not consummated observed as under:

"44. It has to be further pointed out that while PW 1 was cross-examined by the respondent, it has not been suggested to PW 1 that he suggested to the respondent that they should have a child only after two years. Thus it appears that this explanation of the respondent for non-consummation of the marriage is only an afterthought. Even assuming for a moment that the appellant wanted to have a child only after two years that does not mean that the appellant and the respondent cannot and should not have sexual intercourse. Admittedly, both of them are well-educated and there are so many contraceptives available and they could have used such contraceptives and avoided pregnancy if they had wanted."

**12.** Undoubtedly, not allowing a spouse for a long time to have sexual intercourse by his or her partner, without sufficient reason, itself amounts to mental cruelty to such spouse. A Bench of three Judges of this Court in *Samar Ghosh v. Jaya Ghosh* [*Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511] has enumerated some of the illustrations of mental cruelty. Para 101 of the said case is being reproduced below: (SCC pp. 546-47)

"101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

...

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

...

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty."

The abovementioned Illustrations (viii) and (xii) given in *Samar Ghosh case* [*Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511], support the view taken by the High Court in holding that in the present case the wife has treated her husband with mental cruelty.

...

**14.** In view of the above principle of law laid down by this Court, and having considered the submissions of the parties, and the evidence on record, we do not find any ground to interfere with the decree of divorce passed by the High Court on the ground of cruelty...

..."



## IN THE HIGH COURT OF DELHI

Rajeev Kumar v. Vidya Devi

2016 SCC OnLine Del 5425

Pradeep Nandrajog and Pratibha Rani, JJ.

***A husband filed a petition for divorce on the ground of cruelty stating various instances which included refusal on the part of the wife to have sexual relations with him for the previous four and half years. The family court declined to grant the decree of divorce stating that the husband had failed to prove “cruelty” by his wife. The main issue raised in the appeal before the High Court was whether or not the refusal on the part of the spouse to have sexual relations for a period of four and a half years amounted to “cruelty.”***

Rani, J.: “...

6. The appellant/husband is aggrieved by the judgment and decree dated March 01, 2016 whereby the divorce petition filed by him against the respondent/wife has been dismissed by learned Judge, Family Court mainly on the ground that the instances of cruelty pleaded and proved by him do not satisfy the standard of cruelty as per requirements of Section 13(1)(ia) of the Hindu Marriage Act, 1955.

7. The brief facts are that the appellant/husband is the only son of his parents and is employed as peon in Employees State Insurance Corporation of India having his posting at ESI Hospital, Basai Darapur, Delhi. The marriage between the parties was solemnised on November 26, 2001 at Sonapat, Haryana which is the native place of his wife. The marriage was consummated and the parties were blessed with two sons who were aged about 10 years and 9 years respectively at the time of filing of the petition in the year 2013.

8. The appellant/husband has pleaded various instances of mental cruelty being caused to him and his entire family by the respondent/wife which are mainly on the issues of not attending the household work and asking the other family members to do their own work whether in respect of cleaning the house, washing the clothes or working in the kitchen...

9. In para 22 of the plaint the husband has pleaded as under:

**‘22. That apart from above all she has not permitted the petitioner to have bodily relations with the respondent for the last four and half years, though, both were living under the same roof. Whenever, during this cited period, the petitioner to make body relations, the respondent uttered derogatory abusive language (gaaliyan) and pushed him aside.’**

10. Divorce petition was contested by the respondent/wife wherein she denied all the averments made in the divorce petition against her and pleaded that she was subjected to cruelty. In response to para 22 of the petition she has pleaded as under:

**‘22. That, the contents of para No. 22 of the petition are wrong, incorrect, false, fabricated and hence specifically denied. It is submitted that the petitioner had on his own volition turned out the respondent from her matrimonial home and has now levied false allegations against her in the present petition under reply.’**

...

12. The learned Judge, Family Court on considering the testimony of the appellant and his father, observed that the appellant/husband has failed to prove the cruelty being committed by his wife, prayer for divorce was declined.

...

14. The learned Judge Family Court failed to take note of the following facts:-

...

(iii) In the petition in para 22, as reproduced above, he specifically pleaded that for a period of four-and-a-half years despite living under one roof, the parties did not cohabit because of the resistance put by the respondent/wife.

...

16. It is settled legal position that denial of sex to a spouse itself amounts to causing mental cruelty. In the decision reported as AIR 1973 Delhi 200 *Rita Nijhawan v. Balakishan Nijhawan* it was held as under:-

‘Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favorable influence on a woman's mind and body. the result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifies woman's brain. develops her character and trebles her vitality. It must be recognised that nothing is more fatal to marriage than disappointments in sexual intercourse.’

17. In another decision reported as AIR 2015 SC 285 *Vidhya Viswanathan v. Kartik Balakrishnan* the Supreme Court has held as under:

‘12. Undoubtedly, not allowing a spouse for a long time, to have sexual intercourse by his or her partner, without sufficient reason, itself amounts mental cruelty to such spouse.’

18. When the case of the appellant/husband is examined in the above settled legal position, we find that the averments made by him in para 22 of the petition to the effect that the respondent/wife did not permit him to have bodily relations for a period of four-and-a-half years despite living under the same roof, have not been specifically denied by the respondent/wife in the written statement. At the stage of evidence, she abandoned the proceedings. The testimony of the appellant/husband in this regard has remained unchallenged.

19. In view the forgoing discussion, we are of the considered view that the appellant/husband has fully established that he was subjected to mental cruelty by the respondent/wife by denying sex to him for a long period despite living under the same roof without any justification and though she was not suffering from any physical disability. The appeal being well founded deserves to be allowed.

...

## IN THE SUPREME COURT OF INDIA

**Joseph Shine v. Union of India**

**(2019) 3 SCC 39**

**Dipak Misra, C.J., and A.M. Khanwilkar, R.F. Nariman, D.Y. Chandrachud and Indu Malhotra, JJ.**

***A five-judge bench of the Supreme Court struck down Section 497 of the Indian Penal Code, 1860, which dealt with the offence of adultery, as being violative of Articles 14, 15 (1) and 21 of the Indian Constitution. Under the said provision, a man engaging in sexual intercourse (not amounting to rape) with a married woman without her husband's consent or connivance, could be held criminally liable for adultery on a complaint brought forth by the husband. In his concurring opinion, Chandrachud J. held that women's right to sexual autonomy is an integral component of right to privacy, dignity and liberty under Article 21 and right to equality under Article 14.***

**Chandrachud, J. (concurring):** “...

114. In the preceding years, the Court has evolved a jurisprudence of rights-granting primacy to the right to autonomy, dignity and individual choice. The right to sexual autonomy and privacy has been granted the stature of a Constitutional right. In confronting the sources of gendered injustice which threaten the rights and freedoms promised in our Constitution, we set out to examine the validity of Section 497 of the Indian Penal Code. In doing so, we also test the constitutionality of moral and societal regulation of women and their intimate lives through the law.

...

## E. CONFRONTING PATRIARCHY

...

**159.** The petitioner urged that (i) The full realisation of the ideal of equality enshrined in Article 14 of the Constitution ought to be the endeavour of this Court; (ii) the operation of Section 497 is a denial of equality to women in marriage; and (iii) the provision is manifestly arbitrary and amounts to a violation of the constitutional guarantee of substantive equality.

**160.** The act which constitutes the offence under Section 497 of the Penal Code is a man engaging in sexual intercourse with a woman who is the “wife of another man”. For the offence to arise, the man who engages in sexual intercourse must either know or have reason to believe that the woman is married. Though a man has engaged in sexual intercourse with a woman who is married, the offence of adultery does not come into being where he did so with the consent or connivance of her husband. These ingredients of Section 497 lay bare several features which bear on the challenge to its validity under Article 14. The fact that the sexual relationship between a man and a woman is consensual is of no significance to the offence, if the ingredients of the offence are established. What the legislature has constituted as a criminal offence is the act of sexual intercourse between a man and a woman who is “the wife of another man”. No offence exists where a man who has a subsisting marital relationship engages in sexual intercourse with a single woman. Though adultery is considered to be an offence relating to marriage, the legislature did not penalise sexual intercourse between a married man and a single woman. Even though the man in such a case has a spouse, this is considered to be of no legal relevance to defining the scope of the offence. That is because the provision proceeds on the notion that the woman is but a chattel; the property of her husband. The fact that he is engaging in a sexual relationship outside marriage is of no consequence to the law. The woman with whom he is in marriage has no voice of her own, no agency to complain. If the woman who is involved in the sexual act is not married, the law treats it with unconcern. The premise of the law is that if a woman is not the property of a married man, her act would not be deemed to be “adulterous”, by definition.

**161.** The essence of the offence is that a man has engaged in an act of sexual intercourse with the wife of another man. But if the man to whom she is married were to consent or even to connive at the sexual relationship, the offence of adultery would not be established. For, in the eye of the law, in such a case it is for the man in the marital relationship to decide whether to agree to his spouse engaging in a sexual act with another. Indeed, even if the two men (the spouse of the woman and the man with whom she engages in a sexual act) were to connive, the offence of adultery would not be made out.

**162.** Section 497 is destructive of and deprives a woman of her agency, autonomy and dignity. If the ostensible object of the law is to protect the ‘institution of marriage’, it provides no justification for not recognising the agency of a woman whose spouse is engaged in a sexual relationship outside of marriage. She can neither complain nor is the fact that she is in a marital relationship with a man of any significance to the ingredients of the offence. The law also deprives the married woman who has engaged in a sexual act with another man, of her agency. She is treated as the property of her husband. That is why no offence of adultery would be made out if her husband were to consent to her sexual relationship outside marriage. Worse still, if the spouse of the woman were to connive with the person with whom she has engaged in sexual intercourse, the law would blink. Section 497 is thus founded on the notion that a woman by entering upon marriage loses, so to speak, her voice, autonomy and agency. Manifest arbitrariness is writ large on the provision.

...

**168.** The hypothesis which forms the basis of the law on adultery is the subsistence of a patriarchal order. Section 497 is based on a notion of morality which fails to accord with the values on which the Constitution is founded. The freedoms which the Constitution guarantees inhere in men and women alike. In enacting Section 497, the legislature made an ostensible effort to protect the institution of marriage. ‘Ostensible’ it is, because the provision postulates a notion of marriage which subverts the equality of spouses. Marriage in a constitutional regime is founded on the equality of and between spouses. Each of them is entitled to the same liberty which Part III guarantees. Each of them is entitled to take decisions in accordance with his and her conscience and each must have the ability to pursue the human desire for fulfilment. Section 497 is based on the understanding that marriage submerges the identity of the woman. It is based on a notion of marital subordination. In recognising, accepting and enforcing these notions, Section 497 is inconsistent with the ethos of the Constitution. Section 497 treats a woman as but a possession of her spouse. The essential values on which the Constitution is founded - liberty, dignity and equality - cannot allow such a view of marriage. Section 497 suffers from manifest arbitrariness.

**169.** While engrafting the provision into Chapter XX of the Penal Code - “of offences relating to marriage” - the legislature has based the offence on an implicit assumption about marriage. The notion which the law propounds and to which it imposes the sanctions of penal law is that the marital tie subordinates the role and position of the woman. In that view of marriage, the woman is bereft of the ability to decide, to make choices and give free expression to her personality. Human sexuality is an essential aspect of identity. Choices in matters of sexuality are reflective of the human desire for expression. Sexuality cannot be construed purely as a physiological attribute. In its associational attributes, it links up with the human desire to be intimate with a person of one's choice. Sharing of physical intimacies is a reflection of choice. In allowing individuals to make those choices in a consensual sphere, the Constitution acknowledges that even in the most private of zones, the individual must have the ability to make essential decisions. Sexuality cannot be dis-associated from the human personality. For, to be human involves the ability to fulfil sexual desires in the pursuit of happiness. Autonomy in matters of sexuality is thus intrinsic to a dignified human existence. Human dignity both recognises and protects the autonomy of the individual in making sexual choices. The sexual choices of an individual cannot obviously be imposed on others in society and are premised on a voluntary acceptance by consenting parties. Section 497 denudes the woman of the ability to make these fundamental choices, in postulating that it is only the man in a marital relationship who can consent to his spouse having sexual intercourse with another. Section 497 disregards the sexual autonomy which every woman possesses as a necessary condition of her existence. Far from being an equal partner in an equal relationship, she is subjugated entirely to the will of her spouse. The provision is proffered by the legislature as an effort to protect the institution of marriage. But it proceeds on a notion of marriage which is one sided and which denies agency to the woman in a marital tie. The ability to make choices within marriage and on every aspect concerning it is a facet of human liberty and dignity which the Constitution protects. In depriving the woman of that ability and recognising it in the man alone, Section 497 fails to meet the essence of substantive equality in its application to marriage. Equality of rights and entitlements between parties to a marriage is crucial to preserve the values of the Constitution. Section 497 offends that substantive sense of equality and is violative of Article 14.

...

#### F. “THE GOOD WIFE”

**175.** Article 15 of the Constitution reads thus:

**“15. *Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.* -**

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, **sex**, place of birth or any of them.”

(emphasis supplied)

Article 15 prohibits the State from discriminating on grounds only of sex. The Petitioners contend that (i) Section 497, in so far as it places a husband and wife on a different footing in a marriage perpetuates sex discrimination; (ii) Section 497 is based on the patriarchal conception of the woman as property, entrenches gender stereotypes, and is consequently hit by Article 15.

...

**178.** A married man may engage in sexual relations with an unmarried woman who is not his wife without the fear of opening his partner to prosecution and without the consent of his spouse. No recourse is provided to a woman against her husband who engages in sexual relations outside marriage. The effect of Section 497 is to allow the sexual agency of a married woman to be wholly dependent on the consent or connivance of her husband. Though Section 497 does not punish a woman engaging in adultery as an abettor, a married man and a married woman are placed on different pedestals in respect to their actions. The effect of Section 497, despite granting immunity from prosecution to the married woman, is to attach a notion of wrongdoing to the exercise of her sexual agency. Despite exempting her from prosecution, the exercise of her sexual agency is contingent on the consent or connivance of the husband. A husband is considered an aggrieved party by the law if his wife engages in sexual intercourse with another man, but the wife is not, if her husband does the same. Viewed from this angle, Section 497 discriminates between a married man and a married woman to her detriment on the ground of sex. This kind of discrimination is prohibited by the non-discrimination guarantee in Article 15 of the Constitution. Section 497 also places a woman within marriage and the man with whom she shares a sexual relationship outside marriage on a different footing.

**179.** Section 497 criminalizes the conduct of the man who has sexual intercourse with the wife of another without his consent. It exempts women from criminal liability. Underlying this exemption is the notion that women, being denuded of sexual agency, should be afforded the ‘protection’ of the law. In criminalizing the accused who engages in the sexual relationship, the law perpetuates a gender stereotype that men, possessing sexual agency are the seducers, and that women, as passive beings devoid of sexual agency, are the seduced. The notion that a woman is ‘submissive’, or worse still ‘naïve’ has no legitimacy in the discourse of a liberal constitution. It is deeply offensive to equality and destructive of the dignity of the woman. On this stereotype, Section 497 criminalizes only the accused man.

...

**181.** Underlying Section 497 is a gender stereotype that the infidelity of men is normal, but that of a woman is impermissible. In condemning the sexual agency of the woman, only the husband, as the ‘aggrieved’ party is given the right to initiate prosecution. The proceedings once initiated, would be geared against the person who committed an act of ‘theft’ or ‘trespass’ upon his spouse. Sexual relations by a man with another man's wife is therefore considered as theft of the husband's property. Ensuring a man's control over the sexuality of his wife was the true purpose of Section 497.

**182.** Implicit in seeking to privilege the fidelity of women in a marriage, is the assumption that a woman contracts away her sexual agency when entering a marriage. That a woman, by marriage, consents in advance to sexual relations with her husband or to refrain from sexual relations outside marriage without the permission of her husband is offensive to liberty and dignity. Such a notion has no place in the constitutional order. Sexual autonomy constitutes an inviolable core of the dignity of every individual. At the heart of the constitutional rights guaranteed to every individual is a primacy of choice and the freedom to determine one's actions. Curtailing the sexual autonomy of a woman or presuming the lack of consent once she enters a marriage is antithetical to constitutional values.

...

**186.** Section 497 rests on and perpetuates stereotypes about women and sexual fidelity. In curtailing the sexual agency of women, it exacts sexual fidelity from women as the norm. It perpetuates the notion that a woman is passive and incapable of exercising sexual freedom. In doing so, it offers her ‘protection’ from prosecution. Section 497 denudes a woman of her sexual autonomy in making its free exercise conditional on the consent of her spouse. In doing so, it perpetuates the notion that a woman consents to a limited autonomy on entering marriage. The provision is grounded in and has a deep social effect on how society perceives the sexual agency of women. In reinforcing the patriarchal structure which demands her controlled sexuality, Section 497 purports to serve as a provision envisaged for the protection of the sanctity of marriage. In the context of a constitutional vision characterized by the struggle to break through the shackles of gender stereotypes and guarantee an equal citizenship, Section 497 entrenches stereotypes and existing structures of discrimination and has no place in a constitutional order.

...

**189.** Article 15(3) encapsulates the notion of “protective discrimination”. The constitutional guarantee in Article 15(3) cannot be employed in a manner that entrenches paternalistic notions of “protection”. This latter view of protection only serves to place women in a cage. Article 15(3) does not exist in isolation. Articles 14 to 18, being constituents of a single code on equality, supplement each other and incorporate a non-discrimination principle. Neither Article 15(1), nor Article 15(3) allow discrimination against women. Discrimination which is grounded in paternalistic and patriarchal notions cannot claim the protection of Article 15(3). In exempting women from criminal prosecution, Section 497 implies that a woman has no sexual agency and that she was “seduced” into a sexual relationship. Given the presumed lack of sexual agency, criminal exemption is then granted to the woman in order to “protect” her. The “protection” afforded to women under Section 497 highlights the lack of sexual agency that the section imputes to a woman. Article 15(3) when read with the other Articles in Part III, serves as a powerful remedy to remedy the discrimination and prejudice faced by women for centuries. Article 15(3) as an enabling provision is intended to bring out substantive equality in the fullest sense. Dignity and autonomy are crucial to substantive equality. Hence, Article 15(3) does not protect a statutory provision that entrenches patriarchal notions in the garb of protecting women.

## G. DENUING IDENTITY - WOMEN AS SEXUAL PROPERTY

...

**192.** The right to privacy depends on the exercise of autonomy and agency by individuals. In situations where citizens are disabled from exercising these essential attributes, Courts must step in to ensure that dignity is realised in the fullest sense. Familial structures cannot be regarded as private spaces where constitutional rights are violated. To grant immunity in situations when rights of individuals are in siege, is to obstruct the unfolding vision of the Constitution.

**193.** The opinion delivered on behalf of four Judges in *K.S. Puttaswamy (Privacy-9J.) v. Union of India* [*K.S. Puttaswamy (Privacy-9J.) v. Union of India*, (2017) 10 SCC 1] has recognised the dangers of the “use of privacy as a veneer for patriarchal domination and abuse of women”. On the delicate balance between the competing interests of protecting privacy as well as dignity of women in the domestic sphere, the Court held: (SCC p. 471, para 246)

“246. ... The challenge in this area is to enable the State to take the violation of the dignity of women in the domestic sphere seriously while at the same time protecting the privacy entitlements of women grounded in the identity of gender and liberty.”

...

**195.** Control over women's sexuality is the key patriarchal assumption that underlies family and marriage. [ Nivedita Menon, *Seeing like a Feminist*, (Zubaan Books 2012) p. 35.] When it shifts to the “public” as opposed to the “private”, the misogyny becomes even more pronounced. [ Nivedita Menon, *Seeing like a Feminist*, (Zubaan Books 2012) p. 35.] Section 497 embodies this. By the operation of the provision, women's sexuality is sought to be controlled in a number of ways. First, the husband and he alone is enabled to prosecute the man with whom his wife has sexual relations. Even in cases where the relationship is based on the consent of the woman, the law treats it as an offence, denying a woman who has voluntarily entered into a consensual relationship of her sexual agency. Second, such a relationship would be beyond the reach of penal law if her husband consents to it. The second condition is a telling reflection of the patriarchal assumption underlying the criminal provision: that the husband is the owner of the wife's sexual agency.

**196.** In remedying injustices, the Court cannot shy away from delving into the “personal”, and as a consequence, the “public”. It becomes imperative for us to intervene when structures of injustice and persecution deeply entrenched in patriarchy are destructive of constitutional freedom. But, in adjudicating on the rights of women, the Court is not taking on a paternalistic role and “granting” rights. The Court is merely interpreting the text of the Constitution to re-state what is already set in ink—women are equal citizens of this nation, entitled to the protections of the Constitution. Any legislation which results in the denial of these constitutional guarantees to women, cannot pass the test of constitutionality.

**197.** Patriarchy and paternalism are the underpinnings of Section 497. It needs no iteration that misogyny and patriarchal notions of sexual control find no place in a constitutional order which has recognised dignity as intrinsic to a person, autonomy being an essential component of this right. The operation of Section 497 denotes that “adulterous women” virtually exercise no agency; or at least not enough agency to make them criminally liable. [ Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India*, (Sage Publications 1996) p. 119.] They are constructed as victims. As victims, they are to be protected by being exempt from sanctions of a criminal nature. [ Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India*, (Sage Publications 1996) p. 119.] Not only is there a denial of sexual agency, women are also not seen to be harmed by the offence. [ Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India*, (Sage Publications 1996) p. 119.] Thus, the provision is not simply about protecting the sanctity of the marital relationship. It is all about protecting a husband's interest in his “exclusive access to his wife's sexuality”. [ *Id*, p. 120.]

**198.** Section 497 chains the woman to antediluvian notions of sexuality. Dipak Misra, C.J. in *Navtej Johar v. Union of India*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1] emphasised the importance of sexual autonomy as a facet of individual liberty, thus protected under Article 21 of the Constitution: (SCC p. 138, para 245)

“245. The sexual autonomy of an individual to choose his/her sexual partner is an important pillar and an inseparable facet of individual liberty. When the liberty of even a single person of the society is smothered under some vague and archaic stipulation that it is against the order of nature or under the perception that the majority population is peeved when such an individual exercises his/her liberty despite the fact that the exercise of such liberty is within the confines of his/her private space, then the signature of life melts and living becomes a bare subsistence and resultantly, the fundamental right of liberty of such an individual is abridged.”

**199.** In *Navtej [Navtej Singh Johar v. Union of India]*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1], one of us (Chandrachud, J.) held that the recognition of the autonomy of an individual is an acknowledgment of the State's respect for the capacity of the individual to make individual choices: (SCC p. 237, para 474)

“474. The right to privacy enables an individual to exercise his or her autonomy, away from the glare of societal expectations. The realisation of the human personality is dependent on the autonomy of an individual. In a liberal democracy, recognition of the individual as an autonomous person is an acknowledgment of the State's respect for the capacity of the individual to make independent choices. The right to privacy may be construed to signify that not only are certain acts no longer immoral, but that there also exists an affirmative moral right to do them. [ David A.J. Richards, “Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution”, *Hastings Law Journal*, Vol. 30, at pp. 1000-1001.] ”

To characterise a woman as a passive object, denuded of agency, is a denial of autonomy. The same judgment in *Navtej [Navtej Singh Johar v. Union of India]*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1] has recognised sexual choices as an essential attribute of autonomy, intimately connected to the self-respect of the individual: (SCC pp. 238-39, para 477)

“477. In order to understand how sexual choices are an essential attribute of autonomy, it is useful to refer to John Rawls' theory on social contract. Rawls' conception of the “Original Position” serves as a constructive model to illustrate the notion of choice behind a “partial veil of ignorance [ Thomas M. Jr. Scanlon, “Rawls' Theory of Justice”, *University of Pennsylvania Law Review* (1973) at p. 1022.] .” Persons behind the veil are assumed to be rational and mutually disinterested individuals, unaware of their positions in society. [ *Id.*, p. 1023.] The strategy employed by Rawls is to focus on a category of goods which an individual would desire irrespective of what individuals' conception of “good” might be. [ *Id.*, p. 1023.] These neutrally desirable goods are described by Rawls as “primary social goods” and may be listed as rights, liberties, powers, opportunities, income, wealth, and the constituents of self-respect. [ *Id.*, p. 1023.] *Rawls's conception of self-respect, as a primary human good, is intimately connected to the idea of autonomy.* [Ed.: David A.J. Richards, “Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution”, *Hastings Law Journal*, Vol. 30 at p. 971.] *Self-respect is founded on an individual's ability to exercise her native capacities in a competent manner.* [ *Ibid.* p. 972.] ”

(emphasis supplied)

### G.1 Exacting fidelity: The intimacies of marriage

...

**202.** Section 497 seeks the preservation of a construct of marriage in which female fidelity is enforced by the letter of the law and by the coercive authority of the state. Such a conception goes against the spirit of the rights-based jurisprudence of this Court, which seeks to protect the dignity of an individual and her “intimate personal choices”. It cannot be held that these rights cease to exist once the woman enters into a marriage.

**203.** The identity of the woman must be as an “individual in her own right”. In that sense, her identity does not get submerged as a result of her marriage. Section 497 lays down the norm that the identity of a married woman is but as the wife of her spouse. Underlying the norm is a notion of control over and subjugation of the woman. Such notions cannot withstand scrutiny under a liberal Constitution. Dipak Misra, C.J. in *Navtej [Navtej Singh Johar v. Union of India]*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1] has drawn on the interrelationship between “identity” and “autonomy”: (SCC p. 115, para 161)

“161. ... Autonomy is individualistic. ... Under the autonomy principle, the individual has sovereignty over his/her body. He/she can surrender his/her autonomy wilfully to another individual and their intimacy in privacy is a matter of their choice. Such concept of identity is not only sacred but is also in recognition of the quintessential facet of humanity in a person's nature. The autonomy establishes identity and the said identity, in the ultimate eventuate, becomes a part of dignity in an individual. This dignity is special to the man/woman who has a right to enjoy his/her life as per the constitutional norms and should not be allowed to wither and perish like a mushroom. It is a directional shift from conceptual macrocosm to cognizable microcosm. When such culture grows, there is an affirmative move towards a more inclusive and egalitarian society.”

**204.** This Court in *Puttaswamy [K.S. Puttaswamy (Privacy-9J.) v. Union of India]*, (2017) 10 SCC 1] has elucidated that privacy is the entitlement of every individual, with no distinction to be made on the basis of the individual's position in society: (SCC p. 484, para 271)

“271. ... Every individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects. It is privacy as an intrinsic and core feature of life and personal liberty which enables an individual to stand up against a programme of forced sterilisation. Then again, it is privacy which is a powerful guarantee if the State were to introduce compulsory drug trials of non-consenting men or women. The sanctity of marriage, the liberty of procreation, the choice of a family life and the dignity of being are matters which concern every individual irrespective of social strata or economic well-being. The pursuit of happiness is founded upon autonomy and dignity. Both are essential attributes of privacy which makes no distinction between the birth marks of individuals.”

**205.** It would be useful to refer to decisions of this Court which have emphasised on the freedoms of individuals with respect to choices in relationships. In *Navtej [Navtej Singh Johar v. Union of India]*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1] , Dipak Misra, C.J. highlighted the indignity suffered by an individual when “acts within their personal sphere” are criminalised on the basis of regressive social attitudes: (SCC p. 111, para 147)

“147. ... An individual's choice to engage in certain acts within their private sphere has been restricted by criminalising the same on account of the age-old social perception. To harness such an essential decision, which defines the individualism of a person, by tainting it with criminality would violate the individual's right to dignity by reducing it to mere letters without any spirit.”

The Chief Justice observed that the “organisation of intimate relations” between “consenting adults” is a matter of complete personal choice and characterised the “private protective sphere and realm of individual choice and autonomy” as a personal right: (SCC p. 140, para 255)

“255. ... It is true that the principle of choice can never be absolute under a liberal Constitution and the law restricts one individual's choice to prevent harm or injury to others. *However, the organisation of intimate relations is a matter of complete personal choice especially between consenting adults. It is a vital personal right falling within the private protective sphere and realm of individual choice and autonomy. Such progressive proclivity is rooted in the constitutional structure and is an inextricable part of human nature.*”

(emphasis supplied)

**206.** In *Shakti Vahini [Shakti Vahini v. Union of India]*, (2018) 7 SCC 192 : (2018) 3 SCC (Civ) 580 : (2018) 3 SCC (Cri) 1] , this Court has recognised the right to choose a partner as a fundamental right under Articles 19 and 21 of the Constitution. In *Shafin Jahan [Shafin Jahan v. Asokan K.M.]*, (2018) 16 SCC 368 : (2019) 1 SCC (Civ) 446] , “intimate personal choices” were held to be a protected sphere, with one of us (Chandrachud, J.) stating: (*Shafin Jahan case [Shafin Jahan v. Asokan K.M.]*, (2018) 16 SCC 368 : (2019) 1 SCC (Civ) 446] , SCC p. 405, para 84)

“84. ... The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable.”

**207.** In *Navtej [Navtej Singh Johar v. Union of India]*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1] , one of us (Chandrachud, J.) held that the right to sexual privacy is a natural right, fundamental to liberty and a soulmate of dignity. The application of Section 497 is a blatant violation of these enunciated rights. Will a trial to prove adultery lead the wife to tender proof of her fidelity? In *Navtej [Navtej Singh Johar v. Union of India]*, (2018) 10 SCC 1 : (2019) 1 SCC (Cri) 1] , the principle was elucidated thus: (SCC p. 289, para 613)

“613. ... In protecting consensual intimacies, the Constitution adopts a simple principle: the State has no business to intrude into these personal matters.”

Insofar as two individuals engage in acts based on consent, the law cannot intervene. Any intrusion in this private sphere would amount to deprivation of autonomy and sexual agency, which every individual is imbued with.

**208.** In *Puttaswamy [K.S. Puttaswamy (Privacy-9J.) v. Union of India]*, (2017) 10 SCC 1], it was recognised that a life of dignity entails that the “inner recesses of the human personality” be secured from “unwanted intrusion”: (SCC p. 413, para 127)



“127. ... The right to privacy is an element of human dignity. The sanctity of privacy lies in its functional relationship with dignity. Privacy ensures that a human being can lead a life of dignity by securing the inner recesses of the human personality from unwanted intrusion. Privacy recognises the autonomy of the individual and the right of every person to make essential choices which affect the course of life. In doing so privacy recognises that living a life of dignity is essential for a human being to fulfil the liberties and freedoms which are the cornerstone of the Constitution.”

**209.** In criminalising adultery, the legislature has imposed its imprimatur on the control by a man over the sexuality of his spouse. In doing that, the statutory provision fails to meet the touchstone of Article 21. Section 497 deprives a woman of her autonomy, dignity and privacy. It compounds the encroachment on her right to life and personal liberty by adopting a notion of marriage which subverts true equality. Equality is subverted by lending the sanctions of the penal law to a gender biased approach to the relationship of a man and a woman. The statute confounds paternalism as an instrument for protecting marital stability. It defines the sanctity of marriage in terms of a hierarchical ordering which is skewed against the woman. The law gives unequal voices to partners in a relationship.

**210.** This judgment has dwelt on the importance of sexual autonomy as a value which is integral to life and personal liberty under Article 21. Individuals in a relationship, whether within or outside marriage, have a legitimate expectation that each will provide to the other the same element of companionship and respect for choices. Respect for sexual autonomy, it must be emphasised is founded on the equality between spouses and partners and the recognition by each of them of the dignity of the other. Control over sexuality attaches to the human element in each individual. Marriage—whether it be a sacrament or contract—does not result in ceding of the autonomy of one spouse to another

**212.** ...The sexuality of a woman is part of her inviolable core. Neither the State nor the institution of marriage can disparage it. By reducing the woman to the status of a victim and ignoring her needs, the provision penalising adultery disregards something which is basic to human identity. Sexuality is a definitive expression of identity. Autonomy over one's sexuality has been central to human urges down through the ages. It has a constitutional foundation as intrinsic to autonomy. It is in this view of the matter that we have concluded that Section 497 is violative of the fundamental rights to equality and liberty as indeed, the right to pursue a meaningful life within the fold of Articles 14 and 21.

...

**218.** This Court has recognised sexual privacy as a natural right, protected under the Constitution. To shackle the sexual freedom of a woman and allow the criminalisation of consensual relationships is a denial of this right. Section 497 denudes a married woman of her agency and identity, employing the force of law to preserve a patriarchal conception of marriage which is at odds with constitutional morality:

“Infidelity was born on the day that natural flows of sexual desire were bound into the legal and formal permanence of marriage; in the process of ensuring male control over progeny and property, women were chained within the fetters of fidelity.” [ Nivedita Menon, *Seeing like a Feminist*, (Zubaan Books 2012) p. 135; quoting Archana Verma, *Stree Vimarsh Ke Mahotsav* (2010).]

Constitutional protections and freedoms permeate every aspect of a citizen's life — the delineation of private or public spheres become irrelevant as far as the enforcement of constitutional rights is concerned. Therefore, even the intimate personal sphere of marital relations is not exempt from constitutional scrutiny. The enforcement of forced female fidelity by curtailing sexual autonomy is an affront to the fundamental right to dignity and equality.

**219.** Criminal law must be in consonance with constitutional morality. The law on adultery enforces a construct of marriage where one partner is to cede her sexual autonomy to the other. Being antithetical to the constitutional guarantees of liberty, dignity and equality, Section 497 does not pass constitutional muster.

**220.** We hold and declare that:

**220.1.** Section 497 lacks an adequately determining principle to criminalise consensual sexual activity and is manifestly arbitrary. Section 497 is a denial of substantive equality as it perpetuates the subordinate status ascribed to women in marriage and society. Section 497 violates Article 14 of the Constitution;

**220.2.** Section 497 is based on gender stereotypes about the role of women and violates the non-discrimination principle embodied in Article 15 of the Constitution;

**220.3.** Section 497 is a denial of the constitutional guarantees of dignity, liberty, privacy and sexual autonomy which are intrinsic to Article 21 of the Constitution; ...

...

## IN THE HIGH COURT OF MADRAS

**Krishnaraj v. Sathyapriya**

**Civil Miscellaneous Appeal No. 127/2017, decided on January 10, 2019**

**R. Subbiah and C. Saravanan, JJ.**

***The appellant (husband) filed a petition for divorce on the ground of cruelty, arguing inter alia that the respondent (wife) had stopped having sexual relations with him. The couple had been married for 16 years when the petition was filed.***

**Subbiah, J.:** “...

13. The present appeal arises out of the order passed by the Family Court...filed by the appellant for dissolution of the marriage with the respondent on the ground of cruelty. This Petition was filed by the appellant by mainly contending that the respondent refused him conjugal bliss and cohabitation, thereby he was subjected to matrimonial cruelty. In order to lend support to this averment of the appellant, the learned counsel for the appellant placed reliance on the decision of the Division Bench of this Court in the case of (*S. Indirakumari vs. S.Subbaiah*) reported in 2003 (1) CTC 259 wherein it was held that wilful refusal to have sexual intercourse by the wife amounts to cruelty. We are in respectful agreement with the ratio laid down by the Division Bench of this Court in the aforesaid decision, however, the facts, on the basis of which the said decision was laid, is inapplicable to the facts of the present case. In that decision, the Division Bench of this Court had an occasion to consider the refusal of the wife to cohabit with the husband on the nuptial night and during the subsequent days. Further in that case, the husband and wife lived together only for seven days after the marriage. During the course of examination of the wife in that case, she admitted that there was no consummation of marriage during the short period of seven days when they lived together. It is in those circumstances, the Division Bench of this Court has held that wilful refusal on the part of the wife, soon after the marriage, would amount to cruelty. The ratio laid down in that case cannot be ipso facto applied in this case. In the present case, the marriage was consummated and due to the wedlock between the appellant and the respondent, a girl child was born. Further, the marriage between the appellant and the respondent was solemnised on 04.09.1998 and after sixteen years, the present petition has been filed by the appellant before the Family Court on 22.12.2014 alleging that the respondent neglects him and refused conjugal bliss. In effect, after sixteen years of the marriage, the appellant has filed the Original Petition contending that the respondent had refused him conjugal bliss. Refusal of one of the spouse to cooperate in the conjugal relationship soon after the marriage can be considered as one of the grounds for dissolution of the marriage and a ground of cruelty. However, the same yardstick cannot be applied after sixteen long years of marriage between the appellant and the respondent. Alleged lack of cooperation of the respondent to reciprocate and yield to the physical desire of the appellant long after sixteen years of marriage cannot amount to cruelty by the respondent. It may be due to several factors such as age, physical inability, commitment towards the children or family, aversion or lassitude or lack of libido to get physical intimacy over a period of time etc. This is a natural phenomenon on account of several reasons including ageing and no one can be blamed for it. The appellant has refused to gracefully acknowledge the changes associated with the ageing and the challenges which the life exposes. There is a lack of acceptance on the part of the appellant. This is more so that after the birth of the child and by passage of time, the other essence in family life gain significance and the frequency of physical relationship between the couple would witness a slowdown in the normal marriage life, but, it cannot be regarded as a ground for dissolution of marriage. Even in the decision rendered by the Division Bench of this Court relied on by the counsel for the appellant in *Indirakumari's* case mentioned supra, it was held that normal and healthy sexual relationship is one of the basic ingredients for a happy and harmonious marriage. However, denial of the same on account of ill health of one spouse may not amount to cruelty and it depends upon the facts and circumstances of each case. Therefore, having regard to the above ratio laid down by the Division Bench of this Court to the facts of this case, we hold that the appellant cannot succeed in his plea that after sixteen years of marriage he was refused cohabitation and on that ground he is entitled for decree of divorce.

...

## Endnotes

- 1 See: Joseph Shine v. Union of India, (2019) 3 SCC 39; Navtej Singh Johar v. Union of India, (2018) 10 SCC 1; Justice K.S. Puttaswamy – I v. Union of India, (2017) 10 SCC 1; Independent Thought v. Union of India, (2017) 10 SCC 800; Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1..
- 2 Joseph Shine v. Union of India, (2019) 3 SCC 39.
- 3 Section 497, Indian Penal Code, 1860. The Section provided criminal penalties only for a male non-marital partner of the wife, and not for the wife herself.
- 4 By matrimonial laws, reference is to provisions relating to separation, and termination of marriages under personal laws.
- 5 There are certain exceptions to this proposition. For example, all laws on divorce recognize divorce on the basis of mutual consent. See Section 13B, Hindu Marriage Act, 1955; Section 28, Special Marriage Act, 1954; Section 10A, Indian Divorce Act, 1869; Section 2 (ix), Dissolution of Muslim Marriage Act, 1939; Section 32B, Parsi Marriage and Divorce Act, 1936. In recent cases, the Supreme Court has in extraordinary cases granted divorce on the ground of “irretrievable breakdown of marriage.” See *e.g.*, Naveen Kohli v. Neelu Kohli, AIR 2006 SC 1675. However, except for these exceptional situations, in contested divorce cases, the party seeking divorce has to establish that the other party is at fault.
- 6 Note that non-consummation of a marriage is a ground for nullifying a marriage. See *e.g. for instance*: Section 12(1)(a) of the Hindu Marriage Act, 1955 states that a marriage shall be voidable and may be annulled by a decree of nullity if it has not been consummated owing to the impotence of the respondent; Section 25(i) of the Special Marriage Act, 1954 states that a marriage shall be voidable and may be annulled by a decree of nullity if the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage.
- 7 See Joseph Shine v. Union of India, (2019) 3 SCC 39.
- 8 (2007) 4 SCC 511.
- 9 (2014) 15 SCC 221.
- 10 (2012) 188 DLT 1.
- 11 2016 SCC OnLine Del 5425.
- 12 2013 SCC OnLine Bom 1546.
- 13 Civil Miscellaneous Appeal No. 127/2017, decided on Jan. 1, 2019 (High Court of Madras). (Date of Judgment: 10.01.2019).
- 14 2014 SCC OnLine HP 3950.
- 15 AIR 2013 Kar 41.
- 16 ILR (2012) 2 P&H 446.
- 17 Civil Appeal No. 4704/2013, decided on Oct. 27, 2017, by a bench comprising Chief Justice Dipak Misra, Justice A.M. Khanwilkar and Dr. Justice D.Y. Chandrachud.
- 18 (2018) 11 SCC 572.
- 19 *Id.*, 604.
- 20 See *e.g.* Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511 (where the Supreme Court in providing a non-exhaustive list of circumstances which may amount to “cruelty” mentions abortion without the consent or knowledge of the husband as one such circumstance); Satya v. Siri Ram, AIR 1983 P&H 252 (where the court held that the wife terminating the pregnancy, in spite of the desire of the husband and his family to have a child, amounts to cruelty. It ruled that if the wife “deliberately and consistently refuses to satisfy” the “natural and legitimate” craving of the husband to have a child, cruelty is made out); Sushil Kumar Verma v. Smt. Usha, AIR 1987 Del 86 (where the Court held that one of the primary objectives of marriage is to have children. Abortion, especially in the first pregnancy, without the consent of the husband would amount to cruelty).
- 21 Section 9, Hindu Marriage Act, 1955.
- 22 AIR 1983 AP 356.
- 23 (1984) 4 SCC 90.
- 24 Harvinder Kaur v. Harmander Singh Choudhry, AIR 1984 Del 66.
- 25 (2017) 10 SCC 1.
- 26 (2019) 3 SCC 39.
- 27 U.N. Office of the High Commissioner for Human Rights, “Status of Ratification Interactive Dashboard—India,” <http://indicators.ohchr.org/>.
- 28 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained in U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001), Arts. 3-4.*
- 29 Vishaka v. State of Rajasthan, AIR 1997 SC 3011.
- 30 The SLP filed in the Supreme Court against this order of the High Court was dismissed by the Supreme Court (Civil Appeal No. 4704 of 2013, decided on Oct. 27, 2017 (Supreme Court)). See the “Cover Note” for a discussion on the issue of spousal/parental consent before terminating a pregnancy.



# CHAPTER TEN

# MATERNAL HEALTH

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Maternal health, meaning the “*health of women during pregnancy, childbirth and the postpartum period*,”<sup>1</sup> has been recognized by Indian courts as being protected by the right to health, which is a facet of right to life under Article 21 of the Indian Constitution.<sup>2</sup> The Constitution also mandates the State to provide maternity relief to women under Article 42, which has been interpreted to include providing adequate maternal health services.<sup>3</sup> Indian courts have also relied upon international human rights instruments to understand the scope of this right, and the corresponding obligations upon the State. In keeping with these obligations, the State has put in place various schemes and structures for providing maternal health services, especially to impoverished women. Despite these, women face routine denials or lack of access to effective maternal health care services. In this chapter we analyze courts’ responses to such denial of access. We note here that High Courts across the country are engaged in adjudicating cases relating to denial of access to maternal healthcare services. However, many such cases are ongoing and as yet contain no substantive orders laying down any jurisprudence or provide any substantive remedy beyond seeking a reply or a compliance report from the State.<sup>4</sup> Such cases have not been included in the Compendium.

A case that highlights both the articulation of the right to maternal health, as well as the Court’s response to the violation of this right, is ***Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors.***<sup>5</sup> This case involved two petitions before the Delhi High Court challenging the government’s failure to ensure that pregnant women are able to access essential services and entitlements guaranteed under various government benefit schemes.<sup>6</sup> The two petitions also sought accountability for the denial of access to minimum health care to two women during the critical weeks preceding their delivery at home and in public health institutions, causing the maternal death of one of them. Locating these schemes within a matrix of constitutional and international human rights obligations of the State, the High Court reiterated that the right to health (including the right to access and receive a minimum standard of treatment and care in public health facilities), the reproductive rights of women, and the right to food are inalienable survival rights forming part of the right to life. Based on this understanding, the Court held that a pregnant woman should not be denied treatment at any stage irrespective of her social and economic status, or on the basis of her failure to produce appropriate identification documents. The Court also questioned the rationality of denying certain forms of assistance to women beyond two live births in a social milieu where women often have little choice as to whether to have a third child or not. Further, the Court issued a number of directions for strengthening the implementation of these schemes, such as directing the State to provide safe and prompt transportation to and from health care facilities for pregnant women.

Similarly, in ***Sandesh Bansal v. Union of India***,<sup>7</sup> the petitioners highlighted the poor implementation of the National Rural Health Mission (NRHM) in Madhya Pradesh and the state government’s failure to meet its goal of reducing the maternal mortality ratio (MMR). The NRHM aims at improving public health in rural areas and seeks to provide accessible, affordable and quality health care to the rural population. It also seeks to reduce the MMR. Stating that inability to survive through pregnancy and childbirth violates women’s right to life under Article 21 of the Indian Constitution, the High Court of Madhya Pradesh recommended a number of measures to be undertaken by the state to ensure public health care centres are able to provide round the clock quality maternal health care services, including proper sanitation and uninterrupted electricity and water at health centres, adequate staffing at sub- and primary health centres, and 24-hour availability of community health workers at the Panchayat level. The Court also directed that state community health centres should be equipped with 30-50 beds and required staff and should provide 24 hours delivery services.

In ***Rinzing Chewang Kazi v. State of Sikkim***,<sup>8</sup> a public interest litigation was filed before the High Court of Sikkim seeking effective implementation of NRHM in the state. The Court, *inter alia*, directed that the Janani Suraksha Yojana and Janani Shishu Suraksha Karyakaram should be implemented in their letter and spirit. It also passed directions for regular maternal death reviews and community-based monitoring and for uploading necessary materials in this regard on the website of National Health Mission.

In ***People’s Union for Civil Liberties v. Union of India (Right to Food case)***,<sup>9</sup> petitioners questioned the legality of discontinuing the National Maternity Benefit Scheme (NMBS), including the cash benefit provided under it, and introducing the Janani Suraksha Yojana instead. In adjudicating this issue, the Supreme Court directed the state to continue the NMBS scheme and provide cash assistance to pregnant women irrespective of their age and number

of children. However, the Court also directed the Union of India to consider whether the grant of such a benefit regardless of the number of children and age of the pregnant woman went against the national population policy and the prohibition of child marriage.<sup>10</sup>

A Division Bench of the High Court of Delhi in *Court on Its Own Motion v. Union of India*,<sup>11</sup> initiated a *suo motu* public interest litigation based on a news report about the death of a destitute woman after giving birth to a child on the street. Holding that the Court cannot be a “silent spectator” when the inaction of the Government was leading to the deaths of destitute pregnant and lactating women on the streets, the Court issued several directions to protect destitute pregnant and lactating women, which included setting up of shelter homes and provision of medical facilities and mobile medical units for them.

The High Court of Chhattisgarh in *Kali Bai v. Union of India*,<sup>12</sup> was approached by a woman whose pregnant daughter died due to inadequate facilities and mismanagement at a public health facility where she was admitted for delivery. The Court held that the right to health includes the right to access public health facilities and the right to a minimum standard of treatment and care through such facilities. Noting that such right to health and the reproductive rights of women are inalienable components of Article 21, the Court emphasized that the identification of high-risk pregnancies, and the prompt referral of cases needing specialist care to institutions equipped to provide the same, were “indefensible components of access to protection and enforcement of reproductive rights.” To secure the implementation of these rights, the Court issued directions for the improvement of public health facilities, particularly the provision of emergency obstetric care.

These cases highlight that courts have been proactive in both recognizing the right to maternal health as a fundamental right, and in directing and overseeing the proper implementation of existing schemes for securing maternal health.

## Related Human Rights Standards and Jurisprudence

Below is a selection of human rights standards and jurisprudence relating to state obligations to ensure the rights of women and girls to appropriate care related to pregnancy and childbirth. Human rights mechanisms have emphasized that states have a duty to ensure that comprehensive maternal health care, including pre-, peri- and post-natal care, are available, affordable, accessible, and of good quality. States must also take steps to create a social and cultural environment conducive to realizing women’s rights to reproductive and maternal health, free from discrimination.

The Government of India has committed itself to comply with obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR).<sup>13</sup> Under international law all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.<sup>14</sup> The Supreme Court has held that in light of the obligation to “foster respect for international law” in Article 51 (c) of the Indian Constitution, “[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”<sup>15</sup>

### INTERNATIONAL TREATY STANDARDS

#### TREATIES

- **ICESCR, Articles 2(2), 3, 10(2), 12** (prohibiting sex-based discrimination; guaranteeing the right to health, including access for all to medical service when ill).
- **ICCPR, Articles 2(1), 3, 5, 6, 17** (guaranteeing the equal rights of men and women and prohibiting discrimination on the basis of sex; protecting the rights to life and privacy, to found a family, and to equality between spouses).

- **CEDAW, Articles 1-4, 5(b), 9(2), 10(h), 11(2), 12, 13(1), 14(2)(b), 16(e)** (guaranteeing women's rights to equality irrespective of marital status, to health, and to determine the number and spacing of children; specifying that the state must "ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation" and extend all human rights, including access to health care, to rural women).
- **Convention on the Rights of the Child, Articles 24(2)(a), 24(2)(d)–(f), 24(4)** (outlining that States must "ensure appropriate pre-natal and post-natal health care for mothers", strive to reduce infant and child mortality, develop family planning education and services that teach the advantages of breastfeeding, and cooperate internationally between countries in order to realize these goals).

## SELECTED GENERAL COMMENTS

- **Committee for Economic Social and Cultural Rights (CESCR), General Comment No. 22 (2016) on the right to sexual and reproductive health**, U.N. Doc. E/C.12/GC/22 (2016), paras. 9-21, 27-28, 45, 48, 57 (providing that sexual and reproductive health care, including maternal care, must be available, accessible, acceptable and of good quality including to adolescents; and obliging states to eliminate social misconceptions, prejudices and taboos concerning pregnancy and childbirth and to guarantee access to maternal health care, emergency obstetric care, and skilled birth attendants, including in rural areas and for marginalized groups).
- **CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)**, U.N. Doc. E/C.12/2000/4 (2000), paras. 12, 14, 21, 44(a), 52 (outlining that the right to health entitles individuals to available, accessible, acceptable and good quality health care information, facilities, goods and services on a basis of non-discrimination; requiring states to take "measures to improve child and maternal health, [...] including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information;" and highlighting that in order to eliminate discrimination against women, states should aim to reduce maternal mortality and morbidity, remove all barriers to access health services and information, and prevent and remediate harmful traditional practices).
- **CEDAW Committee, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19**, U.N. Doc. CEDAW/C/GC/35 (2017), paras. 12, 18, 20, 38, 40(c) (recognizing that "abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services [...], depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment").
- **CEDAW Committee, General Recommendation No. 34 on the rights of rural women**, U.N. Doc. CEDAW/C/GC/34 (2016), paras. 38-39 (calling on states to safeguard maternal health for rural women).
- **CEDAW Committee, General Recommendation No. 24: Article 12 of the Convention (women and health)**, U.N. Doc. A/54/38/Rev.1, chap. I (1999), paras. 9-15, 17, 20-22, 26-31 (describing state duties to ensure access to health care that respects the rights to informed consent, autonomous decision-making, and freedom from discrimination, and to ante-, peri- and post-natal care, including to free care where necessary; requiring states to budget adequately for women's health needs; outlining that health care systems are discriminatory if they lack services to prevent and treat health conditions specific to women, with consideration for biological as well as socioeconomic differences affecting women; and detailing that high maternal mortality and morbidity rates indicate a breach of state duties).
- **Committee on the Rights of the Child (CRC), General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence**, U.N. Doc. CRC/C/GC/20 (2016), paras. 13, 27, 55, 59-60 (recognizing childbirth as a preventable cause of adolescent mortality and morbidity; outlining that states should ensure adolescents access to free, confidential, adolescent-responsive and non-discriminatory maternity and other reproductive health services). *See also CRC, General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, contained in* U.N. Doc. CRC/GC/2003/4 (2003), para. 27.
- **CRC, General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (article 24)**, U.N. Doc. CRC/C/GC/15 (2013), paras. 43-44, 51-57 (outlining states' obligation to respond to the health needs and rights of expectant and new mothers, including adolescent mothers, to nutrition, the monitoring of health conditions such as eclampsia and pre-eclampsia, and pre-, peri- and post-natal health care).



- **Human Rights Committee (HRC), *General comment No. 36 (2018) on article 6 of the ICCPR on the right to life***, U.N. Doc. CCPR/C/GC/36 (2018), paras. 8, 26 (outlining that the right to life requires ensuring the availability and accessibility of quality prenatal health care on a confidential basis and includes ensuring access to medical examinations and treatments designed to reduce maternal mortality).

## INQUIRIES AND INDIVIDUAL COMPLAINTS

- **CEDAW Committee, *Alyne da Silva Pimentel Teixeira v. Brazil*, Communication No. 17/2008**, U.N. Doc. CEDAW/C/49/D/17/2008 (2011), paras. 7.1-8 (in a case where an Afro-Brazilian woman died due to negligent medical care during pregnancy: holding the state responsible for upholding women's access to health care even when it delegates medical care to private institutions; finding that the violations of her rights to reproductive health and life also constituted discrimination on the basis of sex, race and socioeconomic class; and instructing the state to pay reparations, to ensure proper training and funding for medical institutions and personnel, and to ensure access to effective remedies where violations occur).

## UNITED NATIONS HUMAN RIGHTS EXPERT AND WORKING GROUP REPORTS

- **Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR Health), *Report of the SR Health***, U.N. Doc. E/CN.4/2004/49 (2004), paras. 14, 18, 29-31, 39, 41-44 (defining the right to reproductive health to include the right of access to maternal health care services, including services and information on family planning, pre- and post-natal care, and emergency obstetrics, and that such care must be cost-free where necessary, available in rural areas, based on informed consent and free of coercion, violence and discrimination).
- **SR Health, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Note by the Secretary-General***, U.N. Doc. A/60/348 (2005), paras. 8-9, 11, 15-16, 52-53 (outlining that the right to health includes the rights to maternal health and to care free from discrimination, as well as to effective accountability mechanisms that uphold these rights).
- **Working Group on the issue of discrimination against women in law and in practice, *Report of the Working Group on the issue of discrimination against women in law and in practice***, U.N. Doc. A/HRC/32/44 (2016), paras. 23, 26-34, 37-39, 61-64, 72, 74-75, 79, 89, 105-108 (outlining that in order to realize women's equality, states must ensure non-discriminatory, timely access to affordable, quality maternal health care, and protection from degrading treatment and violence both in and outside health care settings; calling on states to address intersectional discrimination faced by vulnerable subgroups of women, end discriminatory practices such as the criminalization of abortion and policies such as a lack of public funding or restrictive insurance coverage that undermine affordable access to health care services that only women need; and urging states to refrain from restrictive views of maternal health that ignore broader women's health needs such as access to nutrition throughout pregnancy and breastfeeding and the right to decide the circumstances of childbirth).

## REGIONAL CASE LAW

### EUROPEAN COURT OF HUMAN RIGHTS

- ***Konovalova v. Russia*, Application No. 37873/04 (2015)**, paras. 39-50 (where a woman giving birth was observed by medical students who also had access to her medical records, without the opportunity for her to give or withhold her consent: finding a violation of the right to private life).

### INTER-AMERICAN COURT OF HUMAN RIGHTS

- ***Xákmok Kásek Indigenous Community v. Paraguay*, Series C No 214, Merits, Reparations, and Costs (2010)**, paras. 231-234 (where the state's severe neglect of an indigenous community led to, *inter alia*, a woman's death after childbirth: underscoring that extreme poverty and lack of pre- and post-natal care leads to high maternal mortality and morbidity; holding that states must design health care policies to ensure that adequately trained medical personnel are able to prevent maternal mortality through adequate pre-, peri- and post-natal care, and ensure that cases of maternal mortality are adequately documented; and finding, *inter alia*, a violation of the right to life).

# RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

## IN THE SUPREME COURT OF INDIA

**People's Union for Civil Liberties v. Union of India**

**(2009) 16 SCC 149**

**Arijit Pasayat and S.H. Kapadia, JJ.**

***Through an earlier order in this case, the Supreme Court had directed that the National Maternity Benefit Scheme (NMBS) shall not be discontinued or restricted without its prior approval. The Union of India filed an interim application seeking permission to modify the NMBS and introduce a new scheme called Janani Suraksha Yojana (JSY). The People's Union for Civil Liberties (PUCL) filed an application questioning the legality of the discontinuation of the cash benefit under NMBS pursuant to introduction of JSY. The Court ruled that the benefits under the NMBS should continue and cash assistance should be provided to women who are below poverty line, irrespective of their age and number of children. Meanwhile, the Court directed Union of India to consider if the grant of such benefit would go against the national population policy.***

**Pasayat, J.:** "By this order two IAs Nos. 37 of 2004 and 54 of 2005 stand disposed of. IA No. 37 of 2004 is an application by the Union of India for permission to modify the National Maternity Benefit Scheme (in short "NMBS") and to introduce a new scheme called Janani Suraksha Yojana (in short "JSY"). IA No. 54 of 2005 is an application by the petitioner questioning legality of the discontinuation of the benefit under NMBS due to introduction of JSY. By order dated 27-4-2004 [*People's Union for Civil Liberties v. Union of India*, (2009) 16 SCC 598] this Court directed as follows:

"No Scheme ... in particular ... National Maternity Benefit Scheme shall be discontinued or restricted in any way without prior approval of the Court."

**2.** Again, by order dated 9-5-2005 [*People's Union for Civil Liberties v. Union of India*, (2009) 16 SCC 614] this Court directed as follows:

"By IA No. 37, permission is sought to modify the National Maternity Benefit Scheme (NMBS) and to introduce a new scheme, namely, Janani Suraksha Yojana (JSY). Whereas in IA No. 54, the prayer is that the Scheme should not be modified by reducing, abridging or qualifying in any way the social assistance entitlements created under the original scheme of NMBS for expecting BPL mothers, including cash entitlement of Rs 500 provided therein. We have requested learned Additional Solicitor General to place on record further material in the form of affidavit to effectively implement the new Scheme sought to be introduced. The further material shall include the approximate distance of Public Health Centre from the residential complexes and the facility of transportation, etc. The Commissioner shall also examine the matter in depth and file a report. The response to the application may be filed within eight weeks. Meanwhile, the existing National Maternity Benefit Scheme will continue."

**3.** The Government set a numerical ceiling of 57.5 lakh beneficiaries as the annual target for NMBS. However, the number of beneficiaries under JSY in 2006-2007 was only 26.2 lakhs i.e. 45.5% and in the year 2005-2006 this was as low as 5.7 lakhs i.e. 10%. ...

**4.** According to the Union of India, JSY was introduced to put a premium on the willingness of poor women to go in for institutional delivery instead of home delivery. But it was recognised that in the States with lower institutional delivery rates, one of the reasons for low performance have been lesser availability of facilities in the health centres, which acts as disincentive for the poor illiterate women to seek the services.

**5.** Pursuant to the order of this Court dated 9-5-2005 [*People's Union for Civil Liberties v. Union of India*, (2009) 16 SCC 614] the Commissioner had prepared a report.

**6.** After discussions with the Commissioner appointed by this Court, senior officials of the Central Government took a decision to modify JSY Scheme to continue benefits of NMBS and also to improve upon such benefits for non-institutional delivery, where the woman chooses to deliver her baby at home...

**7.** The table below gives details of the number of beneficiaries under JSY (all these would have received Rs 500 under NMBS irrespective of place of delivery) vis-à-vis the annual targets set by the Government of India for NMBS: ...

**8.** The Scheme as the details above go to show has virtually not taken off in many States.

...

**10.** At this juncture, the financial performance needs to be noted.

**11.** Janani Suraksha Yojana is a Centrally sponsored scheme with the Centre providing 100% of the funds. Some States e.g. Andhra Pradesh make their own contribution thereby increasing the amount of cash assistance for institutional deliveries. Tamil Nadu has introduced a separate scheme for providing mothers with Rs 1000 per month for six months i.e. three months prior to the delivery and three months after.

...

**13.** ... Only ten States spent more than 70% of the funds allocated to them under JSY.

**14.** At the time of hearing of the applications, learned counsel for the petitioner and the Union of India highlighted various aspects. Considering the submissions and the material data placed on record we direct as follows:

(a) The Union of India and all the State Governments and the Union Territories shall (i) continue with NMBS, and (ii) ensure that all BPL pregnant women get cash assistance 8-12 weeks prior to the delivery.

(b) The amount shall be Rs 500 per birth irrespective of number of children and the age of the woman.

(c) The Union of India, the State Governments and the Union Territories shall file affidavits within 8 weeks from today indicating the total number of births in the State, number of eligible BPL women who have received the benefits, number of BPL women who had home/non-institutional deliveries and have received the benefit, number of BPL women who had institutional deliveries and have received the benefit.

(d) The total number of resources [*sic* are] allocated and utilised for the period 2000-2006.

(e) All Governments concerned are directed to regularly advertise the revised scheme so that the intended beneficiaries can become aware of the Scheme.

(f) The Central Government shall ensure that the money earmarked for the Scheme is not utilised for any other purpose. The mere insistence on utilisation certificate may not yield the expected result.

(g) It shall be the duty of all concerned to ensure that the benefits of the Scheme reach the intended beneficiaries. In case it is noticed that there is any diversion of the funds allocated for the Scheme, such stringent action as is called for shall be taken against the erring officials responsible for diversion of the funds.

**15.** At this juncture it would be necessary to take note of certain connected issues which have relevance. It seems from the Scheme that irrespective of number of children, the beneficiaries are given the benefit. This in a way goes against the concept of family planning which is intended to curb the population growth. Further, the age of the mother is a relevant factor because women below a particular age are prohibited from legally getting married. The Union of India shall consider this aspect while considering the desirability of the continuation of the Scheme in the present form. After considering the aforesaid aspects and if need be, necessary amendments may be made.

**16.** The IAs are accordingly disposed of."

## IN THE HIGH COURT OF DELHI

**Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors.**

**and**

**Jaitun v. Maternal Home MCD Jangpura**

**(2010) 172 DLT 9**

**S. Muralidhar, J.**

***The two writ petitions sought redress for the denial of benefits to two women during their pregnancy and immediately thereafter, under the Janani Suraksha Yojana (JSY), the Integrated Child Development Scheme (ICDS), the National Maternity Benefit Scheme (NMBS), the Antyodaya Anna Yojana (AAY) and the National Family Benefit Scheme (NFBS). The petitions sought to highlight systemic failures and shortcomings in the implementation of this cluster of schemes for reducing infant and maternal mortality. The Delhi High Court considered whether pregnant women needing healthcare can be denied access to public health facilities due to failure to establish eligibility under government schemes. The Court also considered whether Article 21 of the Indian Constitution guarantees the right to reproductive health and reproductive rights of pregnant women.***

**Muralidhar, J.:** “These two petitions highlight the deficiencies in the implementation of a cluster of schemes, funded by the Government of India, which are meant to reduce infant and maternal mortality. The issues common to both petitions concern the systemic failure resulting in denial of benefits to two mothers below the poverty line (BPL) during their pregnancy and immediately thereafter, under the Janani Suraksha Yojana (‘JSY’), the Integrated Child Development Scheme (‘ICDS’), the National Maternity Benefit Scheme (‘NMBS’), the Antyodaya Anna Yojana (‘AAY’) and the National Family Benefit Scheme (‘NFBS’). Although the interrelatedness of these schemes was recognised by the Supreme Court way back in an order dated 28th November 2001 in Writ Petition No. 196 of 2001 (*People’s Union for Civil Liberties v. Union of India*) (hereafter the ‘*PUCCL case*’), and thereafter periodically orders by way of *mandamus* have been issued to the Union of India and the individual States, much remains to be done on the ground, as these two cases reveal.

2. Although the chief protagonists in the two petitions are the two mothers and their babies, the petitions highlight the gaps in implementation that affect a large number of similarly placed women and children elsewhere in the country. The petitions reveal the unsatisfactory state of implementation of the schemes in the two “high performing states” of Haryana and the National Capital Territory of Delhi (NCT of Delhi). These petitions are essentially about the protection and enforcement of the basic, fundamental and human right to life under Article 21 of the Constitution. These petitions focus on two inalienable survival rights that form part of the right to life: the right to health (which would include the right to access and receive a minimum standard of treatment and care in public health facilities) and in particular the reproductive rights of the mother. The other right which calls for immediate protection and enforcement in the context of the poor is the right to food.

### A BRIEF SYNOPSIS OF THE SCHEMES OF THE JSY

3. Before discussing the facts of the two cases, it is necessary to have a brief overview of the prevalent Schemes, both centrally and state sponsored, for reducing infant and maternal mortality, which in terms of many documented studies is acknowledged as being high in India.

4. The JSY is a safe motherhood intervention scheme under the National Rural Health Mission (‘NRHM’) implemented with the objective of reducing maternal and neo-natal mortality by promoting institutional delivery among the poor pregnant women. This was launched on 12th April, 2005. It is a 100% centrally sponsored scheme and integrates cash schemes with delivery and post-delivery care. The JSY identifies the Accredited Social Health Activist (‘ASHA’) as an effective link between the Government and the poor pregnant women. She usually works under an Auxilliary Nurse Midwife (ANM) and their work is expected to be supervised by a Medical Officer (‘MO’).

5. Under the JSY the role of the ASHA or any other link health worker associated with JSY would be to:

1. Identify pregnant woman as a beneficiary of the scheme and report or facilitate registration for ANC. This should be done at least 20-24 weeks before the expected date of delivery.
2. Assist the pregnant woman to obtain necessary certifications wherever necessary, within 2-4 weeks of registration.

3. Provide and/or help the women in receiving at least three ANC checkups including TT injections, IFA tablets.
4. Identify a functional Government health centre or an accredited private health institution for referral and delivery, immediately on registration.
5. Counsel for institutional delivery.
6. Escort the beneficiary women to the pre-determined health centre and stay with her till the woman is discharged.
7. Arrange to immunize the newborn till the age of 14 weeks.
8. Inform about the birth or death of the child or mother to the ANM/MO.
9. Post natal visit within 7 days of delivery to track mother's health after delivery and facilitate in obtaining care, wherever necessary.
10. Counsel for initiation of breastfeeding to the newborn within one-hour of delivery and its continuance till 3-6 months and promote family planning.
11. A micro birth plan must mandatorily be prepared by the ASHA or equivalent health activist.

**6. A child under the JSY is entitled to:**

1. Emergency care of sick children including Integrated Management of Neonatal and Childhood Illness (IMNCI)
2. Care of routine childhood illness
3. Essential Newborn Care
4. Promotion of exclusive breastfeeding for 6 months.
5. Full immunization of all infants and children against vaccine preventable diseases as per guidelines of GOI
6. Vitamin A prophylaxis to the children as per guidelines
7. Prevention and control of childhood diseases like malnutrition, infections, etc.

**7.** One feature of the JSY is that only a woman, more than 19 years of age who is BPL can be a beneficiary in High Performing States ('HPS'). In case a poor woman does not have a BPL card then the beneficiary can access the benefit upon certification by Gram Panchayat or Pradhan provided the delivery takes place in a Government institution. Cash assistance in HPS is limited to two live births. The disbursement is made at the time of delivery. Cash assistance of Rs. 700 in case of rural and of Rs. 600 in case of urban is given for institutional delivery and of Rs. 500 is given for home delivery. In rural areas, cash assistance for referral transport to go to the nearest health centre for delivery is provided. The JSY identifies only 10 States as low performing States ('LPS') and the remaining as high performing states ('HPS'). What is to be borne in mind however is that the cash incentive is but one component of the JSY.

...

## THE NMBS

**9.** The National Maternity Benefit Scheme ('NMBS') basically talks of providing cash assistance of Rs. 500 to pregnant women. In order to clear the confusion that the cash assistance under the NMBS is independent of the cash assistance under the JSY, the Supreme Court on 20th November, 2007 passed an order in the *PUCL case* directing that all the State Governments and Union Territories (UTs) shall continue to implement the NMBS and ensure that "all BPL pregnant women get cash assistance 8-12 weeks prior to the delivery". It was specifically directed that "the amount shall be Rs. 500/- per birth *irrespective of number of children and the age of the woman*". It was reiterated that "It shall be the duty of all the concerned to ensure that the benefits of the scheme reach the intended beneficiaries. In case it is noticed that there is any diversion of the funds allocated for the scheme, such stringent action as is called for shall be taken against the erring officials responsible for diversion of the funds".

**10.** At this juncture it must be noted that in para 15 of its order dated 20th November, 2007, the Supreme Court observed as under:

“15. At this juncture it would be necessary to take note of certain connected issues which have relevance, it seems from the scheme that irrespective of number of children, the beneficiaries are given the benefit. This in a way goes against the concept of family planning which is intended to curb the population growth. Further the age of the mother is a relevant factor because women below a particular age are prohibited from legally getting married. The Union of India shall consider this aspect while considering the desirability of the continuation of the scheme in the present form. After considering the aforesaid aspects and if need be, necessary amendments may be made.”

**11.** It appears that consequent upon the above observation, the Union of India filed an application in the Supreme Court seeking certain modifications to the above order. However, no orders as yet have been passed in that application. The present position therefore is that the above order dated 20th November, 2007 of the Supreme Court holds the field and is required to be strictly implemented by all the States and UTs.

## THE ICDS

**12.** The objectives of the Integrated Child Development Services (ICDS) Scheme, which was launched in 1975, are:

1. to improve the nutritional and health status of children in the age-group 0-6 years;
2. to lay the foundation for proper psychological, physical and social development of the child;
3. to reduce the incidence of mortality, morbidity, malnutrition and school dropout;
4. to achieve effective co-ordination of policy and implementation amongst the various departments to promote child development; and
5. to enhance the capability of the mother to look after the normal health and nutritional needs of the child through proper nutrition and health education.

...

**14.** The working of the ICDS has been examined by the Supreme Court and several orders have been passed by it. In its order dated 29th April, 2004, the Supreme Court noted that the implementation was “dismal” and that “... a lot more deserves to be done in the field to ensure that nutritious food reaches those who are undernourished or malnourished or others covered under the scheme”. The Court observed that according to the Government of India norms, an Anganwadi Centre (AWC) will be opened for every 1000 population, and 700 in case of tribal areas. It noted that six lakh AWCs had been opened, and ordered that all of them should be made operational by 30th June, 2004. The sanctioned AWCs were to supply nutritious food to the beneficiaries for 300 days in a year under the ICDS scheme. Reports were called from the Chief Secretaries to indicate how many children, adolescent girls, lactating women and pregnant women were provided with nutritious food in the number of days in the year. On 13th December, 2006, further directions were issued by the Supreme Court. It was observed that the universalisation of ICDS “involves extending all ICDS services to every child under the age of 6, all pregnant women, lactating mothers and adolescent girls”.

## THE AAY

**15.** A central feature of the Antyodaya Anna Yojana (AAY) is the provision of rations up to 35 kgs which would include grains and nutritional supplements. In its order dated 28th November, 2001, the Supreme Court directed the States and the UTs to complete the identification of beneficiaries, issuing of cards and distribution of grain latest by 1st January, 2002. It noted that “some Antyodaya beneficiaries may be unable to lift grain because of penury”. In such cases the Centre, the State and the UTs were requested “to consider giving the quota free after satisfying itself in this behalf”.

**16.** On 2nd May, 2003, the Supreme Court directed the Government of India to place on AAY category the following groups of persons:

“(1) Aged, infirm, disabled, destitute men and women, pregnant and lactating women, destitute women;

...”

...

## THE NRHM

**18.** The National Rural Health Mission (NRHM) was launched on 12th April, 2005, throughout the country, with an objective to reduce the Maternal Mortality Rate, the Infant Mortality Rate and the Total Fertility Rate. The Service Guarantees provided under this scheme, which are to be made available by 2010 (according to the timeline prescribed by the Government) are:

- Early registration of pregnancy before 12th week of pregnancy
- Minimum of 4 antenatal check ups first—when pregnancy is suspected, second—around 26 weeks of pregnancy, third—around 32 weeks, fourth—around 36 weeks
- Associated services like general examination such as weight, BP, anaemia, abdominal examination, height and breast examination,
- Injection Tetanus Toxoid, treatment of anaemia, etc. (as per the Guidelines for Antenatal care and Skilled Attendance at Birth by ANMs and LHV's)
- Minimum laboratory investigations like haemoglobin, urine albumen and sugar.
- Identification of high-risk pregnancies and appropriate and prompt referral
- Counselling.
- Folic acid supplementation in the first trimester
- Iron and Folic Acid supplementation from twelve weeks,
- Skilled attendance at home deliveries as and when called for
- A minimum of 2 postpartum home visits. First within 48 hours of delivery, second within 7-10 days.
- Initiation of early breast-feeding within half hour of birth
- Counselling on diet and rest, hygiene, contraception, essential newborn care, infant and young child feeding. (As per Guidelines of GOI on Essential newborn care) and STI/RTI and HIV/AIDS
- Education, Motivation and Counselling to adopt appropriate Family planning methods,
- Provision of contraceptives such as condoms, oral pills, emergency contraceptives, IUD insertions (Wherever the ANM is trained on IUD insertion)
- Counselling and appropriate referral for safe abortion services (MTP) for those in need.
- Appropriate and prompt referral of cases needing specialist care
- Essential Newborn Care
- Promotion of exclusive breast-feeding for 6 months.
- Full Immunization of all infants and children against vaccine preventable diseases as per guidelines of GOI
- Vitamin A prophylaxis to the children as per guidelines. Prevention and control of childhood diseases like malnutrition, infections, etc.

**19.** The essential thrust of the NRHM is of 'convergence' of different schemes. The idea is to put in place a system that facilitates easy accessibility of the public health systems while at the same time making it accountable.

## THE CONSTITUTIONAL RIGHT TO HEALTH AND REPRODUCTIVE RIGHTS

**20.** A conspectus of the above orders would show that the Supreme Court has time and again emphasised the importance of the effective implementation of the above schemes meant for the poor. They underscore the interrelatedness of the 'right to food' which is what the main *PUCL case* was about, and the right to reproductive health of the mother and the right to health of the infant child. There could not be a better illustration of the indivisibility of basic human rights as enshrined in the Constitution of India. Particularly in the context of a welfare State, where the central focus of these centrally sponsored schemes is the economically and socially disadvantaged sections of society, the above orders of the Supreme Court have to be understood as preserving, protecting and enforcing the different facets of the right to life under Article 21 of the Constitution.

**21.** The right to health forming an inalienable component of the right to life under Article 21 of the Constitution has been settled in two important decisions of the Supreme Court: *Pt. Parmanand Katara v. Union of India*, (1989) 4 SCC 286 and *Paschim Banga Khet Majoor Samiti v. State of West Bengal*, (1996) 4 SCC 37. The orders in the *PUCL case* are a continuation of the efforts of the Supreme Court at protecting and enforcing the right to health of the mother and the child and underscoring the interrelatedness of those rights with the right to food. This is consistent with the international human rights law which is briefly discussed hereafter.

**22.** Article 25 of the Universal Declaration of Human Rights, which is considered as having the force of customary international law, declares:

*Article 25*

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

**23.** The International Covenant on Economic, Social and Cultural Rights (ICESCR), which has been ratified by India, spells out in greater detail the various facets of the broad right to health. Articles 10 and 12 of the ICESCR which are relevant in this context, read as under:

*Article 10*

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

*Article 12*

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

- (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.



**24.** The Committee on Economic Social and Cultural Rights has in its General “Comment No. 14 of 2000 on the right to health under the ICESCR explained the scope of the rights as under:

“8. The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health. ...

11. The Committee interprets the right to health, as defined in Article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels. ...

14. “The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child” (Art. 12.2 (a)) may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information.”

**25.** The reproductive rights of women have been accorded recognition, and the obligations of States have been spelt out in the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) which is another international convention ratified by India. The relevant provisions of the CEDAW in this context are:

*Article 12*

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

*Article 14*

...

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

...

(b) To have access to adequate health care facilities, including information, counselling and services in family planning;

...

**26.** The Child Rights Convention (CRC) which has also been ratified by India delineates the rights of the newly born and the young child thus:

*Article 24*

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

- (a) To diminish infant and child mortality;
- (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
- (c) To combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
- (d) To ensure appropriate pre-natal and post-natal health care for mothers;
- (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
- (f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

...

#### Article 27

- 1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
- 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
- 3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

...

**27.** International human rights norms as contained in the Conventions which have been ratified by India are binding on India to the extent they are not inconsistent with the domestic law norms. The Protection of Human Rights Act, 1993 (PHRA) recognises that the above Conventions are now part of the Indian human rights law. Section 2(d) PHRA defines “human rights” to mean “the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by Courts in India” and under Section 2(f) PHRA “International Covenants” means “the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on the 16th December, 1966.”

**28.** The orders in the PUCL case implicitly recognize and enforce the fundamental right to life under Article 21 of the Constitution of the child and the mother. This includes the right to health, reproductive health and the right to food. In effect, the Supreme Court has spelt out what the “minimum core” of the right to health and food is, and also spelt out, consistent with international human rights law, the “obligations of conduct” and the “obligations of result” of the Union of India, the States and the UTs. While recognizing the indivisibility of civil rights and social and economic rights, the Supreme Court has made them enforceable in Courts of law by using the device of a “continuing *mandamus*.” On their part, the High Courts in this country would be obligated to carry forth the mandate of the orders of the Supreme Court to ensure the implementation of those orders within the States and UTs. This then forms the background to this Court's intervention in these petitions.

...

## ANALYSIS OF FACTS

**37.** As Dr. Prakasamma's report, which has not been countered by the Respondents, shows the direct cause of Shanti Devi's death was the Extensive Haemorrhage (PPH) with Retained Placenta. However, there were many indirect and contributing factors to her death, which broadly include, her dismal socioeconomic status which denied access to needed resources and services, and her poor health condition which is a culmination of anemia, tuberculosis and repeated, unsafe pregnancies. The findings of Dr. Prakasamma have already been referred to earlier.

**38.** Dr. Prakasamma's report shows that Smt. Shanti Devi was a high risk patient and advised by the Doctors not to go in for a sixth pregnancy. During her fifth pregnancy in 2008, she had an intrauterine death, retained placenta leading to coagulation disorder. She had also T. B., Bronchiectasis and breathing difficulty. She had fracture of Humerus and multiple fracture ribs. She therefore needed to be constantly monitored and counselled.

**39.** In neither of the cases of Fatema or Shanti Devi were the substantive benefits under the JSY schemes made available. In *Fatema's case*, as the hearing of these cases progressed, the GNCTD incrementally came up with documents which purportedly showed that Fatema had been receiving attention at the MCD's clinic at Jangpura. However, these sporadic documents do not give complete picture. One of them has an endorsement presumably made by Jaitun that she is now getting the rations but that she has to make three or four visits. It is not clear at all that during her pregnancy, Fatema received the benefits. It is claimed that she was given immunization on two or three occasions. A photocopy of the JSY card issued for Fatima was produced. Again it is not known whether Fatima was indeed given this card and whether she used it to get the benefits. There is no register produced to show disbursement of cash assistance to Fatema under the NMBS before she delivered Alisha. It is only after the Court's intervention that she received the AAY card and the NMBS benefit.

**40.** In *Shanti Devi's case* also an attempt was made to show that an ASHA visited her and the photocopy of the register maintained by such ASHA was produced. This however does not inspire confidence as it does not appear to have been countersigned or checked. Clearly, closer to the expected date of delivery *i.e.* 20th March, 2010, the visits by the ASHA were either non-existent or infrequent. Likewise in the case of *Fatema*, there is no record of her being visited by any ASHA or being given assistance for home delivery.

**41.** A significant feature of both cases is that both women delivered their babies outside of the institution. The schemes envisage that even for home deliveries, assistance has to be provided to the pregnant women. In the case of *Fatema* this Court has been shown a report of Dr. Indrani Sharma which appears to suggest that she delivered a baby in her Jhuggi. It is not understood on what basis this report has been prepared. It is however contradicted by the photographs enclosed with the petition which indicate that the baby was indeed delivered under a tree. Be that as it may, there is no record of immediate post-delivery assistance being afforded to Fatema and Alisha as mandated by the JSY.

**42.** Both the cases point to the complete failure of the implementation of the schemes. With the women not receiving attention and care in the critical weeks preceding the expected dates of delivery, they were deprived of accessing minimum health care at either homes or at the public health institutions. As far as Shanti Devi is concerned, the narration of facts concerning her fifth and sixth pregnancy show that she was unable to effectively access the public health system. It was either too little or too late. The quality of services rendered in the private hospital to which Shanti Devi was referred during the fifth pregnancy is a matter of concern. It points to the failure of the referral system where a poor person who is sent to a private hospital cannot be assured of quality and timely health services.

**43.** However, what is clear is that there does not appear to be a system requiring increased visits by the ASHA or ANM, closer to the actual expected date of delivery. Unless this is done, it may be difficult for a pregnant woman with complications to be immediately shifted to an institution for an institutional delivery. With the possibility of babies being delivered prematurely not being able to be completely ruled out, the increased visits by the ANM at least two months prior to the expected date of delivery would ensure the arrangement of ambulance to shift the woman who is facing complications or who may develop labour pain to be immediately shifted to hospital. The woman may require delivery through caesarean operation in which case she also would be required to move to the Government Health Centre with such facilities without delay.

**44.** ...Be that as it may, given that an important component of the JSY is counselling of a pregnant woman, if during the stage of pregnancy and needing critical care, a woman is unwilling to avail of such services, it would be incumbent upon the ASHA or the ANM concerned to immediately report the matter to the ANM/MO who will then make such efforts by counselling the pregnant woman and impressing upon her family to shift her to the hospital. This was not done in *Shanti Devi's case*.

**45.** As far as the NMBS is concerned, it envisages a one-time cash assistance of Rs. 500/- at least 8 to 12 weeks prior to the delivery. While after the Court's order Fatema received the cash assistance, Shanti Devi died without receiving it. Even now the State of Haryana has not paid the said cash assistance to the legal representatives of Shanti Devi.

### CONFUSION REGARDING CASH ASSISTANCE UNDER THE NMBS

**46.** There has been a doubt whether cash assistance under the NMBS is independent of the cash assistance under the JSY. The order dated 20th November, 2007 of the Supreme Court leaves no manner of doubt that this is a separate benefit and has to be provided 8 to 12 weeks prior to the actual date of delivery.

**47.** The Central Government has taken shelter under paragraph 15 of the order dated 20th November, 2007 of the Supreme Court which reads as under:

“15. At this juncture it would be necessary to take note of certain issues which have relevance, it seems from the scheme that irrespective of number of children, the beneficiaries are given the benefit. This in a way goes against the concept of family planning which is intended to curb the population growth. Further the age of the mother is a relevant factor because women below a particular age are prohibited from legally getting married. The Union of India shall consider this aspect while considering the desirability of the continuation of the scheme in the present form. After considering the aforesaid aspects and if need be, necessary amendments may be made.”

**48.** Pursuant to the above directions, an interlocutory application was filed in the Supreme Court seeking modification of its mandatory directions in the order dated 20th November, 2007 to the effect that “the Union of India and all State Governments would continue with the NMBS” and “ensure that all BPL pregnant women get cash assistance 8 to 12 weeks prior to the delivery”. Further it was mandated that the amount shall be Rs. 500/- per birth irrespective of number of children and the age of the woman. Yet, after filing the interlocutory application, in which no order has been passed as yet by the Supreme Court, the State Governments have been instructed to continue following the earlier patterns of denying cash assistance after two live births. Clearly, this is a confusion created by the Central Government at two levels. First by treating the cash assistance under the NMBS as forming part of the cash assistance under the JSY and, therefore, applying the same yardstick. Secondly, in restricting the cash benefit under the NMBS to two live births when clearly the Supreme Court's order says to the contrary.

**49.** As a result of the above confusion created by the Central Government, millions of pregnant women across the country have, despite the order dated 20th November, 2007, been deprived of this cash assistance. While Rs. 500/- may not seem substantial to a salaried middle class person in this country but it means a lot to a pregnant woman struggling to make ends meet.

**50.** An argument was advanced by Mr. A.S. Chandhiok, learned Additional Solicitor General (“ASG”) by drawing an analogy with the allotment of alternate accommodation to a slum dweller, that there is an apprehension that the benefit under the scheme would be ‘misused’. This Court finds this apprehension to be misplaced. Given the status of the facilities available in Government hospitals and primary health centres across the country, it is very unlikely that any person who can otherwise afford health care is going to “misuse” these facilities. On the other hand, when it comes to the question of public health, no woman, more so a pregnant woman should be denied the facility of treatment at any stage irrespective of her social and economic background. This is the primary function in the public health services. This is where the inalienable right to health which is so inherent to the right to life gets enforced. There cannot be a situation where a pregnant woman who is in need of care and assistance is turned away from a Government health facility only on the ground that she has not been able to demonstrate her BPL status or her ‘eligibility’. The approach of the Government, both at the Centre and the States, in operationalising the schemes should be to ensure that as many people as possible get ‘covered’ by the scheme and are not ‘denied’ the benefits of the scheme. Instead of making it easier for poor persons to avail of the benefits, the efforts at present seem to be to insist upon documentation to prove their status as ‘poor’ and ‘disadvantaged’. This onerous burden on them to prove that they are the persons in need of urgent medical assistance constitutes a major barrier to their availing of the services. This is one reason why the coverage under the schemes has been poor in all these years and has required active intervention by the Supreme Court.

**51.** The affidavits filed both by the Government of Haryana as well as the GNCTD reflect that the coverage of beneficiaries under the schemes is indeed improving. Yet the artificial distinction drawn between HPS which presumably include Delhi and Haryana, and the LPS, may actually result in the pregnant women in urgent need in Delhi and Haryana being deprived of it. While the logic of depriving cash assistance beyond two live births even in HPS cannot be justified on any

rational basis particularly since women in the Indian social milieu have very little choice whether she wants to have a third child or not, the other benefits under the JSY and other claims obviously cannot be denied to any woman irrespective of the number of live births.

**52.** Till this Court passed the necessary orders, the AAY card was not given to either Fatema or to the family of Shanti Devi. Sadly during her life-time Shanti Devi did not get the benefit offered under the AAY or the ICDS. This is a major failure which aggravated the causes that ultimately led to her death. As far as Fatema was concerned, after the delivery of the baby under a tree, the GNCTD appears to have got its act together to provide her with an AAY card and to ensure that her baby Alisha is receiving good food at the Aanganwadi Center of the ICDS. All this happened, of course, only after the intervention of this Court.

## REPARATIONS AND RELIEFS

**53.** The question that next arises is how reparations be made for the failure to implement the schemes in both these cases during the time when both women were pregnant. Fortunately in *Fatema's case* the baby and the mother survived. In *Shanti Devi's case* she died giving birth to the child at her residence in Faridabad. This was the second time she was being denied the assistance under the scheme. It may be recalled that she miscarried the child during her fifth pregnancy and the dead foetus had to be removed almost a week later in the institution. The constant monitoring and care envisaged by the JSY was completely absent in her case on both the occasions.

**54.** It was not denied by learned Counsel appearing for the Government of Haryana, the GNCTD as well as the Central Government that as of now there is no inbuilt component for reparations under the schemes. Given that the budget outlay of the schemes is in several hundreds of crores, it is indeed surprising that there is no inbuilt component for reparations. The Petitioners on their part have asked that compensation be awarded to the family of Shanti Devi for her death which resulted as a failure by the Government of Haryana, and the GNCTD to provide the benefits under the above schemes. Likewise, compensation has been claimed for Fatema as well.

**55.** It may be difficult to quantify the actual loss suffered by either family as a result of the failure by the State Government to deliver the benefits under the schemes to each of these women during their pregnancies. What is clear in *Shanti Devi's case* is that the maternal mortality was clearly avoidable.

**56.** In the case of *Fatema* soon after the baby was delivered, she required nutrition and supplements which were denied till the Court's intervention...It is well possible that but for the Court's intervention, the baby and the mother may have been deprived of the benefits which would have caused irreparable injury and possibly loss of life.

**57.** Having considered these circumstances, the Court issued the following directions as regards Writ Petition (C) No. 8853 of 2008 concerning the family of baby Archana, the daughter of late Shanti Devi.

- (a) The GNCTD will refund forthwith to Shanti Devi's husband Rs. 1,000/- charged by the DDU Hospital from Shanti Devi for her treatment since that treatment was free.
- (b) The sum of Rs. 500/- will be paid forthwith to Shanti Devi's husband by the GNCTD under the NMBS.
- (c) The AAY card will be made forthwith for the family of baby Archana.
- (d) Under the Apni Beti Apna Dhan Scheme, the State of Haryana will give Rs. 500/- to Archana through her father. Indira Vikas Patras of Rs. 2,500/- in the name of baby Archana forthwith be handed over to her father.
- (e) Under the Balika Samridhi Yojana Scheme launched by the Government of India, a sum of Rs. 500/- being given as post-birth grant to the mother will now be given to Archana's father. In addition, the following benefits will be ensured during Archana's growing years:

"Class	Amount of Annual Scholarship
I-III	Rs. 300/- per annum for each class
IV	Rs. 500/- per annum
V	Rs. 600/- per annum
VI-VII	Rs. 700/- per annum for each class
VIII	Rs. 800/- per annum
IX-X	Rs. 1,000/- per annum for each class"

(f) Under the NFBS, Shanti Devi will be recognized as a “primary bread winner” and a sum of Rs. 10,000/- will be given to her husband and to the children forthwith.

(g) In addition to the above, for the avoidable death of Shanti Devi a sum of Rs. 2.4 lakhs be paid by the State of Haryana within a period of four weeks to the family of Shanti Devi of which Rs. 60,000/- will be paid to Shanti Devi's husband and Rs. 60,000/- each be kept in a fixed deposit in a nationalised bank in Delhi in the names of Shanti Devi's two sons and Archana which will be kept renewed till each child completes 21 years. The interest on the fixed deposits will be credited to the savings bank account of their father and after each child attains majority to their respective savings bank accounts. After their 21st year, each child can encash the fixed deposits.

**58.** In W.P.(C) No. 10700 of 2009, pursuant to the orders passed by the Court, Fatema has been paid Rs. 500/- cash assistance under the NMBS. She was given an AAY card.

...

**59.** Fatema is a patient of epilepsy and shall continue to receive her medication every 15 days from the Maternity Home of the MCD at Jangpura. She will undergo a medical check-up every two months at the G.B. Pant Hospital. If required, an ambulance will be arranged at the Maternity Home, Jangpura for taking her to the G.B. Pant Hospital for future check-ups.

**60.** The baby Alisha is entitled and shall be granted the comprehensive benefits under the ICDS in terms of the orders dated 20th November, 2007 passed by the Supreme Court in W.P. (C) No. 196 of 2001...

**61.** Alisha is entitled to all the benefits under the BSYS as recast by the Government of India in 1999-2000. Accordingly, the following benefits shall be extended to baby Alisha:

“Class	Amount of Annual Scholarship
I-II	Rs. 300/- per annum for each class
IV	Rs. 500/- per annum
V	Rs. 600/- per annum
VI-VII	Rs. 700/- per annum for each class
VIII	Rs. 800/- per annum
IX-X	Rs. 1,000/- per annum for each class”

**62.** In addition to the above, the GNCTD has announced a Ladli Scheme under which financial deposit in the sum of Rs. 10,000/- has to be made in the name of the girl child after 1st January 2008. The said benefit will be extended to Alisha within a period of four weeks from today.

**63.** For the violation of the fundamental rights of Fatema by being compelled to give birth to Alisha under a tree which is only on account of the denial of basic medical services to her under the various schemes, the MCD and the GNCTD will jointly and severally be liable to pay her compensation in the sum of Rs. 50,000/- within a period of four weeks from today. The said amount will be placed in a fixed deposit for a period of three years in the name of Fatema in an account to be opened in a nearby nationalized bank with the facility of transferring the interest accrued thereon every quarter to her savings account which can even be withdrawn by her. She would be able to encash the fixed deposit after a period of three years.

## SHORTCOMINGS IN THE IMPLEMENTATION OF THE SCHEMES

**64.** This Court notices the following shortcomings in the working of the schemes:

(i) There is no assurance of “portability” of the schemes across the States. In the present case, *Shanti Devi* travelled from Bihar to Haryana and then to Delhi. In Haryana she was clearly unable to access the public health services. At Delhi she had to once again show that she had a BPL card, and on being unable to do so, she was denied access to medical facilities. For the migrant workers this can pose a serious problem. Instructions will have to be issued to ensure that if a person is declared BPL in any state of the country and is availing of the public health services in any part of the country, such person should be assured of continued availability of such access to public health care services wherever such person moves.

- (ii) There is confusion on whether the cash assistance under the NMBS scheme is independent of the cash assistance under the JSY scheme, despite the Supreme Court making this unambiguously clear by its order of 20th November, 2007 in the case of *PUCL v. Union of India*. Further it appears that benefit under the NMBS is being denied to women who have had more than two live births and to women who are under 19 years of age, although the Supreme Court's order dated 20th November, 2007 makes it clear that such benefits should be made available irrespective of the number of live births or the age of the mother. The necessary clarification requires to be immediately issued by the Central Government to all the State Governments in this regard so that pregnant women across the country are not denied cash assistance.
- (iii) There is an overlap of the schemes. The ICDS is administered by the Department of Women and Child Development of the State, the NRHM by the Ministry of Health at the centre and JSY by the Health Ministries of the States. There must be an identified place which the women can approach to be given the benefits under the various schemes. In other words, a pregnant woman or a lactating mother should not have to run to several places to get benefits under the schemes.
- (iv) The system of administering the IWC under the ICDS requires to be overhauled. AWCs even in Delhi appear to operate from single rooms which are inadequate for the number of children who have to be served at the AWC. AWCs are seen to be in a deplorable condition. There is nothing in the form of any label/board to indicate their presence. They also do not appear to have the necessary equipment to carry out the necessary tests. In the rural set up, it should be possible to have a monthly camp held at an identified place where the pregnant women and young children can undergo health checkup.
- (v) The system of referral to private health institutions has to be improved. Safe and prompt transportation of pregnant women from their places of residence to public health institutions or private hospitals and *vice versa* needs to be ensured. The critical days and hours prior to the expected date and time of delivery can be a matter of life or death for a pregnant woman. If adequate ambulance services are not available at that stage, many a life will be needlessly lost. The two cases here show the Court orders were required at various times even to remove the baby for critical care from one hospital to another. Even in places like Delhi, the ambulance and transport services require to be augmented and improved significantly.
- (vi) The NFBS envisages the payment of sum of Rs. 10,000/- in the event of death of the "primary bread winner". It is also necessary to recognize a woman in the family who is a home maker as a "bread winner" for this purpose. In the event of a maternal death, the family should get the cash benefit under the NFBS. It should be ensured that this is made available to her legal heirs as per their legal entitlement. Necessary instructions clarifying this position will have to be issued by the Central Government to the State Governments.
- (vii) The statistics furnished by the State Governments on the performance of the JSY show the number of institutional deliveries but do not indicate what percentage of the total number of deliveries in the State they constitute. Only when such information is available and provided under the schemes, the categorization of States as HPS and LPS is possible. The Central Government must insist on this kind of information for meaningful assessment of the working of the schemes.
- (viii) On the working of the AAY, it appears that the benefits are not reaching to the pregnant women, particularly those who migrate from one State to another. This problem will require urgent attention at the hands of the Central Government, the State Governments and the UTs. There is also a problem of portability of the AAY benefit. Unless the poor woman is assured of the AAY benefits notwithstanding having to travel from one State to another, the scheme cannot be said to be effective.
- (ix) The present cases afford an opportunity to the Central Government, the State Governments and the UTs, particularly the State of Haryana and the GNCTD, to put in place corrective measures.

## OTHER DIRECTIONS

**65.** There are certain general directions which also become necessary to be issued. It is made clear that these directions are only to further effectuate the mandatory orders already issued by the Supreme Court from time-to-time in W.P. (C) No. 196 of 2001 relevant portions of which have already been extracted hereinbefore. These directions are necessary to ensure that the benefits under the various schemes are not denied to the beneficiaries and that assistance is provided promptly at the nearest point where it can be accessed.

66. The health departments of the GNCTD and the State of Haryana will devise formats of registers to be maintained by Medical Officers who are supervising the work of ANMs and the ASHAs. Each ASHA will maintain a proper log of all her visits and have a checklist of the various benefits to be given in terms of the service guarantees of NRHM including ante natal care, essential and emergency obstructive services, referral services, post natal care, child health, family planning and contraception. Each of the visits by an ASHA to a woman during pregnancy and thereafter will be countersigned by an ANM and periodically at least once in 10 days be checked also by the MO.

67. Every ASHA/ANM will report to the MO if any beneficiary is declining the assistance provided or refusing to take medicines or is reluctant to go in for institutional delivery. The MO will then either undertake a personal visit to the woman concerned or issue necessary instructions for further counselling such woman and make a special note thereof in her record. At the District level and thereafter at the State level there must be a periodical review of the performances of the ASHAs and ANMs, district wise. It must be ensured that the cash assistance under the various schemes including the JSY and NMBS is promptly provided to each beneficiary.

68. A review be undertaken of the issuance of AAY card in terms of the orders of the Supreme Court. It should be ensured that every eligible person/family/child is granted the benefit under the AAY.

69. Likewise, there should be a constant review and monitoring under the ICDS as well. This will involve setting up of the Aanganwadi Centres in terms of the directions by these two States for themselves.

70. Ideally special cells have to be set up within the health departments of the Central and State Government for monitoring the implementation of the schemes on a regular basis.

71. The Government of India on its part will immediately issue a corrective to the earlier instructions issued in October 2006 in relation to the JSY as well as instructions relating to the cash assistance under the NMBS so that it is not denied to any woman irrespective of the number of live births or age. There shall be strict compliance of the orders of the Supreme Court in this regard

72. The GNCTD, the State of Haryana and the Union of India will file affidavits by way of compliance with respect to above directions in this Court within eight weeks.

...

## IN THE HIGH COURT OF DELHI

### Court on Its Own Motion v. Union of India

2011 SCC OnLine Del 137

Dipak Misra, C.J., and Sanjiv Khanna, J.

***A suo motu public interest litigation was initiated by the Delhi High Court on the basis of a newspaper report that stated that a destitute woman died after giving birth to a child on the street. The court passed directions for extending protection and health care facilities to destitute pregnant and lactating women.***

**Misra, C.J. and Khanna, J.:** “The present public interest litigation was initiated suo motu by this Court taking into consideration a newspaper report dated 29<sup>th</sup> August, 2010 published in the ‘Hindustan Times’ that a destitute woman breathed her last on a busy street after giving birth to a baby girl, namely, Karishma who had been struggling for life at a foster home, namely, ‘Udayan’.

The matter was dealt with to some extent on 1<sup>st</sup> September, 2010 and how important and significant the life of a child who forms the vertebra of a spine of the nation and the role of the mother in building the nation.

On 20<sup>th</sup> October, 2010, after hearing Mr. Colin Gonsalves, learned Amicus Curiae along with Ms. Jayshree Satpute, Advocate, this Court had issued the following directions: -

“(1) Government of NCT of Delhi to demarcate five secured shelter homes exclusively meant for destitute women, pregnant and lactating women so that apposite care can be taken and no destitute women would be compelled to give birth on the footpath.



- (2) The availability of the facilities in such shelter homes shall be monitored by the helplines handled by professionally trained people.
- (3) In the aforesaid shelter homes, food and medical facility shall be available for 24 hours as such facilities are imperative for the cases of the present nature.
- (4) Despite various schemes being framed by the State Government, as the people are not aware of the same, especially due to illiteracy, there would be dissemination of information by radio as well as television in Hindi.
- (5) There should be awareness camps in the areas or cluster of areas by professionally trained people every fortnight.
- (6) The State Government shall provide a mobile medical unit so that the people, especially who are living in slum areas can be taken to the shelter homes or to the hospital as the case may be.
- (7) The State Government shall make endeavour to involve the genuine NGOs so that they can also work for getting the scheme fortified as such an activity has to flow from the top to the ground reality level.”

... In the counter affidavit, many an assertion has been made but on a perusal of the same, it transpires that the stand and stance of the State is that there are various homes which are meant to take care of destitute and pregnant woman as well as the lactating woman.

...

...[We] just cannot become the silent spectators waiting for the Government to move like a tortoise and allow the destitute pregnant women and lactating women to die on the streets of Delhi, may be after giving birth to a child or may be along with the child. Such a situation cannot be countenanced and is not possible to visualize in the backdrop of Article 21 of the Constitution of India. It is expected of the State and the persons who are in-charge of its departments to have a vision. It has been said long back that the personalities who have vision can always visualize the invisibility. To elaborate: it conveys the situation which exists and are likely to eloquently get edified, must be pursued by the persons who are in the helm of administration.

In view of the aforesaid, we command the Government of NCT of Delhi to file a proper and comprehensive affidavit within a period of four weeks and pending that we direct the Government of NCT of Delhi to demarcate or hire or create at least two shelter centres meant for destitute pregnant women and lactating women so that proper care can be taken to see that no destitute woman is compelled to give birth to a child on the footpath.

We are sure, no apathy shall be shown in this regard as any kind of recalcitrant, propensity or proclivity in this regard would be violative of the concept of Rule of Law.

At this juncture, we may note with profit one of the suggestions given by Mr. Jayant Bhushan. It is submitted by Mr. Bhushan, learned senior counsel that when the State takes recourse to such an action, it should be widely published so that the people who are in such a situation or the people who are aware of such a situation and can help people and also can take them to such shelter homes. We are sure, the State Government shall live upto the same and do the needful within a week including spreading of awareness as stated hereinabove.

Needless to say, a shelter home should have facility for food and appropriate medical aid.

...”

## IN THE HIGH COURT OF MADHYA PRADESH

**Sandesh Bansal v. Union of India**

**W.P. No. 9061/2008 (Order dated February 6, 2012)**

**Ajit Singh and Sanjay Yadav, JJ.**

***This public interest litigation challenged the State of Madhya Pradesh's failure to meet its goal of reducing maternal mortality due to shortcomings in the implementation of the National Rural Health Mission (NRHM). The High Court considered the constitutional obligation of the state to implement NRHM to ensure women's survival during pregnancy and childbirth under Article 21.***

**Yadav, J.:** "In respect of health care time is the essence, because if the timely care is not taken any amount of care later on will not compensate the loss which may occasion due to lack of timely medical assistance. If this is true in case of critical disease, equally true it is in respect of an expecting mother. Who though go through a natural process in delivering a child, but because of lack of pre- assistance suffers causality accounting 40 per 1,00,000 live births, which is on the higher side in Rural than Urban, areas.

**2.** Alarming mother mortality ratio (MMR) paved the way for launching of National Rural Health Mission (in short Mission) by the Central Government, which was in furtherance of its primary duty to improve public health being one of the Directive Principles of the State Policy as enunciated under Article 47 of the Constitution of India, in the year 2005 to meet out peoples' health needs in rural areas.

**3.** The Mission seeks to provide accessible, affordable and quality health care to the rural population. It also seeks to reduce the Maternal Mortality Ratio (hereafter shall be referred to MMR) in the country from 407 to 100 per 1,00,000 live births by focusing on following measures:

(i) strengthening the health care infrastructure construction / upgradation of Primary Health Centre (PHC)/Community Health Centre (CHC)/District Hospitals etc. to enable early detection of higher risk pregnancies and provide iron and folic acid to correct anemia and tetanus toxoid immunization and emergency obstetric care, and to provide these institutions with united funds to improve their services.

(ii) promoting institutional deliveries through the Janani Suraksha Yojna (hereafter shall be referred to as JSY), whereby women who have three antenatal check-ups and deliver in health, institutions are paid Rs.1400 and their motivators Rs.600/- in rural areas and Rs.1200 and Rs.400 respectively in urban areas. JSY is a safe motherhood intervention under the Mission launched on 12th April 2005. It is 100% centrally sponsored scheme and it integrates cash assistance with delivery and post-delivery care.

(iii) Arranging private public partnerships (hereafter shall be referred as PPPs) with private health care institutions and doctors to provide such care against a fixed sum money in areas where public health services are lacking.

(iv) provision of transport to the woman through either public or private transport and recompensating expenses to enable the woman to reach the hospital in time for adequate care.

(v) allowing the Rogi Kalyan Samiti (hereafter shall be referred to as RKS) to charge user fees to raise funds in addition to the funds given by the government for maintaining the health institution and improving its services. R.K.S are the registered societies constituted in the hospitals as an innovative mechanism to involve the peoples representatives in the management of the hospital with a view to improve its functioning through levying user charges.

**4.** The Mission has been implemented in 18 high focus states, one of it being the State of Madhya Pradesh.

**5.** In Madhya Pradesh, the Mission as set out by the Ministry of Health and Family Welfare, Government of India has been adopted and a Programme Implementation Plan 2006-2012 has been mooted out by the State Health Mission, Department of Health and Family Welfare, Government of Madhya, Pradesh with an object that all people living in the State of Madhya Pradesh will have the knowledge and skills required to keep themselves healthy, and have equity in access to effective and affordable health care, as close to the family as possible, that enhances their quality of life, and enables them to lead a health productive life.

...

**7.** While implementing the mission it was noted that (i) Districts Chhatarpur, Guna, Satna and Sidhi have more than 40% pregnant women with no ANC (Ante Natal Care) check-ups and 32 districts have less than 40% pregnant woman with .3 ANC check-ups; (ii) T.T. Coverage is less -than 50% in districts Dindori, West Nimar, Sidhi, Sheopur, Shahdol, Panna and Jhabua; and (iii) Institutional deliveries less than 20% in Chhatarpur, Dindori, Katni, Shahdol, Sidhi and West Nimar.

**8.** While setting the goal of reducing the State MMR from 498 to 200 by the year 2010, the PIP identified following key elements:

- (a) Access to emergency obstetric care
- (b) Skilled attendant at birth
- (c) Effective referral system

The strategy included: ...

...

**10.** Alleging failure of effective implementation of the modalities set by PIP 2006- 2012 and achieving the goal as set by it to reduce the MMR, the petitioner ... has filed this petition alleging that about 75,000 to 1,50,000 women die every year in India after giving birth to their child. It is said that this is about 20 % of the global burden. It is further contended that Madhya Pradesh has the third highest maternal mortality rate in the country, i.e., 498 deaths per 1,00,000 live births. It is contended that there is imbalance within the State itself as though the average MMR is 498 per 1,00,000; however, in Chambal region the MMR is as high as over 800 deaths per 1,00,000 live births. It is urged that anemia is the underlying cause in over 50% of these deaths. Other major causes include haemorrhage (both ante and post partum), toxemia (Hypertension during pregnancy), obstructed labour, puerperal sepsis (infections after delivery) and unsafe abortion.

**11.** It is contended that women are dying because of the high cost of health care and failure of public health system, lack of qualified medical staff in rural areas, lack of appropriate transport, cultural and social reasons that come in way of women for effective and adequate access to health care. By way of example, it is stated that a mother from the richest 20 % of the population is 3.6 times more likely to receive antenatal care from a medically trained person, cornered to a mother from the poorest 20%. The delivery of richer mother is over six times more likely to be attended by a medically trained person than the delivery of the poor mother.

**12.** Placing reliance on the appraisal report of Common Review Mission (The CRM was set up as part of Mission Steering Groups mandate of review and concurrent evaluation) of November 2007, it is contended that there are inadequate institutional deliveries in the State of Madhya Pradesh because of lack of quality services, indifference of Rogi Kalyan Samiti towards patient welfare, early discharge patient care, misuse of Janani Suraksha Yojna (JSY). It is alleged that in respect of Antenatal Care, Intra-Natal Care (24 hours delivery services both normal and assisted) and Postnatal Care, the State of Madhya Pradesh has failed to adhere the norms set by Indian, Public Health Standards for Primary Health Centres (PHC's).

**13.** It is contended that the mission being centrally sponsored, the funds are made available by the Central Government...It is alleged that the mission has failed to achieve the goal because ineffective implementation of the plan.

**14.** It is stated that no District Health Mission has been constituted in the State of Madhya Pradesh under the Mission which has resulted in non survey of household and the facility to measure the progress which in turn has resulted in non-formulation of perspective plans for Districts (though there exists perspective plan for the State). Non formulation of District and Block level Community Monitoring Committees. Nonholding of Jan Sunvayi at Block and PHC level. It is contended that only 31.43% of villages in state have Village Health and Sanitation Committee. That 279 out of 870 Rogi Kalyan Samitis are not set up at PHC level. Non contribution in State budget for the PIP during 2007 - 08 (as against the 11th 5 year plan's mandate for Contribution of 15% of their budget to the mission). Non utilization of the fund. Over expenditure on management then prescribed by the mission at 10.29%. Diverting the fund (it is alleged that Rs.52.07 crore of Mission Flexipool has been diverted to RCH Flexipool). Non utilization of Rs.6357.31 lakhs at District level...

...

**15.** With these surmounting shortcomings the petitioner alleges ineffective implementation of plan and alleges lack of will in the functionaries of the State to meet out the goal of reducing the MMR. It is urged that the State Government be therefore directed to take effective steps to reach the goal of reducing the MMR within the targeted period.

...

**22.** We don't wish to burden our order with further facts. But we observe from the material on record that there is shortage not only of the infrastructure but of the manpower also which has adversely affected the effective implementation of the Mission which in turn is costing the life of mothers in the course of mothering. It be [sic] remembered that the inability of women to survive pregnancy and child birth violates her fundamental right to live as guaranteed under Article 21 of the Constitution of India. And it is the primary duty of the government to ensure that every woman survives pregnancy and child birth, for that, the State of Madhya Pradesh is under obligation to secure their life.

**23.** We therefore, recommend following measure to be taken up in the earnest: At Sub-Centres and PHC Level and CHC/ District Level-

1. At Panchayat the 24 hours availability of trained woman as ASHA/Community Health Worker.
2. Two Auxiliary Nurse Mid-Wives at each Sub-Health Centre.
3. Three Staff-Nurses at the Primary Health Centre to ensure round the clock service therein.
4. Strengthen the Outpatient Services through posting/appointment of AYUSH doctors besides regular Medical Officers.
5. Uninterrupted Electricity -only [sic] and the water supply to the Sub-Centres and Public Health Centres.
6. Ensure proper modern sanitation.
7. Ensure that, in all 227 Community Health Centres in the State of Madhya Pradesh the availability of 24 hours delivery services including normal and assisted deliveries. It has 30-50 beds. To be equipped with man and machine at par with Indian Public Health Standards, which would include Essential and Emergency Obstetric Care Unit, so that round the clock hospital like services are available.
8. Ensure availability of vehicle round the clock under Janani Express Yojna.
9. Ensure that every pregnant women and new born is vaccinated with Tetanus, BCG, Polio, DPT etc.
10. Form Village Health and Sanction Committee in all villages.
11. Ensure that at Block Level Regular Camps are held for Jan Sunwai which would include the Sarpanch, Doctors posted within the Block.
12. To set up all 87 Rogi Kalyan Samitis.
13. Constitute Monitoring Committee at District and Block Level and ensure complete documentation of each and every patient.
14. Fix the time bound Schedule of respective Sub-Centres, PHC, CHCs, and the District Hospital.

These measures though not exhaustive are in addition to the stipulations in PIP 2006-2012.

**24.** Besides above the State is to ensure strict and timely implementation of the goal of NRHM as per the Implementation Plan 2006 - 2012, so that there can be an effective Control of the MMR.

**25.** Respondents are reminded of the fact that the State of Madhya Pradesh having spread over 308.000 sq. kms. with a population of 60.4 million 73% whereof (15.4% of Schedule Caste and 19.9% of Schedule Tribe) living in rural areas and despite of progress on the socio economic front, the State continues to be afflicted with worst indicators in India which include low literacy rate (specially female literacy), high level of morbidity [sic] and mortality and approximately 37% of population lying below poverty line as indicated in PIP 2006-2012. It is the duty of the State to see that the MMR which was 498/lakh live birth should be brought down to the level as indicated by the National Rural Health Mission. To achieve the same, the State will have to strive hard by implementing the Mission Plan in letter and spirit which requires some drastic efforts to be made by the State Government and its functionaries. We expect the State Government to rise to the occasion and will do its best to achieve the goals.

**26.** We have not set a separate time period for implementing the recommendation which we have made hereinabove as the period is already set through Programme Implementation Plan 2006-2012.

**27.** The petition is thus, disposed of finally in above terms."

## IN THE HIGH COURT OF SIKKIM

**Rinzing Chewang Kazi v. State of Sikkim & Ors.****2016 SCC OnLine Sikk 38****Sunil Kumar Sinha, C.J. and Meenakshi Madan Rai, J.**

***This public interest litigation sought effective implementation of the National Rural Health Mission (NRHM) in the State of Sikkim and argued that the State's failure to provide adequate reproductive and child health services to women and children violates their rights under Articles 14, 15 and 21 of the Indian Constitution. The High Court issued directions for proper implementation of Janani Suraksha Yojana and Janani Shishu Suraksha Karyakram under NRHM.***

**Sinha, C.J.:** “By way of introduction, it may be stated here that this is a Public Interest Litigation seeking effective implementation of the National Rural Health Mission (for short NRHM) in the State of Sikkim by issuing appropriate orders to provide for required facilities and personnel in remote rural villages of the State, focusing in particular on the health of Women, Children and Senior Citizens being Marginalised Groups of society. It is also concerned with the violation of Articles 14, 15 and 21 of the Constitution alleging failure on the part of the Respondents to provide adequate facilities to women in terms of reproductive and child health services.

**2.** ...The objective of the NRHM, *inter alia*, is to reduce maternal mortality rate, infant mortality rate and total fertility rate. Within the ambit of the NRHM is the Janani Suraksha Yojana (JSY), a scheme, which is a 100% Centrally Sponsored and “.....integrates the cash assistance with antenatal care during the pregnancy period, institutional care during delivery and immediate post partum period in a health centre by establishing a system of coordinated care by field level health workers.” (See Janani Suraksha Yojana Guidelines for Implementation, Ministry of Health and Family Welfare, Government of India).” The vision of the scheme besides being to reduce maternal mortality and the infant mortality rate, seeks to increase institutional deliveries in women belonging to the Below Poverty Line (BPL) households of the age of 19 years or above, up to two live births. Along with the Scheme of Janani Suraksha Yojana, is the Janani-Shishu Suraksha Karyakram (JSSK) which assures that pregnant women and newborns do not have to incur pocket expenses in all Government institutions and lays down the entitlements for pregnant women and sick new born till 30 days of the birth.

**3.** Under the NRHM, Accredited Social Health Activists (ASHA) are to be appointed in each village and trained to act as an interface between the community and the public health systems. They are to assist the pregnant women belonging to households Below Poverty Line (BPL) in obtaining the use of health services by *inter alia* undertaking certain responsibilities, which include identifying pregnant women, providing them with checkups, counseling them for institutional deliveries, etc.

**4.** This Writ Petition, as already stated has been filed seeking proper implementation of the NRHM.

**5.** In view of the facts put forth in the Writ Petition, this Court vide an Order on 24.8.2012, observed as follows:-

“...From the perusal of the averments made in the Writ Petition, we find that various Govt. Sponsored Schemes, namely, National Rural Health Mission (NRHM), Janani Suraksha Yojana (JSY) and other schemes have not been implemented in right spirit. There are also averments regarding non-availability of life saving drugs in most of the Government Hospitals/Health Centres both at District and Sub-Divisional level. State Respondents will furnish details of the facilities available at District and Sub-Divisional level Hospitals and Primary Health Centres including Dispensaries with details of the number of such Centres. The availability of life saving drugs with its names/brand and quantity with the expiry dates will also be disclosed in the Affidavit so filed.

In the meantime we further direct that the State will ensure availability of life saving drugs in all the Hospitals/Health Centres within a period of 2(two) weeks, if not already available...”

...

**16.** A “Brief Fact Finding Report of the Ground” (sic) was filed by the Petitioner. In terms of the said Report, this Court vide its Order dated 23.9.2013, observed that the Petitioner has *inter alia* pointed out the condition of Gynaecology Department, STNM Hospital at Gangtok, where the patients were facing great hardship on account of dearth of sufficient number of toilets. Admitting this in substance, the State Respondents undertook to explore possibilities to build new

toilets for the OPD patients and attendants accompanying the ailing. The Court directed the State Respondents to expedite the construction of at least one more toilet on each of the floors of the building where Gynaecology Wards were situated, with a further direction that a report be submitted within 30 days regarding the progress...

...

**22.** On 7.8.2014, a second “Fact finding Report” was filed by the Petitioner, which dealt with a fact finding conducted by Advocate, Sarita Bhusal and one Maya Sikan (Health Right Activist from Delhi) on 20-21 May, 2014 concerning the implementation of the NRHM on the ground in the State, wherein it was alleged that most pregnant and lactating women were made to purchase basic medicines like Iron, Folic Acid, Calcium Pills and necessities, such as cotton, gloves, etc. That, basic instruments like ECGs were not available either in the Primary Health Centres of District Hospitals. Pregnant women were made to sleep in the corridors near the toilet, new born babies were kept in rooms without proper ventilation. No incubator facilities were available for new born children, neither was there an Operation Theatre in the District Hospital at Mangan, while both Hospitals at Mangan and Singtam had no Blood Banks and that there was lack of proper sanitation and toilet facilities in Primary Health Centres, hence the NRHM Scheme is not being implemented as envisaged.

...

**25.** It is thus clear that this Court had issued various directions in public interest on different dates and had monitored [*sic*] and compliance reports were filed by the State.

**26.** Now, we would like to concentrate on the core issues highlighted by the Petitioner in CMA No. 387/2014 and CMA No. 251/2015.

**27.** Dr. Doma T. Bhutia, learned Counsel appearing on behalf of the Petitioner, has firstly contended that Maternal Death Reviews (MDRs), as per the Government of India Guidance Manual on maternal death, are not being regularly done and the reviews are not being published in the website of the National Health Mission (NHM) of Sikkim, therefore, immediate directions should be issued...

**28.** Having heard Counsel for both the parties, we are of the view that there is no harm if the above materials are uploaded in the website. On the contrary, they would be helpful for awareness as also leading to transparency and would further show the real picture at a glance for self evaluation. The Maternal Death Reviews and Community based monitoring should be done regularly in the larger public interest and necessary materials should be uploaded in the website of the NHM and we direct accordingly.

**29.** Dr. Bhutia then contended that the State be directed to create blood banks and blood storage facilities as also arrange sufficient number of oxygen cylinders in every district to prevent maternal deaths related to bleedings...The State has a long term goal to update all 4 district hospitals to Indian Public Health Standards (IPHS). However, it requires that these institutions have to first function as First Referral Units (FRUs) with a minimum provision of facilities for Emergency Obstetric Care including surgical interventions like Caesarean Sections, New-born Care and Emergency Care of sick children and blood storage facility... [E]ven according to the NRHM, blood storage facility should be there in a CHC. Apart from the above, if we look into the services guaranteed for the health care, it is a matter of common knowledge that blood transfusion would be necessary in many health services proposed. Thus, taking guidelines from the NRHM, we are of the view that there should be a blood bank in every district hospital and there should also be blood storage facility at least in CHCs. We are conscious that we are not experts, however, the view which we have taken, is based upon the documents of NRHM as also the comprehensive report issued by the State Government. We, therefore, direct that the State Government shall make all endeavour to establish a blood bank in each district and also to establish blood storage facility in each CHC in near future.

**30.** Dr. Bhutia has also contended that enough number of oxygen cylinders should be available in the hospitals. She quoted example that many times only one cylinder caters the need of entire ward where number of patients/new-born children are very high. We have no data about the number of oxygen cylinders usually deployed in different hospitals. Mr. Pradhan has contended that sufficient number of oxygen cylinders have been put in all the district hospitals, which we also find in reply to CMA No. 387/2014. We trust that there would not be any crisis in this regard and the things would go smoothly.

**31.** Dr. Bhutia then contended that the State should initiate a free emergency transport system for referrals in compliance with Janani Sishu Surakshya Karyakram (JSSK). Mr. Pradhan has contended that JSSK was started since the year 2011 and under the JSSK, free transport, free drugs and diet for pregnant mothers and infants are provided. The IPHS

guidelines would show that JSSK was an initiative to assure free services to all pregnant women and sick neonates accessing public health institutions. The scheme envisages free and cashless services to pregnant women including normal deliveries and caesarean section operations and also treatment of sick new-born (up to 30 days after birth) in all Government health institutions across the States. This initiative supplements the cash assistance given to pregnant women under the Janani Surakshya Yojana (JSY) and is aimed at mitigating the burden of out of pocket expenditure incurred by pregnant women and sick newborns. (see p.9 of the IPHS guidelines). Under various entitlements for pregnant women, one is free transport from home to health institutions, between facilities in case of referrals and drop back from institutions to home. The State has filed two quarterly status reports regarding implementation of JSSK (April to June, 2014 and July to September, 2014)...It is thus clear that the State has already initiated free emergency transport system for referrals under the JSSK and no directions are required to be issued in this regard.

**32.** Dr. Bhutia next contended that a Committee should be constituted to investigate, report and find out solutions for poor implementation of JSY. We find that there is no pleading in the Writ Petition making ground for constitution of such a Committee and direct investigation, as prayed for. Even, the Petitioner has never sought any relief in this regard. It appears that while the Counsel for the Petitioner expressed to sort out remaining core issues after various interim directions, the said point was taken up in CMA No. 387/2014 and a direction was sought.

**33.** ...We have scrutinized various documents filed along with the Writ Petition and we do not find that the Petitioner even has made a foundation to show that there was poor implementation of JSY...

**34.** It is, therefore, clear that there are no sufficient reasons before us to constitute a Committee for the above purposes and to take a view that there is poor implementation of JSY and a Committee is immediately required to be constituted to investigate all these...

**35.** Dr. Bhutia then contended that all vacant posts of Doctors and Staff Nurses be directed to be filled up immediately... It is, thus, clear that the Government has already taken steps to fill up the existing vacancies in the above manner when it was being monitored by this Court. Dr. Bhutia has also argued that Doctors and Nurses posted in rural areas should be given incentives. About the incentives of the Doctors and Nurses posted in the rural areas, statement has been made in CMA No. 387/2014 that the Doctors and Nurses appointed under NHM posted in difficult areas are paid higher remuneration as compared to the others. As such, no further directions are required in these matters.

**36.** Dr. Bhutia then contended that directions may be issued for improved hygiene, increased staff and increased bed capacity in STNM Hospital, Gangtok. It was brought to our notice that additional room with 10 beds was established for post natal care mother at the ground floor of Gynae building and ill-hygienic conditions which were on account of over-crowding have now improved. It was also brought to our notice that Department is creating 10 bedded post natal ward within 2-3 months by shifting School Health and National Blindness Control Programme Room situated at ground floor of Gynae complex. This will further improve the ill-hygienic situation. Additional toilet has also been constructed near Gynae complex. Additional two staff nurses from NHM have also been deployed. Besides the above, vide Affidavit dated 30.05.2015, it was stated by the Additional Secretary that construction of a Multi Specialty Hospital at Sichey, Gangtok is under progress and its bed strength was revised from 575 to 1000...

**37.** Dr. Bhutia also contended that a direction should be issued to the State-Respondents to have emergency helpline numbers and emergency Doctors' cell numbers in all the four districts to address health related issues in distress/emergency situation. In reply to the above issue, it was submitted by Additional Advocate General that emergency helpline numbers are already there ... In reply to the above issue, it was submitted by Additional Advocate General that emergency helpline numbers are already there.

**38.** Therefore, nothing is required to be done on the said aspect.

...

**41.** After conclusion of the arguments, on the last date, learned Additional Advocate General made some suggestions to be implemented immediately. They are (i) free medicine counter in all district hospitals/STNM; (ii) all free medicines as per the list provided to this Court to be made available in the said counter; (iii) separate OPD card centre at STNM Hospital, Gangtok viz. male, female and senior citizens; (iv) Out Patient Duty (OPD) morning and afternoon at STNM Hospital should be regular. Afternoon OPD should be maintained strictly and (v) an inquiry desk to be made available at STNM Hospital which should be easily visible to assist the patients/parties. PIL is not in the nature of adversary litigation but it is a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice (vide *Bandhua*

*Mukto Morcha v. Union of India*, (1984) 3 SCC 161 : AIR 1984 SC 802). Therefore, any good suggestions coming from either side can be taken up for consideration and if it appears to be permissible under the law, the same may be directed to be implemented. We are of the view that the above suggestions coming from the Additional Advocate General can be accepted for implementation and we do it accordingly.

**42.** On the discussions made above, we dispose of this PIL along with CMA Nos. 387/2014 & 251/2015 on following terms:-

(1) The State will ensure availability of life saving drugs in all the hospitals/health centres. Interim direction in this regard vide Order dated 24.08.2012 is made absolute.

(see Order dated 24.08.2012)

(2) Other interim directions on which compliance reports have not been filed shall also be taken as absolute.

(3) JSY and JSSK shall be implemented in their letter and spirit so that the eligible women and children derive proper benefits from these schemes.

(4) The Maternal Death Reviews and Community Based Monitoring shall be done regularly and necessary materials shall be uploaded in the website of the NHM.

(see paragraph 28)

(5) The State Government shall make all endeavour to establish a Blood Bank in each district and also to establish Blood Storage facility in each CHC in near future. (see paragraph 29)

(6) State will create a free medicine counter in all district hospitals.

(see paragraph 39)

(7) All free medicines, as per the list provided to this Court, shall be made available in the said counters. (see para 39)

(8) There shall be separate OPD card centres at STNM Hospital, Gangtok viz. male, female and senior citizens. The Out Patient Duty (OPD) morning and afternoon at STNM Hospital shall be regular and afternoon OPD should be maintained strictly.

(see paragraph 39)

(9) An inquiry desk shall be made available at STNM Hospital, Gangtok, which would be easily visible to assist the patients/their attendants.

(see paragraph 39)

**43.** In the facts and circumstances of the case, there shall be no order as to costs."

## IN THE HIGH COURT OF CHHATTISGARH

**Kali Bai v. Union of India & Ors.**

**2017 SCC OnLine Chh 1081**

**Thottathil B. Radhakrishnan, C.J. and Sharad Kumar Gupta, J.**

***A public interest litigation was instituted by a woman whose daughter died due to the poor health facilities and mismanagement at the Community Health Centre (CHC), Gaurela where she was admitted for delivery. Arguing that deficiencies in medical facilities at the CHC violated the right to reproductive health arising from Article 21 of the Indian Constitution and India's international obligations, the petitioner sought directions for improvement of public health facilities and corrective measures for management of maternal mortality.***

**Radhakrishnan, C.J.:** "This writ petition is instituted as a Public Interest Litigation by a woman of Gaurela Block in District Bilaspur, who allegedly lost her daughter due to the poor health facilities and mismanagement of the situations that followed her admission to the Community Health Centre, Gaurela; for short, "CHC", for delivery. The Petitioner does not seek any order personally in her favour..."



**2.** Petitioner pleads that World Health Organisation has defined “maternal death” as “the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management but not from accidental or incidental causes.” She points out that the Ministry of Health and Family Welfare in the Government of India had reported Chhattisgarh Maternal Mortality Ratio; for short, “MMR”, at a very high level and Bilaspur district as having one of the highest MMRs in the State and in India. In public interest, the Petitioner seeks a direction to the Respondents to fill the post of Anesthetist and Gynecologist trained in Emergency Obstetric Care in the CHC and to establish a blood storage facility in that CHC. She also seeks a direction to provide Sonography diagnostic facilities and to ensure that Caesarean section deliveries are conducted in the CHC. She seeks a further direction for supply of free medicine in the CHC and to ensure that corrective measures be taken in the sector of management of maternal mortality. She also seeks a direction that the findings of maternal death audits and the corrective measures in the maternal deaths which occurred in the year 2013 - 2014 be uploaded on the website.

...

**5.** Making reference to the decisions of the Hon'ble Supreme Court of India in *Pt. Parmanand Katara v. Union of India*; 1989 SCR (3) 997, *Consumer Education & Research Centre v. Union of India*; (1995) 3 SCC 42, *Paschim Banga Khet Mazdoor Samity v. State of W.B.*; (1996) 4 SCC 37 as well as the decision of Delhi High Court in *Laxmi Mandal v. Deen Dayal Harinagar Hospital*; in Writ Petition (C) No. 8853 of 2008, decided on 04.06.2010, and that of the Madhya Pradesh High Court in *Sandesh Bansal v. Union of India*; in Writ Petition No. 9061 of 2008, decided on 06.02.2012, learned counsel for the Petitioner highlighted the scope of Article 21 of the Constitution in relation to the facts and situations pleaded by the Petitioner. Making reference to the provisions of the Universal Declaration of Human Rights; for short 'UDHR' and the Convention on the Elimination of all Forms of Discrimination Against Women; for short 'CEDAW'; she argued that the demonstrated shortage of the medical facilities in the Gaurela CHC results in violation of the human rights.

...

**7.** Right to health includes the right to access public health facilities and right to minimum standard of treatment and care through such facilities. Such right to health and reproductive rights of the mother are two among the inalienable components of basic, fundamental and human right to life under Article 21 of the Constitution. Identification of high risk pregnancies, followed by appropriate and prompt referral of cases needing specialist care are infeasible components of access to protection and enforcement of reproductive rights of the mother and eligibility to medical care and support to ensure protection of the foetus from being lost.

**8.** India is either a State party or a ratifying State as regards different International Declarations and Conventions. The State has the international obligation and constitutional responsibility to give effect to, and honour, the terms of such Declarations and Conventions. Motherhood is entitled to special care and assistance in terms of the UDHR. International Covenant on Economic, Social and Cultural Rights, *inter alia*, envisages provisions to ensure reduction of the stillbirth rate and of infant mortality and the obligation of governance to ensure the right of everyone to enjoyment of highest attainable standard of physical and mental health. These are provisions among those international obligations which are binding on India by reason of their acceptance and ratification. Similar are the provisions of the CEDAW, which enjoins, in particular, that women shall be ensured appropriate services in connection with pregnancy, confinement and post-natal period. CEDAW also contains the obligation to ensure focusing on women in rural areas and the obligation to ensure adequate health care facilities. It is the obligation of the State to diminish infant and child mortality and to ensure appropriate pre-natal and post-natal health care for mothers. These situational legal aspects have to be fruitfully effectuated to necessarily ensure that the steps said to have been taken by the Respondents are appropriately carried forward to augment the facilities in the CHCs and other health facility providing centres.

**9.** Article 42 of the Constitution, among the Directive Principles of State Policy enjoins, among other things, that the State shall make provision for maternity relief. The provisions contemplated in that Article are not confined to social security measures in connection with work and employment or places of work and employment. The gaze of that Article should guide the State in carrying forward the relevant provisions made by it in consonance with the eligibility of women to enjoy their right to life in terms of Article 21 of the Constitution. This is so because the Constitutional dictate [*sic*] to the establishment of governance of a Welfare State is to secure the welfare of the people. Providing adequate medical facilities for the people is an inexcusable component of the obligation of governance of a welfare State. Such obligation is discharged by the Governments by running hospitals and health centres which provide medical care.

**10.** The fundamental right to life guaranteed by Article 21 of the Constitution imposes corollary obligation on the State to safeguard the right to life of every person. The Government hospitals including the CHCs run by the State ought to be institutions which extend medical assistance for preserving human life because preservation of human life is of seminal and paramount importance in the context of right to life guaranteed under Article 21 of the Constitution. Failure on the part of Government hospitals to provide timely medical treatment to a person in need of such treatment results in violation of right to life of that person guaranteed under that Article. The State's obligation with reference to Article 21 is to be discharged by ensuring the availability of the Doctors with due acumen at the Government hospitals and by providing equipments of required standard and medicines, blood supplies and other requisites to ensure that the facilitation of the medical and health support through the different hospitals including CHCs are carried out in satisfaction of the constitutional prescriptions and legitimate goals of the polity as a whole.

**11.** Relevant policy documents, materials and the programmes of the Government of India shows that the National Rural Health Mission was launched, *inter alia*, to reduce MMR. Access to emergency obstetric care was identified as one of the key elements in the Programme Implementation Plan. Improvement of access to skilled delivery care and emergency obstetric care were seen necessary. Reduction of maternal morbidity and mortality due to post-partum haemorrhage by active management of the third stage of labour is also an inexcusable need. The infrastructure had to be strengthened by ensuring that operation theaters, labour rooms and maternity wards are updated to suit the requirements in Comprehensive Emergency Obstetric Neonatal Care and Basic Emergency Obstetric Neonatal Care facilities. Providing adequate facilities to ensure all services including blood transfusion and storage facilities are also needed to effectuate proper implementation of the goals sought to be achieved by such programmes. There is no gainsaying in the second decade of the 21<sup>st</sup> century that provisions for such facilities can wait or would take its own time.

**12.** Gaurela is a part of the State of Chhattisgarh which has a large tribal population. Making reference to the census of 2001, it was noted by the National Legal Services Authority; for short 'NALSA', that majority of the population of "Particularly Vulnerable Tribal Groups" population lives in seven States including the State of Chhattisgarh. They need special attention due to their vulnerability. Those who do not fall into that category, be they in groups identified as Scheduled Tribes or otherwise also fall into the basket which carries the homogeneous group of people of this part of Nation. Section 4(d) of the Legal Services Authorities Act, 1987 enjoins that the Central Authority shall take necessary steps by way of social justice litigation with regard to, *inter alia*, consumer protection as well as any other matter of special concern to the weaker sections of the society...While NALSA formulated a scheme aimed at ensuring access to justice to the tribal population in the country and made NALSA (Protection and Enforcement of Tribal Rights) Scheme, 2015, it had identified health issues as among different challenges to that community. By and large, that is a challenge which would extend to all communities having regard to the geographical settings and the socio-economic situations in different areas. NALSA specifically noted that though buildings are built and health care institutions created in the form of health sub-centres, PHCs and CHCs, they often remain dysfunctional and that this situation is further compounded by inadequate monitoring, poor quality of reporting and accountability. It was also noted that the health care needs as well as difficulties in delivering health care in a geographically scattered, culturally different population surrounded by forests and other natural forces require issue specific look and are to be pointedly addressed notwithstanding the national health model which is primarily designed for the non-tribal areas. NALSA also noticed that factors such as unfriendly behaviour of the staff, language barrier, large distances, poor transport, low literacy and low health care seeking, lead to lower utilization of the existing health care institutions in tribal areas. We notice these factors at this juncture since the said NALSA Regulations makes it obligatory on the State Legal Services Authority; for short 'SLSA', to provide, among other things, legal assistance, if needed, by initiating Social Justice Litigation with the approval of the Executive Chairman of the SLSA concerned, whenever required. The said Scheme further provides that the Legal Services Authorities could play a vital role in providing medical help by, essentially, playing a connecting role as between the needy and the medical and health service. These provisions clearly show that the SLSA and the District Legal Services Authority; for short, 'DLSA', concerned ought to be well informed with the availability of the facilities, or the lack of them, in any governmental medical institution which is meant to provide service in such sectors. Therefore, it will be open to the SLSA or the DLSA to obtain reports regarding the provisions for health care, including as regards the deficits brought by the Petitioner to the notice of this Court for consideration, with the plea for issuance of requisite directions.

**13.** In the result, the writ petition is ordered directing that:

(i) The Respondents shall, without fail, ensure that the CHC at Gaurela and the different institutions which are referred to in the return dated 20.06.2017 filed on behalf of the Respondents, in relation to the medical facilities of the area concerned, shall be effectuated completely and meaningfully, in terms of facilities, personnel and equipments, medicines and blood storage facility, within a period of three months from today. It shall be further ensured that such facilities are run without any deficit in terms of Doctors, Nursing Staff, Paramedical Staff and other personnel as are required and by ensuring uninterrupted supply of requisite medicines, support equipments, blood and other necessities. The Respondents shall specifically address the requirement of Anesthetist, Gynecologist trained in emergency Obstetric care and the need to establish blood storage facility, Sonography diagnostic facility as well as free supply of medicines in the Gaurela CHC.

(ii) The Respondents 3 and 4 are directed to provide bi-monthly report to the DLSA, Bilaspur regarding all the affairs of CHC Gaurela as may be relevant in the context of facts and factors dealt with in this judgment and the directions issued herein. The Member Secretary, DLSA, Bilaspur, is directed to visit CHC Gaurela and other medical institutions of that area once in three months or at any time, including at such shorter intervals as may be found necessary by the Chairperson of that DLSA. The Chhattisgarh SLSA is directed to ensure that it takes due action on the reports of the Bilaspur DLSA from time to time on issues relating to those medical facility centers.

(iii) The 3<sup>rd</sup> Respondent is further directed to provide an Action Taken Report on the compliance of the directions contained in this judgment to the Chairperson, DLSA, Bilaspur, on or before 30<sup>th</sup> December, 2017 ensuring that such details given therein are true and correct, issue specific. Such report shall bind all the Respondents.

(iv) Security amount, if any, deposited by the Petitioner be refunded.”

## Endnotes

- 1 World Health Organization, Maternal Health, *accessed at* [http://www.who.int/topics/maternal\\_health/en/](http://www.who.int/topics/maternal_health/en/).
- 2 The Supreme Court has recognized the right to health as a facet of the right to life under Article 21 in cases such as *Pt. Parmanand Katara v. Union of India*, (1989) 4 SCC 286 and *Paschim Banga Khet Majoor Samity v. State of West Bengal*, (1996) 4 SCC 37. *See infra* the extension of this right to cover right to reproductive and maternal health.
- 3 *Kali Bai v. Union of India*, 2017 SCC OnLine Chh 1081.
- 4 Examples include *Centre for Health and Resource Management v. Union of India*, 2015 SCC OnLine Pat 1243 and *Dunabai v. State of M.P.*, 2011 SCC OnLine MP 1360. In *State of U.P. v. Snehalata Singh @ Salenta*, SLP (C) No. 9299/2018, the Supreme Court stayed the operation of directions issued by the Allahabad High Court in *Snehalata Singh @ Salenta v. State of U.P.*, PIL No. 14588/2009 dated Mar. 9, 2018. There have been no substantive orders in this case by the Supreme Court and the matter is pending before the Court.
- 5 (2010) 172 DLT 9.
- 6 For example, the Janani Suraksha Yojana (JSY), Integrated Child Development Scheme (ICDS), National Maternity Benefit Scheme (NMBS), Antyodaya Anna Yojana (AAY) and National Family Benefit Scheme (NFBS).
- 7 W.P. No. 9061 of 2008 (Order dated Feb. 6, 2012) (High Court of Madhya Pradesh).
- 8 2016 SCC OnLine Sikk 38.
- 9 (2009) 16 SCC 149.
- 10 In *People's Union of Civil Liberties v. Union of India*, (2010) 13 SCC 63, the Supreme Court issued notice on an application filed by the Union of India seeking to restrict maternity benefits under the NMBS and Janani Suraksha Yojana on the basis of the number of children and the age of the woman seeking such benefits.
- 11 2011 SCC OnLine Del 137.
- 12 2017 SCC OnLine Chh 1081.
- 13 U.N. Office of the High Commissioner for Human Rights, "Status of Ratification Interactive Dashboard—India," <http://indicators.ohchr.org/>.
- 14 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained in U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001), Arts. 3-4.*
- 15 *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.



# CHAPTER ELEVEN

# MEDICAL NEGLIGENCE, CONSUMER PROTECTION, AND REPRODUCTIVE HEALTH

The question of whether medical services are covered under the Consumer Protection Act, 1986, was answered by the Supreme Court in the landmark case, **Indian Medical Association v. V. P. Shantha**.<sup>1</sup> The Court held that the services provided by medical practitioners or at a hospital are covered under the Consumer Protection Act, 1986, except when such service is provided free of charge to every patient or when provided under a contract of personal service. Consequently, consumer disputes redressal agencies may be approached for seeking relief in case of deficiency in reproductive health services and medical negligence.

The Supreme Court has approved the test laid down in **Bolam v. Friern Hospital Management Committee**<sup>2</sup> (Bolam Test) for determining a medical practitioner's liability for negligence.<sup>3</sup> Thus, the standard against which the practitioner's conduct is judged is of an “ordinary competent person exercising ordinary skill in that profession.”<sup>4</sup>

In **Achutrao Haribhau Khodwa v. State of Maharashtra**,<sup>5</sup> the Supreme Court held a doctor guilty of negligence for failure to act with reasonable skill and care as he had left a mop inside the body of a woman during the sterilization operation that caused her death. Likewise, the Delhi High Court in **R. R. Rana v. State**,<sup>6</sup> refused to interfere with the charge framed under Section 338 of the Indian Penal Code, 1860, against the doctor, noting that the nature of injuries suffered by the woman during the medical termination of her pregnancy could not have been caused by a professional acting with ordinary prudence.

In this section, we discuss the following issues relating to negligence in provision of reproductive health services:

- Sterilization, Medical Negligence, and Liability of the State.<sup>7</sup>
  - Burden of Proving Negligence
  - Liability of the State for Medical Negligence
  - Liability of the State for the Upbringing of an Unintended Child
  - Liability of the State for not Providing Adequate Health-Care Facilities
- Removal of Uterus/Ovaries of a Woman Without Her Consent

## Sterilization, Medical Negligence, and Liability of the State

The Supreme Court in **State of Haryana v. Santra**,<sup>8</sup> held the doctor of a government hospital liable for “negligence *per se*” as he had conducted an “incomplete” sterilization procedure by leaving one of the fallopian tubes unoperated. Noting that the woman had sought complete sterilization, the Court awarded damages on account of childbirth consequent to sterilization procedure.

The Madhya Pradesh High Court in **State of M.P. v. Smt Sundari Bai**,<sup>9</sup> held that a doctor would not be liable for negligence for adopting a particular method of sterilization, where there exists more than one “perfectly proper standard.”

Distinguishing **Santra** as a case of incomplete sterilization and negligence *per se*, the Court held that the doctor had performed a well-recognized sterilization procedure with a reasonable degree of care and skill and added that an error of judgment cannot be equated with negligence. In contrast, the Himachal Pradesh High Court in **State of H.P. v. Madhu Bala**,<sup>10</sup> relied on **Santra** to hold that the presumption of negligence *per se* stood un rebutted as the doctor had not adopted the “latest in vogue” method of sterilization.

A three-judge bench of the Supreme Court in **State of Punjab v. Shiv Ram**,<sup>11</sup> laid down the standard position for awarding compensation in cases of failed sterilizations. The Court stated that **Santra** did not lay down a universal standard and proceeded on the fact of proven negligence. Noting that none of the methods of sterilization is error-free, the Court held that only where the doctor is negligent (as per the Bolam Test) or gives an unequivocal guarantee that sterilization will not lead to any pregnancy, can compensation be awarded.<sup>12</sup> The Supreme Court in **Martin F. D'Souza v. Mohd. Ishfaq**,<sup>13</sup> noted that the approach in **Santra** stands overruled with the decisions in **Shiv Ram** and **Raj Rani**.<sup>14</sup> Various High Courts have followed **Shiv Ram** to deny compensation in the absence of proof of negligence.<sup>15</sup> In **State of H.P. v. Sushma Sharma**,<sup>16</sup> the Himachal

Pradesh High Court held the doctor liable for negligence for breach of duty as she had assured the woman undergoing sterilization that she would not bear any pregnancy in the future and also failed to apprise her of postoperative precautions. The court also noted the educational status of the woman in terms of her being able to understand the contents of the consent form, and held it to be a relevant factor in determining whether effective informed consent was obtained.<sup>17</sup>

## BURDEN OF PROVING NEGLIGENCE

In *Sumathi v. Dr. Suganthi*,<sup>18</sup> the Madras High Court held that the burden of proving absence of negligence lies heavily on the doctor, stating that the lower court had erred in shifting the burden to prove negligence on the woman, who belonged to a weaker section of society.

## LIABILITY OF THE STATE FOR MEDICAL NEGLIGENCE

The Supreme Court in *Achutrao Haribhau Khodwa*,<sup>19</sup> while holding a government doctor liable for negligence, also imposed vicarious liability on the state. It rejected the state's claim of sovereign immunity, holding that although maintaining a hospital is a "welfare activity" of the government, it is not an "exclusive" function or activity which amounts to exercise of sovereign power.

An expansive approach has been adopted by the Kerala High Court in *State of Kerala v. Santa*,<sup>20</sup> where it has held that aside from the vicarious liability, the state would be liable on account of promissory estoppel and will have a "constitutional responsibility" as inferred from the fundamental duties, directive principles of state policy, and fundamental rights to make good the damage suffered by a citizen who undergoes sterilization based on the state's assurance that it is an error-free method of birth control and who suffers upon its failure.

## LIABILITY OF THE STATE FOR UPBRINGING OF AN UNINTENDED CHILD ("WRONGFUL BIRTH")

Highlighting the importance of family planning programmes in a developing country such as India with increasing population, the Supreme Court in *Santra* held that the state would be responsible to provide damages for bringing up the "unwanted child" born as a result of failed sterilization caused due to negligence of the doctor. Considering the poor economic background of the woman who underwent sterilization, the Court allowed her to claim damages for the upbringing of her child up to age of puberty.

The approach in *Santra* no longer holds good with the Supreme Court's decision in *Shiv Ram*, where it has stated that a cause of action for compensation in case of failed sterilization arises only on negligence and not childbirth. The Court added that if a woman opts to bear the child, then such child ceases to be an unintended child and compensation cannot be claimed for the child's maintenance and upbringing. The Court, however, advised the government to establish a welfare fund or insurance scheme to provide relief in case of failed sterilization, particularly to persons belonging to lower strata of the society.

The Delhi High Court in *Nirmala Devi v. Union of India*,<sup>21</sup> held that there was no principle to award compensation for bringing up a mentally challenged child born as a result of failed sterilization, since there was no finding of negligence in this case.

## COMPENSATION FOR FAILURE OF STATE TO PROVIDE ADEQUATE HEALTH-CARE FACILITIES

In *S. Mary v. Union of India*,<sup>22</sup> the Madras High Court awarded compensation for loss of child and removal of uterus to a woman whose caesarean operation was delayed because of non-availability of hospital beds. The Court held that the woman's right to life and health under Article 21 of the Indian Constitution had been jeopardized.<sup>23</sup>

## Removal of Uterus or Ovaries Without Consent

In cases where the uterus and/or ovaries of a woman are removed without her consent in the course of a diagnostic or surgical procedure, courts have not held the doctors guilty of negligence if such removal was necessary for saving the woman's life or preserving her health. The principle was enunciated by the Supreme Court in *Samira Kohli v. Dr. Prabha Manchanda*.<sup>24</sup> The Court held that the following constitute real and valid consent: (i) the patient has the capacity to consent; (ii) the patient consents voluntarily; and (iii) the patient has the adequate level of information about the nature of the medical procedure. The adequacy of such information would be assessed as per the Bolam Test. Further, it held



that consent for a particular treatment will not be valid for another treatment except in case of an emergency when it is unreasonable to delay until consent is obtained. While considering the quantum of compensation for negligence,<sup>25</sup> the Court considered the woman's age and health, repercussions of hysterectomy, and good faith on part of the doctor as mitigating factors.

## Related Human Rights Standards and Jurisprudence

Below is a selection of international human rights laws and standards concerning state parties' obligation to protect individuals from rights violations that may be perpetrated by private third parties, including through negligent medical care. Under human rights law, governments are obligated to prohibit third parties from violating sexual and reproductive health and rights, punish violators, and ensure that victims have access to adequate judicial and other remedies.

The Government of India has committed itself to comply with the obligations outlined in various international human rights treaties that protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), and the International Covenant on Civil and Political Rights (ICCPR).<sup>26</sup> Under international law, all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.<sup>27</sup> The Supreme Court has held that in light of the obligation to "foster respect for international law" in Article 51 (c) of the Indian Constitution "[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee."<sup>28</sup>

### INTERNATIONAL TREATY STANDARDS

#### TREATIES

- **ICCPR, Articles 2(1), 3, 5, 6, 17** (guaranteeing the equal rights of men and women and prohibiting discrimination on the basis of sex; protecting the rights to life, including freedom from arbitrary deprivations of life, and privacy).
- **ICESCR, Articles 10, 12, 15** (protecting the rights to the highest attainable standard of physical and mental health and to "special protection" for women before and after childbirth; and to guarantee the right to "enjoy the benefits of scientific progress and its applications," including by ensuring "the development and the diffusion of science").
- **CEDAW, Articles 4(2), 10(h), 12** (outlining women's equal right to health, including by accommodating women's specific reproductive health needs and ensuring access to reproductive health information).

#### SELECTED GENERAL COMMENTS

- **Committee for Economic Social and Cultural Rights, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12)***, U.N. Doc. E/C.12/2000/4 (2000), paras. 12, 18–23, 33–37, 50–52, 59–62 (the right to health entitles individuals to available, accessible, acceptable, and good-quality health-care information, facilities, goods and services on a basis of non-discrimination; states' obligation to respect, protect, and promote the right to health includes the duty to ensure that third parties do not undermine the right to health and that where violations do occur, effective judicial remedy is available).
- **Committee for Economic Social and Cultural Rights, *General Comment No. 22 (2016) on the right to sexual and reproductive health***, U.N. Doc. E/C.12/GC/22 (2016), paras. 42–49, 54–55, 59–63 (states must take effective steps to monitor, regulate, and otherwise prevent third parties—including private health-care providers, health-insurance companies, educational institutions, and detention centres—from undermining the enjoyment of the right to sexual and reproductive health, including by ensuring that in practice, health-related information, goods, and services meet the standards of available, accessible, acceptable, and quality care).

- **CEDAW Committee, *General Recommendation No. 24: Article 12 of the Convention (women and health)***, U.N. Doc. A/54/38/Rev.1, chap. I (1999), paras. 11–15, 17, 20–22, 31(d)–(e) (outlining the state responsibility to respect, protect, and fulfill women’s equal right to health, including by ensuring women’s access to care on the basis of fully informed consent, without discrimination or third-party consent requirements; requiring that all public and private health-care providers implement appropriate health-care standards; and imposing sanctions on public and private care providers who violate the right to health particularly in the context of gender-based violence).
- **CEDAW Committee, *General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19***, U.N. Doc. CEDAW/C/GC/35 (2017), paras. 24–26 (outlining state responsibility to adopt and implement effective measures to prevent and punish gender-based violence against women committed by nonstate actors, including legislative, executive, and judicial measures that ensure reparations in case of rights violations by private parties).
- **Committee on the Rights of the Child, *General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (Art. 24)***, U.N. Doc. CRC/C/GC/15 (2013), paras. 75–85 (outlining the state duty to impose and enforce specific obligations of nonstate actors to support the health of children and mothers, including by requiring health-related private sector entities to comply with due diligence and other human rights standards).

## INQUIRIES AND INDIVIDUAL COMPLAINTS

- **CEDAW Committee, *Summary of the inquiry concerning the Philippines under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women***, U.N. Doc. CEDAW/C/OP.8/PHL/1 (2015), paras. 21–25, 45, 51 (f), 51 (h)–(k), 52(g) (establishing state duties to impose safeguards and oversight mechanisms on decentralized health-care providers at the local level; to ensure that local hospital procedures and practices facilitate reporting, investigating, and punishing discrimination and abuse; and to implement a system to ensure effective judicial protection and remedies for sexual and reproductive rights violations).

## UNITED NATIONS HUMAN RIGHTS EXPERT REPORTS

- **Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (SR Health), *Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. A/64/272 (2009), paras. 93–95, 101 (emphasizing the importance of implementing an effective legal framework and judicial and administrative mechanisms to ensure that both the state and third parties respect, protect, and fulfill patients’ rights, in practice, to informed consent in medical care).
- **SR Health, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health (by Paul Hunt)***, U.N. Doc. A/60/348 (2005), paras. 8–17 (emphasizing the need for health professionals to receive human rights training; highlighting that patients seeking reproductive health services are at particularly high risk of human rights violations; and outlining that states must “not place health professionals in a position where they may be called on to use their skills to further violations of human rights” of their patients and must provide “accountability mechanisms to redress or prevent human rights violations in the context of clinical practice”).
- **SR Health, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health***, U.N. Doc. E/CN.4/2004/49 (2004), paras. 41–44, 48–49, 73, 85, 88 (giving a brief overview of the right to sexual and reproductive health care that is available, accessible, acceptable, and of good quality, as well as the state obligation to respect, protect and fulfill the right to health, including by ensuring the implementation of “effective, accessible and transparent mechanisms of accountability in relation to all duty-bearers”).

## SELECTED REGIONAL CASE LAW

### EUROPEAN COURT OF HUMAN RIGHTS

- ***Kononova v. Russia, Application No. 37873/04 (2015)***, paras. 39–50 (holding that the laws had not provided adequate protection for the applicant's right to medical privacy, thereby compromising her right to choose, on the basis of informed consent, whether medical students would be able to participate in and “study” her childbirth; and that the domestic courts had not adequately examined her claims).
- ***A.K. v. Latvia, Application No. 33011/08 (2014)***, paras. 84–94, 105 (in a case where the applicant had been negligently denied adequate and timely antenatal testing that would have allowed her to choose whether to terminate her pregnancy: holding that the domestic courts had failed to protect applicant's right to privacy and personal integrity by not properly examining her domestic legal claim, and awarding her 5,000 euros in damages plus costs and expenses).
- ***Csoma v. Romania, Application No. 8759/05 (2013)***, paras. 41–43, 61–68 (in case of negligent sterilization without consent: finding a violation of the state's positive obligation to protect the petitioner's right to private life where the state had failed to put in place a system to hold the appropriate health-care professionals and institutions accountable, rendering it impossible for the victim to obtain adequate redress).
- ***Mehmet Şentürk and Bekir Şentürk v. Turkey, Application No. 13423/09 (2013)***, paras. 79–109 (where medical staff failed to provide emergency care, despite a known critical condition, resulting in the death of a pregnant woman and her foetus: holding that both the substantive and procedural aspects of the woman's right to life had been violated by, respectively, the negligence of hospital authorities and the inadequacy of the pursuant criminal proceedings; ruling separately that an unborn foetus does not attract protections under the right to life).
- ***G.B. and R.B. v. the Republic of Moldova, Application No. 16761/09 (2012)***, paras. 29–34 (holding that the state had failed to uphold the applicant's right to privacy and personal integrity under Article 8 when the domestic court, upon finding a negligent violation of the applicant's right to informed consent to sterilization, did not award adequate compensation for pain and suffering).

### INTER-AMERICAN COURT OF HUMAN RIGHTS

- ***Gonzales Lluy et al. v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Series C No. 298 (2015)*** at § XXI—Reparations (in a case of negligent infection with HIV and subsequent discrimination based on HIV status: finding violations of the rights to life, humane treatment, and physical, mental, and moral integrity where the state failed to ensure adequate medical care from both public and private providers and to ensure an adequate remedy; ordering the state to provide restitution, rehabilitation, reparations, and guarantees of non-repetition).

# RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

## IN THE SUPREME COURT OF INDIA

**Indian Medical Association v. V.P. Shantha**

**(1995) 6 SCC 651**

**Kuldip Singh, S.C. Agrawal and B.L. Hansaria, JJ.**

***The issue before the Supreme Court was whether, and if so under what circumstances, the service rendered by a medical practitioner or at a hospital/nursing home can be construed as “service” under Section 2 (1)(o) of the Consumer Protection Act, 1986.***

Agrawal, J.: “...

2. These appeals, special leave petitions and the writ petition raise a common question, viz., whether and, if so, in what circumstances, a medical practitioner can be regarded as rendering ‘service’ under Section 2(1)(o) of the Consumer Protection Act, 1986 (hereinafter referred to as ‘the Act’). Connected with this question is the question whether the service rendered at a hospital/nursing home can be regarded as ‘service’ under Section 2(1)(o) of the Act. These questions have been considered by various High Courts as well as by the National Consumer Disputes Redressal Commission (hereinafter referred to as ‘the National Commission’).

...

11. ...Since the Act gives protection to the consumer in respect of service rendered to him, the expression ‘service’ in the Act has to be construed keeping in view the definition of ‘consumer’ in the Act. It is, therefore, necessary to set out the definition of the expression ‘consumer’ contained in Section 2(1)(d) insofar as it relates to services and the definition of the expression ‘service’ contained in Section 2(1)(o) of the Act. The said provisions are as follows—

“2. (1)(d) ‘consumer’ means any person who,—

(i) [Omitted]

(ii) hires or avails of *any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the service for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person.*

*Explanation.— [Omitted]”*

(emphasis added)

“2. (1)(o) ‘service’ means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, *but does not include rendering of any service free of charge or under a contract of personal service;*”

(emphasis added)

...

13. The definition of ‘service’ in Section 2(1)(o) of the Act can be split up into three parts — the main part, the inclusionary part and the exclusionary part. The main part is explanatory in nature and defines service to mean service of any description which is made available to the potential users. The inclusionary part expressly includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information. The exclusionary part excludes rendering of any service free of charge or under a contract of personal service.

**14.** The definition of 'service' as contained in Section 2(1)(o) of the Act has been construed by this Court in *Lucknow Development Authority v. M.K. Gupta* [(1994) 1 SCC 243]. After pointing out that the said definition is in three parts, the Court has observed: (SCC p. 255, para 4)

"The main clause itself is very wide. It applies to any service made available to potential users. The words 'any' and 'potential' are significant. Both are of wide amplitude [...] The use of the word 'any' in the context it has been used in clause (o) indicates that it has been used in wider sense extending from one to all. The other word 'potential' is again very wide[...]. In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all actual or potential users."

**15.** The contention that the entire objective of the Act is to protect the consumer against malpractices in business was rejected with the observations: (SCC p. 256, para 5)

"The argument proceeded on complete misapprehension of the purpose of Act and even its explicit language. In fact the Act requires provider of service to be more objective and caretaking."

Referring to the inclusive part of the definition it was said: (SCC p. 257, para 6)

"The inclusive clause succeeded in widening its scope but not exhausting the services which could be covered in earlier part. So any service except when it is free of charge or under a constraint of personal service is included in it."

...

**17.** In the present case the inclusive part of the definition of 'service' is not applicable and we are required to deal with the questions falling for consideration in the light of the main part and the exclusionary part of the definition. The exclusionary part will require consideration only if it is found that in the matter of consultation, diagnosis and treatment, a medical practitioner or a hospital/nursing home renders a service falling within the main part of the definition contained in Section 2(1)(o) of the Act. We have, therefore, to determine whether medical practitioners and hospitals/nursing homes can be regarded as rendering a 'service' as contemplated in the main part of Section 2(1)(o). This determination has to be made in the light of the aforementioned observations in *Lucknow Development Authority* [(1994) 1 SCC 243]. We will first examine this question in relation to medical practitioners.

**18.** It has been contended that in law there is a distinction between a profession and an occupation and that while a person engaged in an occupation renders service which falls within the ambit of Section 2(1)(o), the service rendered by a person belonging to a profession does not fall within the ambit of the said provision and, therefore, medical practitioners who belong to the medical profession are not covered by the provisions of the Act. It has been urged that medical practitioners are governed by the provisions of the Indian Medical Council Act, 1956 and the Code of Medical Ethics made by the Medical Council of India, as approved by the Government of India under Section 3 of the Indian Medical Council Act, 1956 which regulates their conduct as members of the medical profession and provides for disciplinary action by the Medical Council of India and/or State Medical Councils against a person for professional misconduct.

...

**22.** In the matter of professional liability professions differ from other occupations for the reason that professions operate in spheres where success cannot be achieved in every case and very often success or failure depends upon factors beyond the professional man's control. In devising a rational approach to professional liability which must provide proper protection to the consumer while allowing for the factors mentioned above, the approach of the courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services. (See: *Jackson & Powell*, paras 1-04, 1-05 and 1-56).

...

**26.** We are...unable to subscribe to the view that merely because medical practitioners belong to the medical profession they are outside the purview of the provisions of the Act and the services rendered by medical practitioners are not covered by Section 2(1)(o) of the Act.

**27.** Shri Harish Salve, appearing for the Indian Medical Association, has urged that having regard to the expression "which is made available to potential users" contained in Section 2(1)(o) of the Act, medical practitioners are not contemplated by Parliament to be covered within the provisions of the Act. He has urged that the said expression

is indicative of the kind of service the law contemplates, namely, service of an institutional type which is really a commercial enterprise and open and available to all who seek to avail thereof. In this context, reliance has also been placed on the word 'hires' in sub-clause (ii) of the definition of 'consumer' contained in Section 2(1)(d) of the Act. We are unable to uphold this contention...By inserting the words "or avails of" after the word 'hires' in Section 2(1)(d) (ii) by the Amendment Act of 1993, Parliament has clearly indicated that the word 'hires' has been used in the same sense as "avails of"...The word 'user' in the expression "which is made available to potential users" in the definition of 'service' in Section 2(1)(o) has to be construed having regard to the definition of 'consumer' in Section 2(1)(d)(ii) and, if so construed, it means "availing of services". From the use of the words "potential users" it cannot, therefore, be inferred that the services rendered by medical practitioners are not contemplated by Parliament to be covered within the expression 'service' as contained in Section 2(1)(o).

...

**29.** The submission of Shri Salve is that under the said clause, the deficiency with regard to fault, imperfection, shortcoming or inadequacy in respect of a service has to be ascertained on the basis of certain norms relating to quality, nature and manner of performance and that medical services rendered by a medical practitioner cannot be judged on the basis of any fixed norms and, therefore, a medical practitioner cannot be said to have been covered by the expression 'service' as defined in Section 2(1)(o). We are unable to agree. While construing the scope of the provisions of the Act in the context of deficiency in service it would be relevant to take note of the provisions contained in Section 14 of the Act which indicate the reliefs that can be granted on a complaint filed under the Act. In respect of deficiency in service, the following reliefs can be granted:

(i) return of the charges paid by the complainant. [clause (c)]

(ii) payment of such amount as may be awarded as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party. [clause (d)]

(iii) removal of the defects or deficiencies in the services in question. [clause (e)]

**30.** Section 14(1)(d) would, therefore, indicate that the compensation to be awarded is for loss or injury suffered by the consumer due to the negligence of the opposite party. A determination about deficiency in service for the purpose of Section 2(1)(g) has, therefore, to be made by applying the same test as is applied in an action for damages for negligence. The standard of care which is required from medical practitioners as laid down by McNair, J. in his direction to the jury in *Bolam v. Friern Hospital Management Committee* [(1957) 1 WLR 582 : (1957) 2 All ER 118], has been accepted by the House of Lords in a number of cases. (See: *Whitehouse v. Jordan* [(1981) 1 WLR 246 : (1981) 1 All ER 267] ; *Maynard v. West Midlands Regional Health Authority* [(1984) 1 WLR 634 : (1985) 1 All ER 635] ; *Sidaway v. Governors of Bethlem Royal Hospital* [1985 AC 871 : (1985) 1 All ER 643 : (1985) 2 WLR 480] .) In *Bolam* [(1957) 1 WLR 582 : (1957) 2 All ER 118] McNair, J. has said: (All ER p. 121)

"But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

**31.** In an action for negligence in tort against a surgeon this Court, in *Laxman Balkrishna Joshi v. Trimbak Bapu Godbole* [(1969) 1 SCR 206 : AIR 1969 SC 128] has held: (SCR p. 213)

"The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law require."

**32.** It is, therefore, not possible to hold that in view of the definition of 'deficiency' as contained in Section 2(1)(g), medical practitioners must be treated to be excluded from the ambit of the Act and the service rendered by them is not covered under Section 2(1)(o).

...

**37.** ...We are, therefore, unable to hold that on the ground of composition of the Consumer Disputes Redressal Agencies or on the ground of the procedure which is followed by the said Agencies for determining the issues arising before them, the service rendered by the medical practitioners are not intended to be included in the expression 'service' as defined in Section 2(1)(o) of the Act.

**38.** Keeping in view the wide amplitude of the definition of 'service' in the main part of Section 2(1)(o) as construed by this Court in *Lucknow Development Authority* [(1994) 1 SCC 243], we find no plausible reason to cut down the width of that part so as to exclude the services rendered by a medical practitioner from the ambit of the main part of Section 2(1)(o).

**39.** We may now proceed to consider the exclusionary part of the definition to see whether such service is excluded by the said part. The exclusionary part excludes from the main part service rendered (i) free of charge; or (ii) under a contract of personal service.

...

**41.** It is no doubt true that the relationship between a medical practitioner and a patient carries within it a certain degree of mutual confidence and trust and, therefore, the services rendered by the medical practitioner can be regarded as services of personal nature but since there is no relationship of master and servant between the doctor and the patient, the contract between the medical practitioner and his patient cannot be treated as a contract of personal service but is a contract for services and the service rendered by the medical practitioner to his patient under such a contract is not covered by the exclusionary part of the definition of 'service' contained in Section 2(1)(o) of the Act.

**42.** ...There can be a contract of personal service if there is relationship of master and servant between a doctor and the person availing of his services and in that event the services rendered by the doctor to his employer would be excluded from the purview of the expression 'service' under Section 2(1)(o) of the Act by virtue of the exclusionary clause in the said definition.

**43.** The other part of exclusionary clause relates to services rendered "free of charge". The medical practitioners, government hospitals/nursing homes and private hospitals/nursing homes (hereinafter called "doctors and hospitals") broadly fall in three categories:

(i) where services are rendered free of charge to everybody availing of the said services.

(ii) where charges are required to be paid by everybody availing of the services and

(iii) where charges are required to be paid by persons availing of services but certain categories of persons who cannot afford to pay are rendered service free of charges.

There is no difficulty in respect of the first two categories. Doctors and hospitals who render service without any charge whatsoever to every person availing of the service would not fall within the ambit of 'service' under Section 2(1)(o) of the Act. The payment of a token amount for registration purposes only would not alter the position in respect of such doctors and hospitals. So far as the second category is concerned, since the service is rendered on payment basis to all the persons they would clearly fall within the ambit of Section 2(1)(o) of the Act. The third category of doctors and hospitals do provide free service to some of the patients belonging to the poor class but the bulk of the service is rendered to the patients on payment basis. The expenses incurred for providing free service are met out of the income from the service rendered to the paying patients. The service rendered by such doctors and hospitals to paying patients undoubtedly falls within the ambit of Section 2(1)(o) of the Act.

**44.** The question for our consideration is whether the service rendered to patients free of charge by the doctors and hospitals in category (iii) is excluded by virtue of the exclusionary clause in Section 2(1)(o) of the Act. In our opinion, the question has to be answered in the negative...All persons who avail of the services by doctors and hospitals in category (iii) are required to be treated on the same footing irrespective of the fact that some of them pay for the service and others avail of the same free of charge. Most of the doctors and hospitals work on commercial lines and the expenses incurred for providing services free of charge to patients who are not in a position to bear the charges are met out of the income earned by such doctors and hospitals from services rendered to paying patients. The government hospitals may

not be commercial in that sense but on the overall consideration of the objectives and the scheme of the Act, it would not be possible to treat the government hospitals differently. We are of the view that in such a situation, the persons belonging to “poor class” who are provided services free of charge are the beneficiaries of the service which is hired or availed of by the “paying class”. We are, therefore, of the opinion that service rendered by the doctors and hospitals falling in category (iii) irrespective of the fact that part of the service is rendered free of charge, would nevertheless fall within the ambit of the expression ‘service’ as defined in Section 2(1)(o) of the Act. We are further of the view that persons who are rendered free service are the ‘beneficiaries’ and as such come within the definition of ‘consumer’ under Section 2(1)(d) of the Act.

**45.** ...The medical officer who is employed in the hospital renders the service on behalf of the hospital administration and if the service, as rendered by the hospital, does not fall within the ambit of Section 2(1)(o), being free of charge, the same service cannot be treated as service under Section 2(1)(o) for the reason that it has been rendered by a medical officer in the hospital who receives salary for employment in the hospital. There is no direct nexus between the payment of the salary to the medical officer by the hospital administration and the person to whom service is rendered. The salary that is paid by the hospital administration to the employee medical officer cannot be regarded as payment made on behalf of the person availing of the service or for his benefit so as to make the person availing of the service a ‘consumer’ under Section 2(1)(d) in respect of the service rendered to him. The service rendered by the employee-medical officer to such a person would, therefore, continue to be service rendered free of charge and would be outside the purview of Section 2(1)(o).

**46.** A contention has also been raised that even in the government hospitals/health centres/dispensaries where services are rendered free of charge to all the patients, the provisions of the Act shall apply because the expenses of running the said hospitals are met by appropriation from the Consolidated Fund which is raised from the taxes paid by the taxpayers. We do not agree.

**47.** ...The tax paid by the person availing of the service at a government hospital cannot be treated as a consideration or charge for the service rendered at the said hospital and such service, though rendered free of charge, does not cease to be so because the person availing of the service happens to be a taxpayer.

**48.** Adverting to the individual doctors employed and serving in the hospitals, we are of the view that such doctors working in the hospitals/nursing homes/dispensaries, whether government or private — belonging to categories (ii) and (iii) above would be covered by the definition of ‘service’ under the Act and as such are amenable to the provisions of the Act along with the management of the hospital, etc. jointly and severally.

**49.** There may, however, be a case where a person has taken an insurance policy for medicare whereunder all the charges for consultation, diagnosis and medical treatment are borne by the insurance company. In such a case, the person receiving the treatment is a beneficiary of the service which has been rendered to him by the medical practitioner, the payment for which would be made by the insurance company under the insurance policy. The rendering of such service by the medical practitioner cannot be said to be free of charge and would, therefore, fall within the ambit of the expression ‘service’ in Section 2(1)(o) of the Act. So also there may be cases where as a part of the conditions of service, the employer bears the expense of medical treatment of the employee and his family members dependent on him. The service rendered to him by a medical practitioner would not be free of charge and would, therefore, constitute service under Section 2(1)(o).

...

**55.** On the basis of the above discussion, we arrive at the following conclusions:

(1) Service rendered to a patient by a medical practitioner (except where the doctor renders service free of charge to every patient or under a contract of personal service), by way of consultation, diagnosis and treatment, both medicinal and surgical, would fall within the ambit of ‘service’ as defined in Section 2(1)(o) of the Act.

(2) The fact that medical practitioners belong to the medical profession and are subject to the disciplinary control of the Medical Council of India and/or State Medical Councils constituted under the provisions of the Indian Medical Council Act would not exclude the services rendered by them from the ambit of the Act.

(3) A “contract *of* personal service” has to be distinguished from a “contract *for* personal services”. In the absence of a relationship of master and servant between the patient and medical practitioner, the service rendered by a medical practitioner to the patient cannot be regarded as



service rendered under a 'contract *of* personal service'. Such service is service rendered under a "contract *for* personal services" and is not covered by exclusionary clause of the definition of 'service' contained in Section 2(1)(o) of the Act.

(4) The expression "contract of personal service" in Section 2(1)(o) of the Act cannot be confined to contracts for employment of domestic servants only and the said expression would include the employment of a medical officer for the purpose of rendering medical service to the employer. The service rendered by a medical officer to his employer under the contract of employment would be outside the purview of 'service' as defined in Section 2(1)(o) of the Act.

(5) Service rendered free of charge by a medical practitioner attached to a hospital/nursing home or a medical officer employed in a hospital/nursing home where such services are rendered free of charge to everybody, would not be 'service' as defined in Section 2(1)(o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(6) Service rendered at a non-government hospital/nursing home where no charge whatsoever is made from any person availing of the service and all patients (rich and poor) are given free service — is outside the purview of the expression 'service' as defined in Section 2(1)(o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(7) Service rendered at a non-government hospital/nursing home where charges are required to be paid by the persons availing of such services falls within the purview of the expression 'service' as defined in Section 2(1)(o) of the Act.

(8) Service rendered at a non-government hospital/nursing home where charges are required to be paid by persons who are in a position to pay and persons who cannot afford to pay are rendered service free of charge would fall within the ambit of the expression 'service' as defined in Section 2(1)(o) of the Act irrespective of the fact that the service is rendered free of charge to persons who are not in a position to pay for such services. Free service, would also be 'service' and the recipient a 'consumer' under the Act.

(9) Service rendered at a government hospital/health centre/dispensary where no charge whatsoever is made from any person availing of the services and all patients (rich and poor) are given free service — is outside the purview of the expression 'service' as defined in Section 2(1)(o) of the Act. The payment of a token amount for registration purpose only at the hospital/nursing home would not alter the position.

(10) Service rendered at a government hospital/health centre/dispensary where services are rendered on payment of charges and also rendered free of charge to other persons availing of such services would fall within the ambit of the expression 'service' as defined in Section 2(1)(o) of the Act, irrespective of the fact that the service is rendered free of charge to persons who do not pay for such service. Free service would also be 'service' and the recipient a 'consumer' under the Act.

(11) Service rendered by a medical practitioner or hospital/nursing home cannot be regarded as service rendered free of charge, if the person availing of the service has taken an insurance policy for medical care whereunder the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of 'service' as defined in Section 2(1)(o) of the Act.

(12) Similarly, where, as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent on him, the service rendered to such an employee and his family members by a medical practitioner or a hospital/nursing home would not be free of charge and would constitute 'service' under Section 2(1)(o) of the Act..."

## IN THE SUPREME COURT OF INDIA

**Achutrao Haribhau Khodwa v. State of Maharashtra**

**(1996) 2 SCC 634**

**S.P. Bharucha and B.N. Kirpal, JJ.**

***A suit for damages for medical negligence was filed by the husband and children of a woman who died as a result of the complications arising out of her sterilization operation, wherein a mop was left inside her body. The suit succeeded at the trial court, but failed on appeal to the Bombay High Court. In this appeal, the Court examined whether the government doctors who attended the woman were negligent in discharge of their duties and if so, whether the State of Maharashtra could be held vicariously liable for their negligence.***

**Kirpal, J.:** “The appellants are aggrieved by the judgment of the Aurangabad Bench of the Bombay High Court which has reversed a decree for Rs 36,000 passed by the Civil Judge, Second Division, Aurangabad, as damages on account of the death of one Chandrikabai who was the wife of Appellant 1 and the mother of Appellants 2 to 5, after she had undergone a sterilisation operation at the Civil Hospital, Aurangabad.

**2.** ...Chandrikabai delivered a male child on 10-7-1963. As she had got herself admitted to this hospital with a view to undergo a sterilisation operation after the delivery, the said operation was performed by Respondent 2 on 13-7-1963. Soon thereafter Chandrikabai developed high fever and also had acute pain which was abnormal after such a simple operation. Her condition deteriorated further and on 15-7-1963 Appellant 1 approached Respondent 3 and one Dr Divan, PW 2, who was a well-known surgeon and was attached to the hospital, but was not directly connected with the Gynaecological Department. At the insistence of Appellant 1 Dr Divan examined Chandrikabai on 15-7-1963, and seeing her condition, he is alleged to have suggested that the sterilisation operation which had been performed should be reopened. This suggestion was not acted upon by Respondents 2 and 3 and the condition of Chandrikabai became very serious. On 19-7-1963, Dr Divan, on being called once again, reopened the wound of the earlier operation in order to ascertain the true cause of the seriousness of the ailment and to find out the cause of the worsening condition of Chandrikabai. According to the appellants, Respondents 2 and 3 assisted Dr Divan in this operation. Dr Divan, as a result of the second operation, found that a mop (towel) had been left inside the body of Chandrikabai when sterilisation operation was performed on her. It was found that there was collection of pus and the same was drained out by Dr Divan. Thereafter, the abdomen was closed and the second operation completed. Even, thereafter the condition of Chandrikabai did not improve and ultimately she expired on 24-7-1963.

**3.** Alleging that Chandrikabai was working as a teacher in a government school and her salary augmented the total income of the family, it was pleaded that the death of Chandrikabai was caused due to the negligence of Respondent 2 who had performed the sterilisation operation on 13-7-1963, as well as the irresponsible behaviour of Respondent 3. The appellants also alleged that the hospital lacked adequate medical aid and proper care and there was gross dereliction of duty on the part of the officers of the Government Civil Hospital which directly resulted in the death of Chandrikabai and, therefore, the appellants were entitled to recover damages from the Government of Maharashtra (Respondent 1) as well as Respondents 2 to 4. The appellants claimed total damages of Rs 1,75,000...

...

**8.** Two questions which arise for consideration in this appeal are whether the State of Maharashtra can be held liable for any negligence of its employees and secondly whether the respondents or any one of them acted negligently in the discharge of their duties.

**9.** Decisions of this Court now leave no scope for arguing that the State cannot be held to be vicariously liable if it is found that the death of Chandrikabai was caused due to negligence on the part of its employees.

**10.** In *State of Rajasthan v. Vidhyawati* [AIR 1962 SC 933 : 1962 Supp (2) SCR 989 : (1963) 1 MLJ (SC) 70] the question arose with regard to the vicarious liability of the State of Rajasthan... this Court held that “the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such, as any other employer”. This question again came up for consideration in *Kasturi Lal Ralia Ram Jain v. State*

of *U.P.* [AIR 1965 SC 1039] and which has been referred to by the High Court in the present case while coming to the conclusion that the State of Maharashtra cannot be held to be vicariously liable... This Court distinguished the decision in *Vidhyawati case* [AIR 1962 SC 933 : 1962 Supp (2) SCR 989 : (1963) 1 MLJ (SC) 70] by observing:

“In dealing with such cases, it must be borne in mind that when the State pleads immunity against claims for damages resulting from injury caused by negligent acts of its servants, the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld, the Court must always find that the impugned act was committed in the course of an undertaking or employment which is referable to the exercise of sovereign power, or to the exercise of delegated sovereign power...”

Explaining the distinction between the two types of cases, it was also observed as follows:

“It is not difficult to realize the significance and importance of making such a distinction particularly at the present time when, in pursuit of their welfare ideal, the Government of the States as well as the Government of India naturally and legitimately enter into many commercial and other undertakings and activities which have no relation with the traditional concept of governmental activities in which the exercise of sovereign power is involved. It is necessary to limit the area of these affairs of the State in relation to the exercise of sovereign power, so that if acts are committed by government employees in relation to other activities which may be conveniently described as non-governmental or non-sovereign, citizens who have a cause of action for damages should not be precluded from making their claim against the State. That is the basis on which the area of the State immunity against such claims must be limited; and this is exactly what has been done by this Court in its decision in the case of *State of Rajasthan* [AIR 1962 SC 933 : 1962 Supp (2) SCR 989 : (1963) 1 MLJ (SC) 70].”

Two recent decisions where the State has been held to be vicariously liable on account of the negligent acts of its employees are those of *N. Nagendra Rao and Co. v. State of A.P.* [(1994) 6 SCC 205 : 1994 SCC (Cri) 1609] and *State of Maharashtra v. Kanchanmala Vijaysing Shirke* [(1995) 5 SCC 659 : 1995 SCC (Cri) 1002 : JT (1995) 6 SC 155]. In *Nagendra Rao case* [(1994) 6 SCC 205 : 1994 SCC (Cri) 1609]..., this Court while allowing the appeal observed as follows: (SCC pp. 235-36, para 25)

“In Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity. The determination of vicarious liability of the State being linked with negligence of its officers, if they can be sued personally for which there is no dearth of authority and the law of misfeasance in discharge of public duty having marched ahead, there is no rationale for the proposition that even if the officer is liable the State cannot be sued. The liability of the officer personally was not doubted even in *Viscount Canterbury* [*Viscount Canterbury v. Attorney General*, 1 PH 306 : 41 ER 648]. But the Crown was held immune on doctrine of sovereign immunity. Since the doctrine has become outdated and sovereignty now vests in the people, the State cannot claim any immunity and if a suit is maintainable against the officer personally, then there is no reason to hold that it would not be maintainable against the State.”

A similar view has been taken in *Kanchanmala Vijaysing case* [(1995) 5 SCC 659 : 1995 SCC (Cri) 1002 : JT (1995) 6 SC 155]...

**11.** The High Court observed that the Government cannot be held liable in tort for tortious acts committed in a hospital maintained by it because it considered that maintaining and running a hospital was an exercise of the State's sovereign power. We do not think that this conclusion is correct. Running a hospital is a welfare activity undertaken by the Government but it is not an exclusive function or activity of the Government so as to be classified as one which could be regarded as being in exercise of its sovereign power. In *Kasturi Lal case* [AIR 1965 SC 1039] itself, in the passage which

has been quoted hereinabove, this Court noticed that in pursuit of the welfare ideal the Government may enter into many commercial and other activities which have no relation to the traditional concept of governmental activity in exercise of sovereign power. Just as running of passenger buses for the benefit of general public is not a sovereign function, similarly the running of a hospital, where the members of the general public can come for treatment, cannot also be regarded as being an activity having a sovereign character. This being so, the State would be vicariously liable for the damages which may become payable on account of negligence of its doctors or other employees.

**12.** Before considering whether the respondents in the present case could be held to be negligent, it will be useful to see as to what can be regarded as negligence on the part of a doctor. The test with regard to the negligence of a doctor was laid down in *Bolam v. Friern Hospital Management Committee* [(1957) 1 WLR 582 : (1957) 2 All ER 118] . It was to the effect that a doctor is not guilty of negligence if he acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. This principle in *Bolam case* [(1957) 1 WLR 582 : (1957) 2 All ER 118] has been accepted by the House of Lords in England as applicable to diagnosis and treatment. (See *Sidaway v. Board of Governors of Bethlem Royal Hospital* [1985 AC 871 : (1985) 2 WLR 480 : (1985) 1 All ER 643, HL] (AC at 881). Dealing with the question of negligence, the High Court of Australia in *Rogers v. Whitaker* [(1993) 109 ALR (sic)] has held that the question is not whether the doctor's conduct accords with the practice of a medical profession or some part of it, but whether it conforms to the standard of reasonable care demanded by the law. That is a question for the court to decide and the duty of deciding it cannot be delegated to any profession or group in the community. It would, therefore, appear that the Australian High Court has taken a somewhat different view than the principle enunciated in *Bolam case* [(1957) 1 WLR 582 : (1957) 2 All ER 118] . This Court has had an occasion to go into this question in the case of *Laxman Balkrishna Joshi (Dr) v. Dr Trimbak Babu Godbole* [AIR 1969 SC 128 : (1969) 1 SCR 206 : 71 Bom LR 236] . In that case the High Court had held that the death of the son of the claimant was due to the shock resulting from reduction of the patient's fracture attempted by the doctor without taking the elementary caution of giving anaesthetic. In this context, with reference to the duties of the doctors to the patient, this Court, in appeal, observed as follows:

“The duties which a doctor owes to his patient are clear. A person who holds himself out ready to give medical advice and treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person when consulted by a patient owes him certain duties, viz., a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give or a duty of care in the administration of that treatment. A breach of any of those duties gives a right of action for negligence to the patient. The practitioner must bring to his task a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires.”

**13.** The above principle was again applied by this Court in the case of *A.S. Mittal v. State of U.P.* [(1989) 3 SCC 223 : 1989 SCC (Cri) 539 : AIR 1989 SC 1570] In that case irreparable damage had been done to the eyes of some of the patients who were operated upon at an eye camp. Though this Court refrained from deciding, in that particular case, whether the doctors were negligent, it observed: (SCC pp. 230-31, para 19)

“A mistake by a medical practitioner which no reasonably competent and a careful practitioner would have committed is a negligent one.”

The Court also took note that the law recognises the dangers which are inherent in surgical operations and that mistakes will occur, on occasions, despite the exercise of reasonable skill and care. The Court further quoted *Street on Torts* (1983) (7th Edn.) wherein it was stated that the doctrine of *res ipsa loquitur* was attracted:

“ ... Where an unexplained accident occurs from a thing under the control of the defendant, and medical or other expert evidence shows that such accidents would not happen if proper care were used, there is at least evidence of negligence for a jury.”

The latest case to which reference can be made is that of *Indian Medical Assn. v. V.P. Shantha* [(1995) 6 SCC 651] . The question which arose in this case was whether the Consumer Protection Act, 1986, applied to medical practitioners, hospitals and nursing homes. It was held in this case that medical practitioners were not immune from a claim for damages on the ground of negligence. The Court also approved a passage from Jackson and Powell on *Professional Negligence* and held that:

“(T)he approach of the courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services.”

**14.** The skill of medical practitioners differs from doctor to doctor. The very nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence.

**15.** In cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in torts would be maintainable. As held in *Laxman case* [AIR 1969 SC 128 : (1969) 1 SCR 206: 71 Bom LR 236] by this Court, a medical practitioner has various duties towards his patient and he must act with a reasonable degree of skill and knowledge and must exercise a reasonable degree of care. This is the least which a patient expects from a doctor.

**16.** In the present case the facts speak for themselves. Negligence is writ large...In a case like this the doctrine of *res ipsa loquitur* clearly applies. Chandrikabai had had a minor operation on 13-7-1963 and due to the negligence of Respondent 2 a mop (towel) was left inside her peritoneal cavity. It is true that in a number of cases when foreign bodies are left inside the body of a human being either deliberately, as in the case of orthopaedic operations, or accidentally no harm may befall the patient, but it also happens that complications can arise when the doctor acts without due care and caution and leaves a foreign body inside the patient after performing an operation and it suppurates. The formation of pus leaves no doubt that the mop left in the abdomen caused it, and it was the pus formation that caused all the subsequent difficulties. There is no escape from the conclusion that the negligence in leaving the mop in Chandrikabai's abdomen during the first operation led, ultimately, to her death...Under these circumstances, and in the absence of any valid explanation by the respondents which would satisfy the Court that there was no negligence on their part, we have no hesitation in holding that Chandrikabai died due to negligence of Respondents 2 and 3.

**17.** Even if it be assumed that it is the second operation performed by Dr Divan which led to peritonitis, as has been deposed to by Dr Purandare, the fact still remains that but for the leaving of the mop inside the peritoneal cavity, it would not have been necessary to have the second operation. Assuming even that the second operation was done negligently or that there was lack of adequate care after the operation which led to peritonitis, the fact remains that Dr Divan was an employee of Respondent 1 and the State must be held to be vicariously liable for the negligent acts of its employees working in the said hospital. The claim of the appellants cannot be defeated merely because it may not have been conclusively proved as to which of the doctors employed by the State in the hospital or other staff acted negligently which caused the death of Chandrikabai. Once death by negligence in the hospital is established, as in the case here, the State would be liable to pay the damages. In our opinion, therefore, the High Court clearly fell in error in reversing the judgment of the trial court and in dismissing the appellants' suit.

**18.** For the aforesaid reasons, this appeal is allowed...”

## IN THE SUPREME COURT OF INDIA

**State of Haryana v. Santra****(2000) 5 SCC 182****S. Saghir Ahmad and D.P. Wadhwa, JJ.**

***The petitioner became pregnant despite having a sterilization operation under a state programme to promote sterilization. On examination, it was revealed that her operation was “incomplete” as her left fallopian tube had not been operated upon. She was advised that termination of pregnancy could pose risk to her life. A suit for recovery of damages alleging negligence on part of the doctor was decreed in her favour. Subsequently, appeals filed by each of the parties against the order of the trial court were dismissed. The State then appealed to the High Court of Punjab and Haryana which did not succeed. In this special leave petition filed by the State, the issue before the Supreme Court was whether the doctor and the State could be held liable if the sterilization operation fails on account of the doctor’s negligence.***

Ahmad, J.: “...

3. Smt Santra, the victim of the medical negligence, filed a suit for recovery of Rs 2 lakhs as damages for medical negligence, which was decreed for a sum of Rs 54,000 with interest at the rate of 12 per cent per annum from the date of institution of the suit till the payment of the decretal amount...Both the appeals — one filed by the State of Haryana and the other by Smt Santra were dismissed. The second appeal filed by the State of Haryana was summarily dismissed by the Punjab & Haryana High Court on 3-8-1999. It is in these circumstances that the present special leave petition has been filed in this Court.

4. The “sterilisation scheme”, admittedly, was launched by the Haryana Government and taking advantage of that scheme, Smt Santra approached the Chief Medical Officer, Gurgaon, for her sterilisation in 1988...Smt Santra was assured that full, complete and successful sterilisation operation had been performed upon her and she would not conceive a child in future. But despite the operation, she conceived. When she contacted the Chief Medical Officer and other doctors of the General Hospital, Gurgaon, she was informed that she was not pregnant. Two months later when the pregnancy became apparent, she again approached those doctors who then told her that her sterilisation operation was not successful. Dr Sushil Kumar Goyal, who was examined as DW 2, stated that the operation related only to the right Fallopian tube and the left Fallopian tube was not touched, which indicates that “complete sterilisation” operation was not done. She requested for an abortion, but was advised not to go in for abortion as the same would be dangerous to her life. She ultimately gave birth to a female child. Smt Santra already had seven children and the birth of a new child put her to unnecessary burden of rearing up the child as also all the expenses involved in the maintenance of that child, including the expenses towards her clothes and education.

...

6. The trial court as also the lower appellate court both recorded concurrent findings of fact that the sterilisation operation performed upon Smt Santra was not “complete” as in that operation only the right Fallopian tube was operated upon while the left tube was left untouched. The courts were of the opinion that this exhibited negligence on the part of the Medical Officer who performed the operation. Smt Santra, in spite of the unsuccessful operation, was informed that the sterilisation operation was successful and that she would not conceive any child in future. The plea of estoppel raised by the defendants was also rejected...

...

9. Learned counsel appearing on behalf of the State of Haryana has contended that the negligence of the Medical Officer in performing the unsuccessful sterilisation operation upon Smt Santra would not bind the State Government and the State Government would not be liable vicariously for any damages to Smt Santra. It was also claimed that the expenses awarded for rearing up the child and for her maintenance could not have been legally decreed as there was no element of “tort” involved in it nor had Smt Santra suffered any loss which could be compensated in terms of money.

...

19. Family planning is a national programme. It is being implemented through the agency of various government hospitals and health centres and at some places through the agency of the Red Cross...The implementation of the programme is thus directly in the hands of the government officers, including Medical Officers involved in the family

planning programmes. The Medical Officers entrusted with the implementation of the family planning programme cannot, by their negligent acts in not performing the complete sterilisation operation, sabotage a scheme of national importance. The people of the country who cooperate by offering themselves voluntarily for sterilisation reasonably expect that after undergoing the operation they would be able to avoid further pregnancy and consequent birth of an additional child.

**20.** If Smt Santra, in these circumstances, had offered herself for complete sterilisation, both the Fallopian tubes should have been operated upon. The doctor who performed the operation acted in a most negligent manner as the possibility of conception by Smt Santra was not completely ruled out as her left Fallopian tube was not touched. Smt Santra did conceive and gave birth to an unwanted child.

**21.** Who has to bear the expenses in bringing up the “unwanted child”, is the question which is to be decided by us in this case.

**22.** The amount of Rs 54,000 which has been decreed by the courts below, represents the amount of expenses which Smt Santra would have to incur at the rate of Rs 3000 per annum in bringing up the child up to the age of puberty.

**23.** The domestic legal scenario on this question appears to be silent, except one or two stray decisions of the High Courts, to which a reference shall be made presently.

...

**35.** In *State of M.P. v. Asharam* [1997 ACJ 1224 (MP)] the High Court allowed the damages on account of medical negligence in the performance of a family planning operation on account of which a daughter was born after fifteen months of the date of the operation.

**36.** No other decision of any High Court has come to our notice where damages were awarded on account of a failed sterilisation operation.

**37.** Ours is a developing country where the majority of the people live below the poverty line. On account of the ever-increasing population, the country is almost at the saturation point so far as its resources are concerned. The principles on the basis of which damages have not been allowed on account of failed sterilisation operation in other countries either on account of public policy or on account of pleasure in having a child being offset against the claim for damages cannot be strictly applied to Indian conditions so far as poor families are concerned. The public policy here professed by the Government is to control the population and that is why various programmes have been launched to implement the State-sponsored family planning programmes and policies. Damages for the birth of an unwanted child may not be of any value for those who are already living in affluent conditions but those who live below the poverty line or who belong to the labour class, who earn their livelihood on a daily basis by taking up the job of an ordinary labour, cannot be denied the claim for damages on account of medical negligence.

...

**42.** Having regard to the above discussion, we are positively of the view that in a country where the population is increasing by the tick of every second on the clock and the Government had taken up family planning as an important programme for the implementation of which it had created mass awakening for the use of various devices including sterilisation operation, the doctor as also the State must be held responsible in damages if the sterilisation operation performed by him is a failure on account of his negligence, which is directly responsible for another birth in the family, creating additional economic burden on the person who had chosen to be operated upon for sterilisation.

**43.** The contention as to the vicarious liability of the State for the negligence of its officers in performing the sterilisation operation cannot be accepted in view of the law settled by this Court in *N. Nagendra Rao & Co. v. State of A.P.* [(1994) 6 SCC 205 : 1994 SCC (Cri) 1609 : AIR 1994 SC 2663], *Common Cause, A Regd. Society v. Union of India* [(1999) 6 SCC 667 : 1999 SCC (Cri) 1196 : AIR 1999 SC 2979] and *Achutrao Haribhau Khodwa v. State of Maharashtra* [(1996) 2 SCC 634 : 1996 ACJ 505]. The last case, which related to the fallout of a sterilisation operation, deals, like the two previous cases, with the question of vicarious liability of the State on account of medical negligence of a doctor in a government hospital. The theory of sovereign immunity was rejected.

**44.** Smt Santra, as already stated above, was a poor lady who already had seven children. She was already under considerable monetary burden. The unwanted child (girl) born to her has created additional burden for her on account of the negligence of the doctor who performed the sterilisation operation upon her and, therefore, she is clearly entitled to claim full damages from the State Government to enable her to bring up the child at least till she attains puberty.”

## IN THE HIGH COURT OF MADHYA PRADESH

State of M.P. v. Smt. Sundari Bai

AIR 2003 MP 284

S.P. Khare, J.

***The plaintiff/appellant underwent a sterilization procedure at a government hospital. Considering her specific health needs, the doctor adopted ligation method for sterilization instead of section method. Six years later, the plaintiff delivered a child and filed a suit against the doctor and State Government seeking compensation for failed sterilization. The trial court held that the doctor was negligent in adopting the ligation method and imposed vicarious liability on the State Government. In this appeal, the High Court examined whether the doctor had conducted the sterilization procedure with “reasonable degree of care and skill”.***

**Khare, J.:** “1. This is first appeal under section 96, Civil Procedure Code by defendant No. 2 State of Madhya Pradesh against the judgment and decree by which compensation of Rs. 50,000/- has been awarded to the plaintiff for “failure of sterilisation”.

2. It is no longer in dispute that plaintiff Sundaribai had two sons. At the time of the birth of second son on 27-8-1980 she got her “sterilisation” done so that there is no further pregnancy. The operation was performed by defendant No. 1 Dr. R. Rathore, Assistant Surgeon, Ashta in the Government hospital “by ligation method”. She conceived again in the year 1986 and gave birth to a female child on 8-12-1986.

3. The plaintiff's case is that she is a poor and illiterate lady. She was told by the lady doctor that she would not have any further pregnancy. According to the plaintiff the defendant No. 1 acted negligently in performing the tubectomy operation. She claimed Rs. 50,000/- as compensation for “failed sterilisation” for expenses incurred in the delivery, for rearing the female child and her marriage, against the doctor and the State Government.

4. The case of the defendants is that the sterilization was done by “tying the fallopian tubes” on account of personal peculiar physical condition of the plaintiff. Her physical condition could not allow the cutting of the fallopian tubes. She was advised to avoid hard work, physical strain and sexual intercourse for sometime. It has been denied that there was any negligence on the part of the doctor. According to the defendants the sterilisation failed because of the act of the plaintiff herself. It is scientifically and universally recognised that the sterilisation operation can fail in some cases...

...

6. In this appeal it has been argued that the finding of the trial Court that there was negligence of the doctor is not correct. It is submitted that “ligation Method” is one of the recognised modes of sterilisation and if keeping in view the personal and physical condition of the plaintiff the doctor in her judgment adopted this method it cannot be held by the Courts that she acted negligently.

...

10. From the evidence of the lady doctor it is found that she adopted one of the recognised methods of sterilisation and that was “ligation method”. She has given reasons for not cutting the fallopian tubes. According to her testimony, there has been no failure of sterilization in any other case except that of the plaintiff. The testimony of the lady doctor is reliable. It cannot be said that she was negligent because she did not adopt the section method of sterilisation. She was an experienced doctor and she could exercise her discretion as to which method she should adopt for the purpose of sterilization. As already stated no evidence has been adduced by the plaintiff to prove negligence of the doctor except her own testimony.

11. The trial Court has held defendant No. 1 Dr. Rathore negligent as she did not adopt the section method for sterilization. The view taken by the trial Court is not correct. It was for the doctor to decide which method of sterilisation she should adopt in the case of the plaintiff. The trial Court in para 23 of its judgment has accepted the proposition that there is a possibility of failure of the sterilisation operation. The trial Court has not rejected the evidence of the lady doctor on this point that she has performed a large number of sterilisation operations (about 1500 - 25% of 6000) through “ligation method” and there has been no failure in any other case and therefore this version of the lady doctor is true. Even in case of the plaintiff the ligation method was successful for about six years and during this period she had no conception...

12. *William's Obstetrics* 21st Edition pages 1556 to 1560 deal with “sterilization”. This edition which is available at present is of the year 1997. In the present case sterilization was done in the year 1980 and at that time as per 1971 edition the ligation method of tubal sterilization was quite acceptable. Now more safe techniques have been developed. It is stated at



page 1559 of 1997 edition: “No method of tubal sterilization is without failure”...A similar conclusion was reached by the American College of Obstetricians and Gynecologists (1996), which stated...“Finally, the lifetime increased cumulative failure rates overtime are supportive that failures *after one year are not likely due to technical errors*”. Thus, according to this authoritative book the failure of tubal sterilization is not necessarily on account of negligence of the doctor. In the present case the tubal sterilization failed after six years and it cannot be attributed to the negligence of the doctor.

**13.** The learned counsel for the appellant has cited the decision of the Supreme Court in *State of Haryana v. Santra*, (2000) 5 SCC 182. In that case the plaintiff having seven children under went sterilization operation. It was found that in her case the right fallopian tube was operated upon and the left fallopian tube was left untouched. The negligence of the doctor was writ large as it was necessary to operate both fallopian tubes to avoid further pregnancy. It is because of this negligence *per se* the damages were awarded to the plaintiff. The Supreme Court observed that every doctor who enters the medical profession has a duty to act with a “reasonable degree of care and skill”. This is what is known as “implied undertaking” by member of the medical profession that he would use a fair reasonable and competent degree of skill. The test known as “Bolam test” laid down in *Bolam v. Friern Hospital Management Committee*, (1957) 2 All. E.R. 118 has been cited with approval. In this case the law was summed up as under: “The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art ..... in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. ....there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent.”

**14.** The decision of the House of Lords in *Whitehouse v. Jordan*, (1981) 1 All. E.R. 267 has also been relied upon in which the legal position has been stated as: “the true position is that an error of judgment may, or may not, be negligent; it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that (such) a man, acting with ordinary care, might have made, then it is not negligence.”

**15.** The Supreme Court said in *Laxman v. Trimbak*, AIR 1969 SC 128 : “Neither the very highest nor very low degree of care and competence judged in the light of the particular circumstances of each case is what the law requires”. In *Vinitha Ashokv. Lakshmi Hospital*, (2001) 8 SCC 731 the entire case law has been dealt with and it has been concluded that the doctor is not liable for negligence if the course adopted by him is “reasonable” and his view is not “illogical”.

**16.** Now examining the facts of the present case on the touchstone of the above mentioned principles it can be safely held that there was no negligence on the part of the doctor. In the present case the plaintiff had two sons when the sterilisation was performed. Her physical condition was not good. The “ligation method” which is a well recognised mode of sterilization was adopted. This method was used by the doctor in hundreds of cases and there was no failure of this mode. Even in case of the plaintiff this method worked well for six years and the pregnancy was prevented. Thus the doctor acted with reasonable degree of care and skill. There were more than one “perfectly proper standards” and if the doctor chose one then she cannot be said to be negligent. There might have been an error of judgment while acting with ordinary care and skill and that cannot be equated with negligence. It is one thing to say that it would have been better if “section method” had been chosen for sterilisation but the adoption of “ligation method” on the facts of the present case is not negligence *per se*. The defendant No. 1 though quite experienced was working in a Primary Health Centre and she used a fair, reasonable and competent degree of skill.

...

**19.** It is not necessary for the doctor to warn the plaintiff of the “risk of failure of sterilisation” because it is well known that there is such failure though in very limited number of cases. It is not necessary to give the warning of something which is well known and well recognised. In *Gold v. Haringey Health Authority*, (1988) 1 QB 481 a doctor was not held negligent in failing to warn the plaintiff of the failure rate for female sterilisation.

**20.** A doctor does not give a contractual warranty. He is not an insurer against all possible risks. He or she does not provide insurance that there would be no pregnancy after sterilisation operation. As demonstrated above there is a chance of sterile being turned into fertile even after the operation has been done with due care and caution. A doctor is not liable in negligence because someone of greater skill and knowledge would have prescribed different treatment or “operated in a different way”. She has to show only a reasonable standard of care. She cannot be held guilty for error of judgment. Considerable deference is paid to the practices of the professions (particularly medical profession)

as established by expert evidence and the Court should not attempt to put itself in the shoes of the surgeon or other professional man. In the present case the plaintiff had two sons only. A female baby was born to her after six years. She should accept her with grace as gift of God. The parents are primarily liable to give birth to this child. They should not hold the doctor liable when they have been blessed with this baby. She should not have a feeling that she is an unwanted child. The birth of this baby should be considered a blessing and cause for rejoicing. A healthy female baby after the two sons, a lovely creature, must have brought decency, discipline and sobriety in the family. The doctor not being negligent cannot be fastened with liability to pay damages and therefore the Government is also not vicariously liable.

21. In the result, the judgment and decree of the trial Court are set aside and the suit of the plaintiff for compensation of Rs. 50,000/- is dismissed.”

## IN THE SUPREME COURT OF INDIA

**State of Punjab v. Shiv Ram & Ors.**

**(2005) 7 SCC 1**

**R.C. Lahoti, C.J., and C.K. Thakker and P.K. Balasubramanyan, JJ.**

***A woman became pregnant after undergoing a sterilization operation and chose to continue the pregnancy as she considered abortion to be a sin. She filed a suit for claiming compensation against the doctor and State, since she had undergone a tubectomy procedure in response to the State's publicity campaign encouraging sterilization. The procedure was conducted by a doctor employed by the State government. The trial court and the first appellate court imposed vicarious liability on the State solely on the ground that the woman became pregnant despite having undergone the sterilization operation. A second appeal was summarily dismissed by the High Court. In this appeal, the Supreme Court examined whether the failure of sterilization was attributable to negligence on part of the doctor and ruled on the correctness of the approach of the courts below.***

**Lahoti, C.J.:** “The plaintiff-respondents, respectively the husband and the wife, filed a suit against the State of Punjab, the appellant before us and a lady surgeon who was in the State Government's employment at the relevant time, for recovery of damages to the tune of Rs 3,00,000 on account of a female child having been born to them in spite of the wife Respondent 2 having undergone a tubectomy operation performed by the lady surgeon... After serving a notice under Section 80 of the Code of Civil Procedure, a suit for recovery of damages was filed on 15-5-1992 attributing the birth of the child to carelessness and negligence of the lady surgeon. The plaint alleged *inter alia* that the respondents considered abortion to be a sin and that is why after knowing of the conception they did not opt for abortion.

...

4. ...However, the two courts have proceeded on the reasoning that on the birth of a child to a woman who was allured into undergoing sterilisation operation by the State in pursuance of its Family Planning Schemes, the State was liable to compensate for the consequences of the operation having failed. The suit was decreed for Rs 50,000 with interest and costs. The decree for compensation passed by the trial court has been upheld by the first appellate court. The second appeal preferred by the State has been summarily dismissed.

...

6. Very recently, this Court has dealt with the issues of medical negligence and laid down principles on which the liability of a medical professional is determined generally and in the field of criminal law in particular. Reference may be had to *Jacob Mathew v. State of Punjab* [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369] . The Court has approved the test [**Ed.:** At p. 19, para 19.] as laid down in *Bolam v. Friern Hospital Management Committee* [(1957) 1 WLR 582 : (1957) 2 All ER 118 (QBD)] popularly known as *Bolam's test*, in its applicability to India.

7. The relevant principles culled out from the case of *Jacob Mathew* [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369] read as under: (SCC pp. 32-33, para 48)

“(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in *Law of Torts*, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove,

holds good. Negligence becomes actionable on account of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) ... A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions, what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence....

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence."

This Court has further held in *Jacob Mathew case* [(2005) 6 SCC 1 : 2005 SCC (Cri) 1369] : (SCC p. 24, para 33)

"33. Accident during the course of medical or surgical treatment has a wider meaning. Ordinarily, an accident means an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated (see *Black's Law Dictionary*, 7th Edn.). Care has to be taken to see that the result of an accident which is exculpatory may not persuade the human mind to confuse it with the consequence of negligence."

8. The plaintiffs have not alleged that the lady surgeon who performed the sterilisation operation was not competent to perform the surgery and yet ventured into doing it. It is neither the case of the plaintiffs, nor has any finding been arrived at by any of the courts below that the lady surgeon was negligent in performing the surgery. The present one is not a case where the surgeon who performed the surgery has committed breach of any duty cast on her as a surgeon. The surgery was performed by a technique known and recognised by medical science. It is a pure and simple case of sterilisation operation having failed though duly performed. The learned Additional Advocate General has also very fairly not disputed the vicarious liability of the State, if only its employee doctor is found to have performed the surgery negligently and if the unwanted pregnancy thereafter is attributable to such negligent act or omission on the part of the employee doctor of the State.

9. The learned Advocate General has brought to our notice a number of textbooks on gynaecology. We refer to some of them.

10. In *Jeffcoate's Principles of Gynaecology*, revised by V.R. Tindall, MSc, MD, FRCSE, FRCOG, Professor of Obstetrics and Gynaecology, University of Manchester (5th Edn.) published by Butterworth Heinemann, the following techniques of female sterilisation are stated:...

11. Dealing with reliability of the sterilisation procedures performed and commonly employed by gynaecologists, the textbook states (at p. 621):

*"Reliability*

The only sterilisation procedures in the female which are both satisfactory and reliable are: resection or destruction of a portion of both fallopian tubes; and hysterectomy. *No method, however, is absolutely reliable and pregnancy is reported after subtotal and total hysterectomy, and even after hysterectomy with bilateral salpingectomy.* The explanation of these extremely rare cases is a persisting communication between the ovary or tube and the vaginal vault.

*Even when tubal occlusion operations are competently performed and all technical precautions are taken, intrauterine pregnancy occurs subsequently in 0.3 per cent of cases. This is because an ovum gains access to spermatozoa through a recanalised inner segment of the tube.*

There is clinical impression that tubal resection operations are more likely to fail when they are carried out at the time of caesarean section than at any other time. The fact that they occasionally fail at any time has led many gynaecologists to replace the term 'sterilisation' by 'tubal ligation' or 'tubal resection' in talking to the patient and in all records. This has real merit from the medicolegal standpoint."

(underlining [italicised.] by us)

...

**13.** In *The Essentials of Contraceptive Technology*, written by four doctors and published by the Center for Communication Programs, the Johns Hopkins School of Public Health in July 1997, certain questions and answers are stated. Questions 5 and 6 and their answers, which are relevant for our purpose, read as under:

*"5. Will female sterilisation stop working after a time? Does a woman who had a sterilisation procedure ever have to worry about getting pregnant again?"*

Generally, no. Female sterilisation should be considered permanent. Failure rates are probably higher than previously thought however. A major new US study found that *the risk of pregnancy within 10 years after sterilisation is about 1.8 per 100 women — about 1 in every 55 women*. The risk of sterilisation failure is greater for younger women because they are more fertile than older women. Also, some methods of blocking the tubes work better than others. Methods that cut away part of each tube work better than spring clips or bipolar electrocoagulation (electric current). Effectiveness also depends on the skill of the provider.

The same US study found that 1 of every 3 pregnancies after sterilisation was ectopic. *If a woman who has had sterilisation ever thinks that she is pregnant or has an ectopic pregnancy, she should seek help right away.*

(underlining [italicised] by us)

*6. Pregnancy after female sterilisation is rare but why does it happen at all?*

The most common reason is that the woman was *already pregnant at the time of sterilisation*. Pregnancy can also occur if the provider confused another structure in the body with the fallopian tubes and blocked or cut the wrong place. In other case pregnancy results because clips on the tubes come open, because the ends of the tubes grow back together, or because abnormal openings develop in the tube, allowing sperm and egg to meet."

**14.** In the newsletter "Alert" September 2000 Issue, Prof. (Dr.) Gopinath N. Shenoy writes:

"Female sterilisation can be done by many methods/techniques, which are accepted by medical professionals all over the world. It is also *an accepted fact that none of these methods/techniques are cent per cent 'failure free'*. *This 'failure rate' may vary from method to method*. A doctor is justified in choosing one method to the exclusion of the others and he cannot be faulted for his choice if his choice is based on reasonable application of mind and is not 'palpably' wrong. A doctor has discretionary powers to choose the method/technique of sterilisation he desires to adopt."

(emphasis supplied)

...

**16.** In *Medico-legal Aspects in Obstetrics and Gynaecology*, edited by three doctors, Chapter 18, deals with medico-legal problems in sterilisation operations. It is stated therein that there are several methods of female sterilisation of which one that will suit the patient and the surgeon/gynaecologist should be selected. In India, Pomeroy's method is widely practised. Other methods include Madlener's, Irving's, Uchida's methods and so on. The text further states that failure is one of the undesirous outcomes of sterilisation. The overall incidence of failure in tubectomy is 0.4 per 100 women per year. The text describes the following events wherefrom sterilisation failure usually results:...

**17.** It is thus clear that there are several alternative methods of female sterilisation operation which are recognised by medical science of today. Some of them are more popular because of being less complicated, requiring minimal body invasion and least confinement in the hospital. However, none is foolproof and no prevalent method of sterilisation guarantees 100% success. The causes for failure can well be attributable to the natural functioning of the human body and not necessarily attributable to any failure on the part of the surgeon. Authoritative textbooks on gynaecology and empirical researches which have been carried out recognise the failure rate of 0.3% to 7% depending on the technique

chosen out of the several recognised and accepted ones. The technique which may be foolproof is the removal of the uterus itself but that is not considered advisable. It may be resorted to only when such procedure is considered necessary to be performed for purposes other than merely family planning.

**18.** An English decision, *Eyre v. Measday* [(1986) 1 All ER 488 (CA)] is very near to the case at hand. The facts of the case were that in 1978, the plaintiff and her husband decided that they did not wish to have any more children. The plaintiff consulted the defendant gynaecologist with a view to undergoing a sterilisation operation. The defendant explained to the couple the nature of the particular operation he intended to perform, emphasising that it was irreversible. He stated that the operation “must be regarded as a permanent procedure” but he did not inform the plaintiff that there was a small risk (less than 1%) of pregnancy occurring following the operation. Consequently, both the plaintiff and her husband believed that the result of the operation would be to render her absolutely sterile and incapable of bearing further children. In 1979 the plaintiff became pregnant and gave birth to a child. The plaintiff brought an action against the defendant for damages, *inter alia*, for breach of contract, contending that his representation that the operation was irreversible and his failure to warn her of the minute risk of the procedure being unsuccessful, amounted to breach of a contractual term, or express or implied collateral warranty, to render her irreversibly sterile. The Judge dismissed her claim and the plaintiff appealed to the Court of Appeal.

**19.** The Court held: (All ER p. 488*f-h*)

“(1) The contract undertaken by the defendant was to carry out a particular type of operation rather than to render the plaintiff absolutely sterile. Furthermore, the defendant’s representations to the plaintiff that the operation was ‘irreversible’ did not amount to an express guarantee that the operation was bound to achieve its acknowledged object of sterilising the plaintiff. On the facts, it was clear that the representations meant no more than that the operative procedure in question was incapable of being reversed.

(2) Where a doctor contracted to carry out a particular operation on a patient and a particular result was expected, the court would imply into the contract between the doctor and the patient a term that the operation would be carried out with reasonable care and skill, but would be slow to imply a term or unqualified collateral warranty that the expected result would actually be achieved, since it was probable that no responsible medical man would intend to give such a warranty. On the facts, no intelligent lay bystander could have reasonably inferred that the defendant was intending to give the plaintiff a guarantee that after the operation she would be absolutely sterile and the fact that she believed that this would be the result was irrelevant.”

**20.** The appeal was dismissed. The Court of Appeal, upheld the finding of the trial Judge that the risk of pregnancy following such a procedure to which the plaintiff was subjected is described as very small. It is of the order of 2 to 6 in every 1000. There is no sterilisation procedure which is entirely without such a risk.

**21.** Slade, L.J., stated in his opinion that: (All ER p. 495*f-h*)

“[I]n the absence of any express warranty, the court should be slow to imply against a medical man an unqualified warranty as to the results of an intended operation, for the very simple reason that, objectively speaking, it is most unlikely that a responsible medical man would intend to give a warranty of this nature. Of course, objectively speaking, it is likely that he would give a guarantee that he would do what he had undertaken to do with reasonable care and skill; but it is quite another matter to say that he has committed himself to the extent suggested in the present case.”

**22.** Purchas, L.J., stated in his opinion that: (All ER p. 497*a-c*)

“It is true that as a matter of deliberate election the defendant did not, in the course of describing the operation which he was recommending, disclose that there was a very small risk, one might almost say an insignificant risk, that the plaintiff might become pregnant. In withholding this information it must be borne in mind, first that the defendant must have believed that the plaintiff would be sterile, second that the chances were extremely remote that the operation would be unsuccessful, third that in withholding this information the defendant was following a practice acceptable to current professional standards and was acting in the best interests of the plaintiff, and, fourth that no allegation of negligence in failing to give this information to the plaintiff is pursued any longer in this case. There are, therefore, in my judgment, no grounds for asserting that the result would necessarily be 100% successful.”

**23.** In *Thake v. Maurice* [(1986) 1 All ER 497 : (1986) 2 WLR 337 : 1986 QB 644 (CA)] the claim for damages was founded on contract and not in tort. The Court of Appeal firmly rejected the possibility of an enforceable warranty. Neill, L.J. said: (All ER p. 510*h*)

“The reasonable man would have expected the defendant to exercise all the proper skill and care of a surgeon in that speciality; he would not ... have expected the defendant to give a guarantee of 100% success.”

**24.** Nourse, L.J. said: (All ER p. 512*f*)

“Of all sciences medicine is one of the least exact. In my view a doctor cannot be objectively regarded as guaranteeing the success of any operation or treatment unless he says as much in clear and unequivocal terms.”

**25.** We are, therefore, clearly of the opinion that merely because a woman having undergone a sterilisation operation became pregnant and delivered a child, the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy or unwanted child. The claim in tort can be sustained only if there was negligence on the part of the surgeon in performing the surgery. The proof of negligence shall have to satisfy *Bolam's test*. So also, the surgeon cannot be held liable in contract unless the plaintiff alleges and proves that the surgeon had assured 100% exclusion of pregnancy after the surgery and was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery. As noted in various decisions which we have referred to hereinabove, ordinarily a surgeon does not offer such guarantee.

**26.** The cause of failure of the sterilisation operation may be obtained from laparoscopic inspection of uterine tubes, or by x-ray examination, or by pathological examination of the materials removed at a subsequent operation of re-sterilisation...

**27.** Mrs K. Sarada Devi, the learned counsel appearing for the plaintiff-respondents placed reliance on a two-Judge Bench decision of this Court in *State of Haryana v. Santra* [(2000) 5 SCC 182 : JT (2000) 5 SC 34] wherein this Court has upheld the decree awarding damages for medical negligence on account of the lady having given birth to an unwanted child on account of failure of sterilisation operation. The case is clearly distinguishable and cannot be said to be laying down any law of universal application. The finding of fact arrived at therein was that the lady had offered herself for complete sterilisation and not for partial operation and, therefore, both her fallopian tubes should have been operated upon. It was found as a matter of fact that only the right fallopian tube was operated upon and the left fallopian tube was left untouched. She was issued a certificate that her operation was successful and she was assured that she would not conceive a child in future. It was in these circumstances, that a case of medical negligence was found and a decree for compensation in tort was held justified. The case thus proceeds on its own facts.

**28.** The methods of sterilisation so far known to medical science which are most popular and prevalent are not 100% safe and secure. In spite of the operation having been successfully performed and without any negligence on the part of the surgeon, the sterilised woman can become pregnant due to natural causes. Once the woman misses the menstrual cycle, it is expected of the couple to visit the doctor and seek medical advice. A reference to the provisions of the Medical Termination of Pregnancy Act, 1971 is apposite. Section 3 thereof permits termination of pregnancy by a registered medical practitioner, notwithstanding anything contained in the Penal Code, 1860 in certain circumstances and within a period of 20 weeks of the length of pregnancy. Explanation II appended to sub-section (2) of Section 3 provides:

“*Explanation II.*—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.”

**29.** And that provides, under the law, a valid and legal ground for termination of pregnancy. If the woman has suffered an unwanted pregnancy, it can be terminated and this is legal and permissible under the Medical Termination of Pregnancy Act, 1971.

**30.** The cause of action for claiming compensation in cases of failed sterilisation operation arises on account of negligence of the surgeon and not on account of childbirth. Failure due to natural causes would not provide any ground for claim. It is for the woman who has conceived the child to go or not to go for medical termination of pregnancy. Having gathered the knowledge of conception in spite of having undergone the sterilisation operation, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed.

**31.** For the foregoing reasons, we are of the opinion that the judgments and the decrees passed by the High Court and the courts below cannot be sustained. The trial court has proceeded to pass a decree of damages in favour of the plaintiff-respondents solely on the ground that in spite of the plaintiff Respondent 2 having undergone a sterilisation operation, she became pregnant. No finding has been arrived at that will hold the operating surgeon or its employer — the State, liable for damages either in contract or in tort. The error committed by the trial court, though pointed out to the first appellate court and the High Court, has been overlooked. The appeal has, therefore, to be allowed and the judgment and decree under appeal have to be set aside...”

## IN THE SUPREME COURT OF INDIA

**Samira Kohli v. Dr. Prabha Manchanda**

**(2008) 2 SCC 1**

**B.N. Agrawal, P.P. Naolekar and R.V. Raveendran, JJ.**

***An unmarried woman aged 44 years gave her consent for diagnostic and operative laparoscopy. However, during the operation when she was unconscious, the surgeon obtained her mother's consent for hysterectomy and removed her uterus. The woman's complaint alleging negligence on part of the surgeon was rejected by the National Consumer Disputes Redressal Commission. In this appeal, the issue before the Supreme Court was whether “informed consent” of a patient is required for a surgical procedure which involves removal of reproductive organs and if so, what should be the nature of such consent. Further, it examined if and under what circumstances can consent given for a particular procedure be treated as consent for an additional surgical procedure.***

**Raveendran, J.:** “This appeal is filed against the order dated 19-11-2003 passed by the National Consumer Disputes Redressal Commission (for short “the Commission”) rejecting the appellant's complaint (OP No. 12 of 1996) under Section 21 of the Consumer Protection Act, 1986 (“the Act”, for short).

### UNDISPUTED FACTS

**2.** On 9-5-1995, the appellant, an unmarried woman, aged 44 years, visited the clinic of the first respondent (for short “the respondent”) complaining of prolonged menstrual bleeding for nine days. The respondent examined and advised her to undergo an ultrasound test on the same day. After examining the report, the respondent had a discussion with the appellant and advised her to come on the next day (10-5-1995) for a laparoscopy test under general anaesthesia, for making an affirmative diagnosis.

**3.** Accordingly, on 10-5-1995, the appellant went to the respondent's clinic with her mother. On admission, the appellant's signatures were taken on (i) admission and discharge card; (ii) consent form for hospital admission and medical treatment; and (iii) consent form for surgery. The admission card showed that admission was “for diagnostic and operative laparoscopy on 10-5-1995”. The consent form for surgery filled by Dr. Lata Rangan (the respondent's assistant) described the procedure to be undergone by the appellant as “diagnostic and operative laparoscopy. Laparotomy may be needed.” Thereafter, the appellant was put under general anaesthesia and subjected to a laparoscopic examination. When the appellant was still unconscious, Dr. Lata Rangan, who was assisting the respondent, came out of the operation theatre and took the consent of the appellant's mother, who was waiting outside, for performing hysterectomy under general anaesthesia. Thereafter, the respondent performed an abdominal hysterectomy (removal of uterus) and bilateral salpingo-oophorectomy (removal of ovaries and fallopian tubes). The appellant left the respondent's clinic on 15-5-1995 without settling the bill.

...

**5.** On 19-1-1996 the appellant filed a complaint before the Commission claiming a compensation of Rs 25 lakhs from the respondent. The appellant alleged that the respondent was negligent in treating her; that the radical surgery by which her uterus, ovaries and fallopian tubes were removed without her consent, when she was under general anaesthesia for a laparoscopic test, was unlawful, unauthorised and unwarranted; that on account of the removal of her reproductive organs, she had suffered premature menopause necessitating a prolonged medical treatment and a hormone replacement therapy (HRT) course, apart from making her vulnerable to health problems by way of side-effects.

The compensation claimed was for the loss of reproductive organs and consequential loss of opportunity to become a mother, for diminished matrimonial prospects, for physical injury resulting in the loss of vital body organs and irreversible permanent damage, for pain, suffering emotional stress and trauma, and for decline in the health and increasing vulnerability to health hazards.

6. ...After hearing arguments, the Commission dismissed the complaint by order dated 19-11-2003. The Commission held: (i) the appellant voluntarily visited the respondent's clinic for treatment and consented for diagnostic procedures and operative surgery; (ii) the hysterectomy and other surgical procedures were done with adequate care and caution; and (iii) the surgical removal of uterus, ovaries, etc. was necessitated as the appellant was found to be suffering from endometriosis (Grade IV), and if they had not been removed, there was likelihood of the lesion extending to the intestines and bladder and damaging them. Feeling aggrieved, the appellant has filed this appeal.

...

## QUESTIONS FOR CONSIDERATION

17. On the contentions raised, the following questions arise for our consideration:

- (i) Whether informed consent of a patient is necessary for surgical procedure involving removal of reproductive organs? If so, what is the nature of such consent?
- (ii) When a patient consults a medical practitioner, whether consent given for diagnostic surgery can be construed as consent for performing additional or further surgical procedure—either as conservative treatment or as radical treatment—without the specific consent for such additional or further surgery?
- (iii) Whether there was consent by the appellant, for the abdominal hysterectomy and bilateral salpingo-oophorectomy (for short AH-BSO) performed by the respondent?
- (iv) Whether the respondent had falsely invented a case that the appellant was suffering from endometriosis to explain the unauthorised and unwarranted removal of uterus and ovaries, and whether such radical surgery was either to cover-up negligence in conducting diagnostic laparoscopy or to claim a higher fee?
- (v) Even if the appellant was suffering from endometriosis, the respondent ought to have resorted to conservative treatment/surgery instead of performing radical surgery?
- (vi) Whether the respondent is guilty of the tortious act of negligence/battery amounting to deficiency in service, and consequently liable to pay damages to the appellant?

## RE: QUESTIONS (I) AND (II)

18. Consent in the context of a doctor-patient relationship, means the grant of permission by the patient for an act to be carried out by the doctor, such as a diagnostic, surgical or therapeutic procedure. Consent can be implied in some circumstances from the action of the patient. For example, when a patient enters a dentist's clinic and sits in the dental chair, his consent is implied for examination, diagnosis and consultation. Except where consent can be clearly and obviously implied, there should be express consent. There is, however, a significant difference in the nature of express consent of the patient, known as “real consent” in UK and as “informed consent” in America. In UK, the elements of consent are defined with reference to the patient and a consent is considered to be valid and “real” when (i) the patient gives it voluntarily without any coercion; (ii) the patient has the capacity and competence to give consent; and (iii) the patient has the minimum of adequate level of information about the nature of the procedure to which he is consenting to. On the other hand, the concept of “informed consent” developed by American courts, while retaining the basic requirements of consent, shifts the emphasis on the doctor's duty to disclose the necessary information to the patient to secure his consent. ...

19. In *Canterbury v. Spence* [464 F 2d 772 : 150 US App DC 263 (1972)] the United States Court of Appeals, District of Columbia Circuit, emphasised the element of doctor's duty in “informed consent” thus: (F 2d pp. 782-83, paras 11-12)

“... It is well established that the physician must seek and secure his patient's consent before commencing an operation or other course of treatment. It is also clear that the consent, to be efficacious, must be free from imposition upon the patient. It is the settled rule that therapy not authorized by the patient may amount to a tort—a common law battery—by the physician. *And it is*



*evident that it is normally impossible to obtain a consent worthy of the name unless the physician first elucidates the options and the perils for the patient's edification. Thus the physician has long borne a duty, on pain of liability for unauthorized treatment, to make adequate disclosure to the patient."*

(emphasis supplied)

**20.** The basic principle in regard to patient's consent may be traced to the following classic statement by Cardozo, J. in *Schloendorff v. Society of New York Hospital* [211 NY 125 : 105 NE 92 (1914)] : (NE p. 93, paras 5-6)

"... Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."

This principle has been accepted by an English court also. *F. (Mental Patient: Sterilisation)*, In re [(1990) 2 AC 1 : (1989) 2 WLR 1025 : (1989) 2 All ER 545 sub nom *F. v. West Berkshire HA*] the House of Lords while dealing with a case of sterilisation of a mental patient reiterated the fundamental principle that every person's body is inviolate and performance of a medical operation on a person without his or her consent is unlawful...

**21.** The next question is whether in an action for negligence/battery for performance of an unauthorised surgical procedure, the doctor can put forth as defence the consent given for a particular operative procedure, as consent for any additional or further operative procedures performed in the interests of the patient. In *Murray v. McMurchy* [(1949) 2 DLR 442 : (1949) 1 WWR 989] the Supreme Court of British Columbia, Canada, was considering a claim for battery by a patient who underwent a caesarean section. During the course of caesarean section, the doctor found fibroid tumours in the patient's uterus. Being of the view that such tumours would be a danger in case of future pregnancy, he performed a sterilisation operation. The Court upheld the claim for damages for battery. It held that sterilisation could not be justified under the principle of necessity, as there was no immediate threat or danger to the patient's health or life and it would not have been unreasonable to postpone the operation to secure the patient's consent. The fact that the doctor found it convenient to perform the sterilisation operation without consent as the patient was already under general anaesthesia, was held to be not a valid defence. A somewhat similar view was expressed by the Court of Appeal in England in *F.*, In re [(1990) 2 AC 1 : (1989) 2 WLR 1025 : (1989) 2 All ER 545 sub nom *F. v. West Berkshire HA*]. It was held that the additional or further treatment which can be given (outside the consented procedure) should be confined to only such treatment as is necessary to meet the emergency, and as such needs to be carried out at once and before the patient is likely to be in a position to make a decision for himself. ...

**22.** The decision in *Marshall v. Curry* [(1933) 3 DLR 260 : 60 CCC 136] decided by the Supreme Court of Nova Scotia, Canada, illustrates the exception to the rule, that an unauthorised procedure may be justified if the patient's medical condition brooks no delay and warrants immediate action without waiting for the patient to regain consciousness and take a decision for himself... Thus, the principle of necessity by which the doctor is permitted to perform further or additional procedure (unauthorised) is restricted to cases where the patient is temporarily incompetent (being unconscious), to permit the procedure delaying of which would be unreasonable because of the imminent danger to the life or health of the patient.

**23.** It is quite possible that had the patient been conscious, and informed about the need for the additional procedure, the patient might have agreed to it. It may be that the additional procedure is beneficial and in the interests of the patient. It may be that postponement of the additional procedure (say removal of an organ) may require another surgery, whereas removal of the affected organ during the initial diagnostic or exploratory surgery, would save the patient from the pain and cost of a second operation. Howsoever practical or convenient the reasons may be, they are not relevant. What is relevant and of importance is the inviolable nature of the patient's right in regard to his body and his right to decide whether he should undergo the particular treatment or surgery or not. Therefore at the risk of repetition, we may add that unless the unauthorised additional or further procedure is necessary in order to save the life or preserve the health of the patient and it would be unreasonable (as contrasted from being merely inconvenient) to delay the further procedure until the patient regains consciousness and takes a decision, a doctor cannot perform such procedure without the consent of the patient.

**24.** We may also refer to the Code of Medical Ethics laid down by the Medical Council of India (approved by the Central Government under Section 33 of the Indian Medical Council Act, 1956). It contains a chapter relating to disciplinary action which enumerates a list of responsibilities, violation of which will be professional misconduct. Clause 13 of the said chapter places the following responsibility on a doctor:

"13. Before performing an operation the physician should obtain in writing the consent from the husband or wife, parent or guardian in the case of a minor, or the patient himself as the case may be. In an operation which may result in sterility the consent of both husband and wife is needed."

**26.** The consent form for hospital admission and medical treatment, to which the appellant's signature was obtained by the respondent on 10-5-1995, which can safely be presumed to constitute the contract between the parties, specifically states:

“(A) It is customary, except in emergency or extraordinary circumstances, that no substantial procedures are performed upon a patient unless and until he or she has had an opportunity to discuss them with the physician or other health professional to the patient's satisfaction.

(B) Each patient has right to consent, or to refuse consent, to any proposed procedure of therapeutic course.”

**27.** We therefore hold that in medical law, where a surgeon is consulted by a patient, and consent of the patient is taken for diagnostic procedure/surgery, such consent cannot be considered as authorisation or permission to perform therapeutic surgery either conservative or radical (except in life-threatening or emergent situations). Similarly where the consent by the patient is for a particular operative surgery, it cannot be treated as consent for an unauthorised additional procedure involving removal of an organ, only on the ground that such removal is beneficial to the patient or is likely to prevent some danger developing in future, where there is no imminent danger to the life or health of the patient.

**28.** We may next consider the nature of information that is required to be furnished by a doctor to secure a valid or real consent...

**29.** In *Salgo v. Leland Stanford* [154 Cal App 2d 560 (1957)] it was held that a physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment.

**30.** *Canterbury* [464 F 2d 772 : 150 US App DC 263 (1972)] explored the rationale of a doctor's duty to reasonably inform a patient as to the treatment alternatives available and the risk incidental to them, as also the scope of the disclosure requirement and the physician's privileges not to disclose. It laid down the “reasonably prudent patient test” which required the doctor to disclose all material risks to a patient, to show an “informed consent”. It was held: (F 2d pp. 780-82 & 786-87, paras 2-7, 10 & 20)

“... True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible.

... Just as plainly, due care normally demands that the physician warn the patient of any risks to his well-being which contemplated therapy may involve.

The context in which the duty of risk-disclosure arises is invariably the occasion for decision as to whether a particular treatment procedure is to be undertaken. To the physician, whose training enables a self-satisfying evaluation, the answer may seem clear, but it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie. To enable the patient to chart his course understandably, some familiarity with the therapeutic alternatives and their hazards becomes essential.

A reasonable revelation in these respects is not only a necessity but, as we see it, is as much a matter of the physician's duty. It is a duty to warn of the dangers lurking in the proposed treatment, and that is surely a facet of due care. It is, too, a duty to impart information which the patient has every right to expect. The patient's reliance upon the physician is a trust of the kind which traditionally has exacted obligations beyond those associated with arm's length transactions. His dependence upon the physician for information affecting his well-being, in terms of contemplated treatment, is well-nigh abject. ... we ourselves have found ‘in the fiducial qualities of (the physician-patient) relationship the physician's duty to reveal to the patient that which in his best interests it is important that he should know’. We now find, as a part of the physician's overall obligation to the patient, a similar duty of reasonable disclosure of the choices with respect to proposed therapy and the dangers inherently and potentially involved.

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20. In our view, the patient's right of self-decision shapes the boundaries of the duty to reveal. That right can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is the information material to the decision. Thus the test for determining whether a particular peril must be divulged is its materiality to the patient's decision: all risks potentially affecting the decision must be unmasked."

It was further held that a risk is material "when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy". The doctor, therefore, is required to communicate all inherent and potential hazards of the proposed treatment, the alternatives to that treatment, if any, and the likely effect if the patient remained untreated. This stringent standard of disclosure was subjected to only two exceptions: (i) where there was a genuine emergency e.g. the patient was unconscious; and (ii) where the information would be harmful to the patient e.g. where it might cause psychological damage, or where the patient would become so emotionally distraught as to prevent a rational decision. It, however, appears that several States in USA have chosen to avoid the decision in *Canterbury* [464 F 2d 772 : 150 US App DC 263 (1972)] by enacting legislation which severely curtails operation of the doctrine of informed consent.

31. The stringent standards regarding disclosure laid down in *Canterbury* [464 F 2d 772 : 150 US App DC 263 (1972)], as necessary to secure an informed consent of the patient, were not accepted in the English courts. In England, standard applicable is popularly known as the Bolam test, first laid down in *Bolam v. Friern Hospital Management Committee* [(1957) 1 WLR 582 : (1957) 2 All ER 118]. McNair, J., in a trial relating to negligence of a medical practitioner, while instructing the Jury, stated thus:

(i) A doctor is not negligent if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. ... Putting it the other way round, a doctor is not negligent if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. (All ER p. 122 B-D)

(ii) When a doctor dealing with a sick man strongly believed that the only hope of cure was submission to a particular therapy, he could not be criticised if, believing the danger involved in the treatment to be minimal, did not stress them to the patient.

(iii) In order to recover damages for failure to give warning the plaintiff must show not only that the failure was negligent but also that if he had been warned he would not have consented to the treatment. (All ER p. 118 H-I)

...

33. In *Sidaway v. Board of Governors of Bethlem Royal Hospital* [1985 AC 871 : (1985) 2 WLR 480 : (1985) 1 All ER 643 (HL)] the House of Lords, per majority, adopted the Bolam test, as the measure of doctor's duty to disclose information about the potential consequences and risks of proposed medical treatment...

34. The House of Lords upheld the decision of the Court of Appeal that the doctrine of informed consent based on full disclosure of all the facts to the patient, was not the appropriate test of liability for negligence, under English law. The majority were of the view that the test of liability in respect of a doctor's duty to warn his patient of risks inherent in treatment recommended by him was the same as the test applicable to diagnosis and treatment, namely, that the doctor was required to act in accordance with the practice accepted at the time as proper by a responsible body of medical opinion...

...

Lord Bridge however made it clear that when questioned specifically by the patient about the risks involved in a particular treatment proposed, the doctor's duty is to answer truthfully and as fully as the questioner requires. He further held that remote risk of damage (referred to as risk at 1% or 2%) need not be disclosed but if the risk of damage is substantial (referred to as 10% risk), it may have to be disclosed. Lord Scarman, in minority, was inclined to adopt the more stringent test laid down in *Canterbury* [464 F 2d 772 : 150 US App DC 263 (1972)].

35. In India, Bolam test has broadly been accepted as the general rule. We may refer three cases of this Court. In *Achutrao Haribhau Khodwa v. State of Maharashtra* [(1996) 2 SCC 634] this Court held: (SCC pp. 645-46, paras 14-15)

“14. The skill of medical practitioners differs from doctor to doctor. The nature of the profession is such that there may be more than one course of treatment which may be advisable for treating a patient. Courts would indeed be slow in attributing negligence on the part of a doctor if he has performed his duties to the best of his ability and with due care and caution. Medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient, but as long as a doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor to be guilty of negligence.

15. In cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in torts would be maintainable.”

**36.** In *Vinitha Ashok v. Lakshmi Hospital* [(2001) 8 SCC 731] this Court after referring to *Bolam* [(1957) 1 WLR 582 : (1957) 2 All ER 118] , *Sidaway* [1985 AC 871 : (1985) 2 WLR 480 : (1985) 1 All ER 643 (HL)] and *Achutrao* [(1996) 2 SCC 634] , clarified: (SCC p. 747, para 38)

“38. ... a doctor will be liable for negligence in respect of diagnosis and treatment in spite of a body of professional opinion approving his conduct where it has not been established to the court's satisfaction that such opinion relied on is reasonable or responsible. If it can be demonstrated that the professional opinion is not capable of withstanding the logical analysis, the court would be entitled to hold that the body of opinion is not reasonable or responsible.”

**37.** In *Indian Medical Assn. v. V.P. Shantha* [(1995) 6 SCC 651] this Court held: (SCC p. 666, para 22)

“22. ... the approach of the courts is to require that professional men should possess a certain minimum degree of competence and that they should exercise reasonable care in the discharge of their duties. In general, a professional man owes to his client a duty in tort as well as in contract to exercise reasonable care in giving advice or performing services.”

Neither *Achutrao* [(1996) 2 SCC 634] nor *Vinitha Ashok* [(2001) 8 SCC 731] referred to the American view expressed in *Canterbury* [464 F 2d 772 : 150 US App DC 263 (1972)].

...

**48.** Having regard to the conditions obtaining in India, as also the settled and recognised practices of medical fraternity in India, we are of the view that to nurture the doctor-patient relationship on the basis of trust, the extent and nature of information required to be given by doctors should continue to be governed by the *Bolam* test rather than the “reasonably prudent patient” test evolved in *Canterbury* [464 F 2d 772 : 150 US App DC 263 (1972)] . It is for the doctor to decide, with reference to the condition of the patient, nature of illness, and the prevailing established practices, how much information regarding risks and consequences should be given to the patients, and how they should be couched, having the best interests of the patient. A doctor cannot be held negligent either in regard to diagnosis or treatment or in disclosing the risks involved in a particular surgical procedure or treatment, if the doctor has acted with normal care, in accordance with a recognised practice accepted as proper by a responsible body of medical men skilled in that particular field, even though there may be a body of opinion that takes a contrary view. Where there are more than one recognised school of established medical practice, it is not negligence for a doctor to follow any one of those practices, in preference to the others.

**49.** We may now summarise principles relating to consent as follows:

(i) A doctor has to seek and secure the consent of the patient before commencing a “treatment” (the term “treatment” includes surgery also). The consent so obtained should be real and valid, which means that: the patient should have the capacity and competence to consent; his consent should be voluntary; and his consent should be on the basis of adequate information concerning the nature of the treatment procedure, so that he knows what he is consenting to.

(ii) The “adequate information” to be furnished by the doctor (or a member of his team) who treats the patient, should enable the patient to make a balanced judgment as to whether he should submit himself to the particular treatment or not. This means that the doctor should disclose (a) nature and procedure of the treatment and its purpose, benefits and effect; (b) alternatives if any available; (c) an outline of the substantial risks; and (d) adverse consequences of refusing treatment. But there

is no need to explain remote or theoretical risks involved, which may frighten or confuse a patient and result in refusal of consent for the necessary treatment. Similarly, there is no need to explain the remote or theoretical risks of refusal to take treatment which may persuade a patient to undergo a fanciful or unnecessary treatment. A balance should be achieved between the need for disclosing necessary and adequate information and at the same time avoid the possibility of the patient being deterred from agreeing to a necessary treatment or offering to undergo an unnecessary treatment.

(iii) Consent given only for a diagnostic procedure, cannot be considered as consent for therapeutic treatment. Consent given for a specific treatment procedure will not be valid for conducting some other treatment procedure. The fact that the unauthorised additional surgery is beneficial to the patient, or that it would save considerable time and expense to the patient, or would relieve the patient from pain and suffering in future, are not grounds of defence in an action in tort for negligence or assault and battery. The only exception to this rule is where the additional procedure though unauthorised, is necessary in order to save the life or preserve the health of the patient and it would be unreasonable to delay such unauthorised procedure until patient regains consciousness and takes a decision.

(iv) There can be a common consent for diagnostic and operative procedures where they are contemplated. There can also be a common consent for a particular surgical procedure and an additional or further procedure that may become necessary during the course of surgery.

(v) The nature and extent of information to be furnished by the doctor to the patient to secure the consent need not be of the stringent and high degree mentioned in *Canterbury* [464 F 2d 772 : 150 US App DC 263 (1972)] but should be of the extent which is accepted as normal and proper by a body of medical men skilled and experienced in the particular field. It will depend upon the physical and mental condition of the patient, the nature of treatment, and the risk and consequences attached to the treatment.

50. ...We have, however, consciously preferred the “real consent” concept evolved in *Bolam* [(1957) 1 WLR 582 : (1957) 2 All ER 118] and *Sidaway* [1985 AC 871 : (1985) 2 WLR 480 : (1985) 1 All ER 643 (HL)] in preference to the “reasonably prudent patient test” in *Canterbury* [464 F 2d 772 : 150 US App DC 263 (1972)] , having regard to the ground realities in medical and health care in India. But if medical practitioners and private hospitals become more and more commercialised, and if there is a corresponding increase in the awareness of patient's rights among the public, inevitably, a day may come when we may have to move towards *Canterbury* [464 F 2d 772 : 150 US App DC 263 (1972)] . But not for the present.

### RE: QUESTION (III)

51. “Gynaecology” (2nd Edn.) edited by Robert W. Shah, describes “real consent” with reference to gynaecologists (p. 867 et seq.) as follows:

“An increasingly important risk area for all doctors is the question of consent. No one may lay hands on another against their will without running the risk of criminal prosecution for assault and, if injury results, a civil action for damages for trespass or negligence. In the case of a doctor, consent to any physical *interference will readily be implied*; a woman must be assumed to consent to a normal physical examination if she consults a gynaecologist, in the absence of clear evidence of her refusal or restriction of such examination. The problems arise when the gynaecologist's intervention results in unfortunate side-effects or permanent interference with a function, whether or not any part of the body is removed. *For example, if the gynaecologist agrees with the patient to perform a hysterectomy and removes the ovaries without her specific consent, that will be a trespass and an act of negligence. The only available defence will be that it was necessary for the life of the patient to proceed at once to remove the ovaries because of some perceived pathology in them.*

What is meant by consent? The term ‘informed consent’ is often used, but there is no such concept in English Law. The consent must be real: that is to say, the patient must have been given sufficient information for her to understand the nature of the operation, its likely effects, and any complications which may arise and which the surgeon in the exercise of his duty to the patient considers she should be made aware of; only then can she reach a proper decision. But the surgeon need not warn the patient of remote risks, any more than an anaesthetist need warn the patient that a certain small number of those anaesthetised will suffer cardiac arrest or never recover consciousness. Only

where there is a recognised risk, rather than a rare complication, is the surgeon under an obligation to warn the patient of that risk. He is not under a duty to warn the patient of the possible results of hypothetical negligent surgery....

In advising an operation, therefore, the doctor must do so in the way in which a competent gynaecologist exercising reasonable skill and care in similar circumstances would have done. In doing this he will take into account the personality of the patient and the importance of the operation to her future well-being. It may be good practice not to warn a very nervous patient of any possible complications if she requires immediate surgery for, say, a malignant condition. The doctor must decide how much to say to her taking into account his assessment of her personality, the questions she asks and his view of how much she understands. If the patient asks a direct question, she must be given a truthful answer. ... To take the example of hysterectomy: although the surgeon will tell the patient that it is proposed to remove her uterus and perhaps her ovaries, and describe what that will mean for her future well-being (sterility, premature menopause), she will not be warned of the possibility of damage to the ureter, vesicovaginal fistula, fatal haemorrhage or anaesthetic death."

...

**56.** The admission and discharge card maintained and produced by the respondent showed that the appellant was admitted "for diagnostic and (?) operative laparoscopy on 10-5-1995". The OPD card dated 9-5-1995 does not refer to endometriosis, which is also admitted by the respondent in her cross-examination. In fact, the respondent also admitted that the confirmation of diagnosis is possible only after laparoscopy test:...

**57.** The consent form dated 10-5-1995 signed by the appellant states that the appellant has been informed that the treatment to be undertaken is "diagnostic and operative laparoscopy. Laparotomy may be needed." The case summary dictated by the respondent and written by Dr. Lata Rangan also clearly says "admitted for hysteroscopy, diagnostic laparoscopy and operative laparoscopy on 10-5-1995". (*Note.*—Hysteroscopy is inspection of uterus by special endoscope and laparoscopy is abdominal exploration by special endoscope.)

**58.** In this context, we may also refer to a notice dated 5-6-1995 issued by the respondent to the appellant through counsel, demanding payment of Rs 39,325 towards the bill amount...

This also makes it clear that the appellant was not admitted for conducting hysterectomy or bilateral salpingo-oophorectomy, but only for diagnostic purposes. We may, however, refer to a wrong statement of fact made in the said notice. It states that on 10-5-1995 after conducting a laparoscopic examination, the video recording of the lesion was shown to the appellant's mother, and the respondent informed the appellant and her mother that conservative surgery would be futile and removal of uterus and more extensive surgery was preferable having regard to the more extensive lesion and destruction of the function of the tubes. But this statement cannot be true. The extensive nature of lesion and destruction of the functions obviously became evident only after diagnostic laparoscopy. But after diagnostic laparoscopy and the video recording of the lesion, there was no occasion for the respondent to inform anything to the appellant. When the laparoscopy and video recording was made, the appellant was already unconscious. Before she regained consciousness, AH-BSO was performed removing her uterus and ovaries. Therefore, the appellant could not have been informed on 10-5-1995 that conservative surgery would be futile and removal of uterus and extensive surgery was preferable in view of the extensive lesion and destruction of the function of the tubes did not arise.

**59.** The admission card makes it clear that the appellant was admitted only for diagnostic and operative laparoscopy. It does not refer to laparotomy. The consent form shows that the appellant gave consent only for diagnostic operative laparoscopy, and laparotomy if needed. Laparotomy is a surgical procedure to open up the abdomen or an abdominal operation...

...

**63.** Medical texts and authorities clearly spell out that laparotomy is at best the initial step that is necessary for performing hysterectomy or salpingo-oophorectomy. Laparotomy by itself is not hysterectomy or salpingo-oophorectomy... Laparotomy does not refer to surgical removal of any vital or reproductive organs... In medical circles, it is well recognised that a catch-all clause giving the surgeon permission to do anything necessary does not give roving authority to remove whatever he fancies may be for the good of the patient. For example, a surgeon cannot construe a consent to termination of pregnancy as a consent to sterilise the patient.

**64.** When the oral and documentary evidence is considered in the light of the legal position discussed above while answering Questions (i) and (ii), it is clear that there was no consent by the appellant for conducting hysterectomy and bilateral salpingo-oophorectomy.

**65.** The respondent next contended that the consent given by the appellant's mother for performing hysterectomy should be considered as valid consent for performing hysterectomy and salpingo-oophorectomy. The appellant was neither a minor, nor mentally challenged, nor incapacitated. When a patient is a competent adult, there is no question of someone else giving consent on her behalf. There was no medical emergency during surgery. The appellant was only temporarily unconscious, undergoing only a diagnostic procedure by way of laparoscopy. The respondent ought to have waited till the appellant regained consciousness, discussed the result of the laparoscopic examination and then taken her consent for the removal of her uterus and ovaries. In the absence of an emergency and as the matter was still at the stage of diagnosis, the question of taking her mother's consent for radical surgery did not arise. Therefore, such consent by mother cannot be treated as valid or real consent. Further a consent for hysterectomy, is not a consent for bilateral salpingo-oophorectomy.

...

**68.** We find that the Commission has, without any legal basis, concluded that "the informed choice has to be left to the operating surgeon depending on his/her discretion, after assessing the damage to the internal organs, but subject to his/her exercising care and caution". It also erred in construing the words "such medical treatment as is considered necessary for me for..." in the consent form as including surgical treatment by way of removal of uterus and ovaries.

**69.** The Commission has also observed: "whether the uterus should have been removed or not or some other surgical procedure should have been followed are matters to be left to the discretion of the performing surgeon, as long as the surgeon does the work with adequate care and caution". This proceeds on the erroneous assumption that where the surgeon has shown adequate care and caution in performing the surgery, the consent of the patient for removal of an organ is unnecessary. The Commission failed to notice that the question was not about the correctness of the decision to remove the uterus and ovaries, but the failure to obtain the consent for removal of those important organs. There was also a faint attempt on the part of the respondent's counsel to contend that what were removed were not "vital" organs and having regard to the advanced age of the appellant, as procreation was not possible, uterus and ovaries were virtually redundant organs... Suffice it to say that for a woman who has not married and not yet reached menopause, the reproductive organs are certainly important organs. There is also no dispute that removal of ovaries leads to abrupt menopause causing hormonal imbalance and consequential adverse effects.

## RE: QUESTIONS (IV) AND (V)

...

**74.** The evidence therefore demonstrates that on laparoscopic examination, the respondent was satisfied that the appellant was suffering from endometriosis. The evidence also demonstrates that there is more than one way of treating endometriosis. While one view favours conservative treatment with hysterectomy as a last resort, the other favours hysterectomy as a complete and immediate cure. The age of the patient, the stage of endometriosis among others will be determining factors for choosing the method of treatment. The very suggestion made by the appellant's counsel to the expert witness Dr. Sudha Salhan that worldwide studies show that most hysterectomies are conducted unnecessarily by gynaecologists, which demonstrates that it is considered as a favoured treatment procedure among medical fraternity, offering a permanent cure. Therefore the respondent cannot be held to be negligent, merely because she chose to perform radical surgery in preference to conservative treatment. This finding however has no bearing on the issue of consent which has been held against the respondent. The correctness or appropriateness of the treatment procedure, does not make the treatment legal, in the absence of consent for the treatment.

...

## RE: QUESTION (VI)

**76.** In view of our finding that there was no consent by the appellant for performing hysterectomy and salpingo-oophorectomy, performance of such surgery was an unauthorised invasion and interference with the appellant's body which amounted to a tortious act of assault and battery and therefore a deficiency in service. But as noticed above, there are several mitigating circumstances. The respondent did it in the interest of the appellant. As the appellant was already 44 years' old and was having serious menstrual problems, the respondent thought that by surgical removal of

uterus and ovaries she was providing permanent relief. It is also possible that the respondent thought that the appellant may approve the additional surgical procedure when she regained consciousness and the consent by the appellant's mother gave her authority. This is a case of the respondent acting in excess of consent but in good faith and for the benefit of the appellant. Though the appellant has alleged that she had to undergo hormone therapy, no other serious repercussions is made out as a result of the removal. The appellant was already fast approaching the age of menopause and in all probability required such hormone therapy. Even assuming that AH-BSO surgery was not immediately required, there was a reasonable certainty that she would have ultimately required the said treatment for a complete cure. On the facts and circumstances, we consider that interests of justice would be served if the respondent is denied the entire fee charged for the surgery and in addition, directed to pay Rs 25,000 as compensation for the unauthorised AH-BSO surgery to the appellant.

**77.** We accordingly allow this appeal and set aside the order of the Commission and allow the appellant's claim in part..."

## IN THE SUPREME COURT OF INDIA

**Martin F. D'Souza v. Mohd. Ishfaq**

**(2009) 3 SCC 1**

**Markandey Katju and R.M. Lodha, JJ.**

***In this appeal against a decision of the National Consumer Disputes Redressal Commission, the Supreme Court discussed the general principles of medical negligence and their application to particular cases. While doing so, the Court confirmed that the earlier position in State of Haryana v. Santra ((2000) 5 SCC 182) as per which a doctor was held liable in case of child birth following sterilization, stands overruled by the decisions in State of Punjab v. Shiv Ram ((2005) 7 SCC 1) and State of Haryana v. Raj Rani ((2005) 7 SCC 22).***

Katju, J.: "...

**30.** Keeping the above two notions in mind we may discuss the broad general principles relating to medical negligence

...

***Application of the abovementioned general principles to particular cases***

***Decisions of the Courts***

...

**53.** In *State of Haryana v. Raj Rani* [(2005) 7 SCC 22] it was held that if a child is born to a woman even after she had undergone a sterilisation operation by a surgeon, the doctor was not liable because there cannot be a 100% certainty that no child will be born after a sterilisation operation. The Court followed the earlier view of another three-Judge Bench in *State of Punjab v. Shiv Ram* [(2005) 7 SCC 1]. These decisions will be deemed to have overruled the two-Judge Bench decision in *State of Haryana v. Santra* [(2000) 5 SCC 182 : AIR 2000 SC 1888] in which it was held that if a child is born after the sterilisation operation the surgeon will be liable for negligence..."



## IN THE HIGH COURT OF DELHI

Dr. R.R. Rana v. State

2012 SCC OnLine Del 3187

Pratibha Rani, J.

***The complainant's wife had approached the petitioner for medical termination of pregnancy (MTP). As her pregnancy continued even after the procedure was conducted, she approached the petitioner again. The petitioner performed another operation for MTP during which a hole was made in her uterus along with a cut in her intestine. An FIR was registered and the petitioner was charged under Sections 420 and 338 of the Indian Penal Code, 1860. In this revision petition challenging the Magistrate's order framing the charges, the High Court examined whether the petitioner was prima facie liable for falsely representing conduct of first procedure for MTP and causing grievous injury due to negligence in conduct of second procedure for MTP.***

**Rani, J.:** "1. By this revision petition filed under Section 397 read with Section 401 Cr.P.C. the petitioner is impugning the order dated 14.09.2005 whereby the learned M.M ordered to frame charge against the petitioner Dr. R.R. Rana (accused in case FIR No. 48/2000, under Sections 338/420 IPC, registered at P.S. Seema Puri, Delhi) for committing the offence punishable under Section 338/420 IPC.

2. In brief the case of the prosecution is that Smt. Kusum Pahwa, wife of the complainant Manmohan Pahwa was pregnant and she along with her husband contacted the petitioner for medical termination of pregnancy (MTP). On 07.01.1997 the wife of the complainant visited the clinic of the petitioner to get the pregnancy terminated in his clinic i.e. Munpee Clinic and Fertility Centre. After keeping the wife of the complainant in the clinic for a few hours, the petitioner informed the complainant and his wife that the MTP has been done. He charged Rs. 1,500/- and discharged the patient Smt. Kusum Pahwa.

3. After discharge from the clinic, since certain complications developed, the complainant got the ultrasound test of his wife conducted at Bhupender Clinic, Bulandshahr (U.P.) on 03.02.1997 and the ultrasound report confirmed pregnancy of 13 weeks.

4. It is also the prosecution case that the complainant again contacted the petitioner on 05.02.1997 and confronted him with the ultrasound report. On this, Dr. R.R. Rana, the petitioner admitted his mistake and offered to conduct the case at Rajdhani Nursing Home, A-5, Jagatpuri, Shahdara, Delhi on 06.02.1997. The complainant along with his wife reached Rajdhani Nursing Home where his wife was admitted and operated...In the evening when his wife regained consciousness, she was in acute pain. The complainant consulted his brother Dr. Baldev Pahwa about the condition of his wife and his brother also talked to the petitioner in this regard. The patient was discharged on 10.02.1997, but the condition of the patient continued deteriorating. Dr. Rana was also made to pay home visit and he left after giving an injection. When the condition of the wife of the complainant became very serious she was removed to GTB Hospital where the Doctors informed that during operation a hole has been made in the uterus and a cut has been made in the intestine through which the stool passes off the body. Wife of the complainant was again operated in GTB Hospital and remained hospitalized for a long time and suffered from many complications.

5. The complainant also expressed suspicion on the genuineness of the degree of MBBS and MS in Obstetrics and Gynaecology and qualifications of Dr. R.R. Rana, petitioner and prayed for legal action against him. On the basis of complaint and medical record, FIR was registered against the petitioner for committing the offences punishable under Sections 420/120-B/338 IPC...

6. After hearing arguments and discussing relevant case law on the point of charge, the learned M.M, vide the impugned order dated 14.09.2005, formed an opinion that prima facie a case for committing the offences punishable under Sections 420/338 IPC is made against the accused and charged him for the said offences.

...

11. The legal position is almost settled that at the stage of charge, the Court is not required to consider pros and cons of the case. The Court can only sift and weigh the material for the limited purpose of finding whether or not a prima facie case for framing the charge has been made out. In my opinion, the learned M.M has taken into account all the relevant material and passed the order impugned herein following the parameters laid down in various judgments referred to by him in the said order.

...

13. In the instant case from the statement of the complainant as well as prescription slip of Munpee Clinic which is printed on the letter head of the petitioner, prima facie it is revealed that on 07.01.1997 by falsely representing to the complainant that medical termination of pregnancy has been done, he induced the complainant to part with Rs. 1,500/-...This prima facie makes the petitioner liable to be charged for commission of the offence punishable under Section 420 IPC.
14. Another contention of the petitioner that at the time of admission in GTB hospital, wife of the complainant did not mention about the first MTP or there was only one MTP conducted about 5-6 days back, does not cut much ice for the reason the complainant knew that MTP had been done only 5-6 days back at Rajdhani Nursing Home and prior to that he had been cheated by the petitioner by falsely misrepresenting that the MTP had been done.
15. Now the question arises whether for making a hole in the uterus and making a cut in the intestine through which the stool passes off the body, the petitioner can be charged for commission of offence punishable under Section 338 IPC.
16. The decision of *Indian Medical Association v. V.S. Shantha* (1995) 6 SCC 651 has adopted Bolam test as guidelines for the Courts to adjudicate the medical negligence. In *Jacob Mathew v. State of Punjab* (2005) SCC (Crl.) 1369, the legal principles laid down in *Dr. Suresh Gupta v. Govt. of NCT of Delhi* (2004) 6 SCC 422 were re-affirmed by the Supreme Court. While summing up the conclusion, it was held as under:-

“(3). A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, which reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582, 586 holds good in its applicability in India.”
17. In the instant case, the nature of injuries suffered by the wife of the complainant have been described as major which can be termed as grievous. While treating a patient for medical termination of pregnancy, the nature of injuries which the wife of complainant allegedly suffered at the hands of the petitioner are such that no professional or skilled person in his ordinary senses and prudence could have caused. It appears that the petitioner did not have even the ordinary skill to perform the MTP.
18. *Prima facie*, taking into consideration the material adduced by the prosecution against the petitioner which is to be proved during trial, I am of the considered view that while ordering for framing of charge against the petitioner for committing offences punishable under Sections 420/338 IPC, no illegality or infirmity has been committed by the learned M.M. The impugned order requires no interference by this Court.
19. The revision petition is hereby dismissed with no order as to costs...”

## IN THE HIGH COURT OF MADRAS

S. Mary v. Union of India

(2013) 2 CTC 332

N. Paul Vasanthakumar, J.

***Due to non-availability of hospital beds, the petitioner's caesarean operation was delayed. As a result, her uterus was severely damaged and had to be removed, and she suffered a stillbirth. In this writ petition, the High Court examined whether the respondents were negligent in not extending timely treatment to the petitioner and whether shortage of resources can be a ground to deny her compensation.***

**Vasanthakumar, J.:** "1. This Writ Petition is filed with a prayer to issue a Writ of Mandamus directing the Respondents to consider Petitioner's Representations dated 1.7.2011, 18.7.2011 & 14.11.2011 and consequently direct the Respondents 1 & 2 to pay compensation of Rs. 10 lakhs to the Petitioner for the negligent acts done by the staffs and Doctors in the Government Hospitals in Tamil Nadu and Pondicherry/4th to 7th Respondents herein.

2. The brief facts necessary for disposal of the Writ Petition are as follows:

...

(b) Petitioner became pregnant for the second time and after full term, on 19.6.2010 her husband took the Petitioner to the Government Headquarters Hospital at Kallakurichi and admitted her as an inpatient. The Hospital Authorities informed the Petitioner that operation time in the hospital was only between 7 a.m. and 12 noon and as the Petitioner was already suffering from Labour pain, she was directed to approach the Hospital at Salem or at Pondicherry.

(c) On the way to Pondicherry, due to severe pain, Petitioner's husband took her to the Government Medical College Hospital, Mundiambakkam, Villupuram, and according to the Petitioner, the authorities in the said Hospital, after consulting the Doctors, refused to admit the Petitioner and directed her to approach JIPMER Hospital at Pondicherry.

(d) Thereafter, Petitioner's husband took the Petitioner to JIPMER Hospital at Pondicherry and admitted her at 12.00 mid night on 19.6.2010/20.6.2010. As the Petitioner was suffering from labour pain from 4.00 p.m. on 19.6.2010 onwards, the Doctors in the JIPMER Hospital took a decision to conduct emergent caesarean at 3.00 a.m. on 20.6.2010, *i.e.*, within three hours of her admission in the hospital and directed the staff members in the hospital to shift the Petitioner to Ward No. 17 for initial preparation for conducting caesarean.

(e) The staff of the hospital, in a negligent manner shifted the Petitioner Ward No. 12, which is a normal ward. Doctors also failed to note the mistake committed by the staff and failed to do caesarean at 3.00 a.m. on 20.6.2010. Petitioner's husband was not allowed to be in the maternity ward as several patients expecting delivery were admitted.

(f) According to the Petitioner, the staff nurse noted discharge of blood and she was taken to the operation theatre at 9.30 a.m. on 20.6.2010 and noted that her uterus was fully damaged and a male child was also found dead. Finally the Doctors removed Petitioner's uterus, according to the Petitioner, without the consent of Petitioner's husband. Petitioner was immediately admitted in ICU ward and was given three units of blood and four units of plasma. On 21.6.2010 the Doctors informed the Petitioner that a male child was born and died in Neonatal Intensive Care Unit (NICU).

...

(h) Petitioner having lost her male child, uterus and health and suffering from continuous abdominal pain, she is unable to do any work and living with her husband and a female child. As her husband is already suffering from spinal cord problem, there is no income to Petitioner's family and according to the Petitioner, due to the negligent act of Doctors and staff members of the 4th Respondent-Hospital, Petitioner is put to such a predicament for which the 4th Respondent is bound to pay compensation.

...

...

7. The point for consideration in this Writ Petition is as to whether the Petitioner was put to suffering and she lost her male child and uterus due to non-extending of timely treatment in the 4th Respondent-Hospital.

...

10. ...[I]t is an admitted position that even though caesarean time was fixed at 3.00 a.m. on 20.6.2010, actually caesarean was conducted only at 9.20 a.m. on 20.6.2010, which according to the 4th Respondent was due to non-availability of operation theatre. The staff of the hospital and Doctors in the hospital cannot be blamed personally for not conducting caesarean to the Petitioner at 3.00 a.m. on 20.6.2010 as it is pleaded in the Counter Affidavit that the Petitioner was shifted to Ward No. 12, which is a normal ward, where pregnant patients, post operative patients were kept for treatment. Petitioner's uterus was also beyond repair at the time of conducting caesarean, that was at 9.20 a.m. on 20.6.2010 and blood loss was severe. Therefore the Doctors decided to perform hysterectomy to save the Petitioner's life and for doing such hysterectomy, consent from the Petitioner's husband, who was waiting outside the operation theatre was obtained as per the Counter Affidavit filed. Even otherwise, Petitioner's husband has given a consent to that effect in writing to do all kinds of treatment and a Consent Letter signed by Petitioner's husband is filed before this Court as stated supra. Petitioner was thereafter given treatment in the Intensive Care Unit and subsequently she was discharged on 1.7.2010. Thus, it is evident that due to non-availability of operation theatre/table, even though caesarean was to be performed at 3.00 a.m. on 20.6.2010, the Doctors could perform caesarean only at 9.20 a.m., which resulted in asphyxia to the child in the womb and also damaged the uterus of the p Petitioner.

...

12. It is not the case of the 4th Respondent-Hospital that the child was not alive when Doctors examined the Petitioner at 00.39 hours on 20.6.2010. It is also not the case of the 4th Respondent that the child could have died before 3.00 a.m., that was prior to the time fixed for conducting caesarean, as such death of the child was due to asphyxia, which in turn was due to the delay in conducting caesarean at 3.00 a.m. and taking out the child from the uterus of the Petitioner only at 9.30 a.m.

13. Article 21 of the Constitution of India guarantees fundamental right to live to every citizen.

(a) The right of a citizen to preserve one's life and get medical treatment on time was considered by the Supreme Court in the decision reported in *P.T. Parmanand Katara v. Union of India*, 1989 (4) SCC 286 : AIR 1989 SC 2039, wherein in paragraph 8 it is held thus,—

“8. Article 21 of the Constitution casts the obligation on the State to preserve life. The provision as explained by this Court in scores of decisions has emphasised and reiterated with gradually increasing emphasis that position. A Doctor at the Government Hospital positioned to meet this State obligation is, therefore, duty bound to extend medical assistance for preserving life. Every Doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. No law or State action can intervene to avoid/delay the discharge of the paramount obligation cast upon members of the medical profession. The obligation being total, absolute and paramount, laws of procedure whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must, therefore, give way.”

(b) In *Chameli Singh v. State of U.P.*, 1996 (2) SCC 549 : AIR 1996 SC 1051, in paragraph 8 the Hon'ble Supreme Court held thus—

“8. In any organised society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this object. Right to live guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilised society. All Civil, political, social and cultural rights enshrined in the Universal Declaration of Human Rights and Convention or under the Constitution of India cannot be exercised without these basic human rights.”

(c) In *Paschim Bangal Khet Mazdoor Samity v. State of West Bengal*, 1996 (4) SCC 37 : AIR 1996 SC 2426 : 1997 (1) MLJ 7, the Hon'ble Supreme Court held that the patient cannot be denied emergency aid due to non-availability of bed in the Government Hospital and if any such denial is made, the same amounts to denial of right to life guaranteed under Article 21 of the Constitution of India.

(d) The Division Bench of Orissa High Court in the case in OJC No. 8819 of 2000 order dated 17.9.2012, considered the medical negligence for not giving timely treatment due to which a lady and child died. The Division Bench ordered Rs. 5 lakhs as compensation with 6% interest till date of payment.

(e) The Calcutta High Court in the decision reported in *Ranjit Kumar Das v. Medical Officer, ESI Hospital*, 1997 (3) CPJ 336 (CDRC West Bengal) held that even the failure of the hospital to treat the card-holder on the ground of absence of bed would amount to negligence and therefore, adequate compensation must be provided.

**14.** From the above cited decisions it is beyond doubt that the action of the 4th Respondent in not conducting caesarean at 3.00 a.m. on 20.6.2010 due to want of table in the operation theatre is not a ground to deny compensation claimed by the Petitioner, particularly when it is proved that the child was alive till the time fixed for operation, *i.e.*, 12.00 midnight on 19.6.2010 and beyond 3.00 a.m. on 20.6.2010.

**15.** The 4th Respondent is also not justified in blaming the Respondents 2, 3, 5 to 7 for not extending treatment to the Petitioner in the hospital at Kallakuruchi or in the Government Medical College Hospital, Villupuram, as the Petitioner's husband willingly taken the Petitioner to admit her in the 4th Respondent-Hospital, which is as per the wish of the Petitioner as well as her husband. However, the action of the Doctors and staff in the Government Headquarters Hospital at Kallakuruchi and in the Government Medical College Hospital at Villupuram in not providing treatment to the Petitioner is contrary to the Code of Medical Ethics drawn up with the approval of the Central Government under Section 33 of the Indian Medical Council Act, 1956, which states that every Doctor, whether at the Government Hospital or otherwise, has professional obligation to extend his services to protect the life. This obligation being total, absolute and paramount, laws or procedures, whether in statute or otherwise cannot be sustained and, therefore must give way.

**16.** The Government is spending huge money for promotion of health. However in this case it is proved that adequate operation theatre/table is not provided in the well reputed hospital *i.e.*, JIPMER hospital, Pondicherry, which resulted in the death of a male child and caused physical and mental agony to the Petitioner and her family. As right to health is recognised as a fundamental right, not providing adequate table to conduct caesarean in the Government Hospital, either due to inadequacy of space or funds, cannot be a ground. Hence, the Petitioner is to be compensated by the 4th Respondent.

**17.** The next issue to be considered is how much amount can be ordered to be paid by the 4th Respondent as compensation to the Petitioner, who not only lost her child but also lost her uterus. Petitioner, having lost a fully grown child at the time of conducting caesarean belatedly and lost her uterus permanently, is entitled to get adequate compensation.

**18.** There is no codified law for arriving at the quantum of compensation in cases of this type. The enactments like Motor Vehicles Act, 1988; Workmen's Compensation Act, 1948; and Fatal Accidents Act, 1855 may be applied for arriving at just compensation.

**19.** Considering the facts and circumstances of the case, I am of the view that interest of justice would be met by directing the 4th Respondent to pay a sum of Rs. 2.00 lakhs for the loss/death of child of the Petitioner due to the delay in conducting caesarean, and Rs. 1.00 lakh for the loss of uterus due to the delay in performing caesarean and Rs. 25,000/- for pain and sufferings. The said compensation amounts totalling Rs. 3.25 lakhs is directed to be paid by the 4th Respondent to the Petitioner within a period of four weeks from the date of receipt of copy of this order..."

## IN THE HIGH COURT OF DELHI

**Nirmala Devi & Ors. v. Union of India**

**AIR 2015 (NOC 224) 92**

**Vibhu Bakhru, J.**

***On account of a failed sterilization procedure, petitioners no. 1 and 2 begot a child who was diagnosed with a mental disorder. In this writ petition filed by the parents and the child, the petitioners sought compensation for their child's education, livelihood and development, and medical negligence resulting in failure of sterilization. The High Court examined whether the "right to live with dignity" under Article 21 could be invoked to provide resources for upbringing the petitioners' child.***

**Bakhru, J.:** "1. Petitioner Nos. 1 and 2 are parents of petitioner no. 3, Master Deependra, who was born on 14.06.2001. Master Deependra is stated to be suffering from mental disorder and requires constant care...The petitioners claim that they have a right to life under Article 21 of the Constitution of India and have prayed that the respondents make suitable arrangements for the livelihood, education and development of their son...In addition, petitioner nos. 1 and 2 have claimed compensation of Rs. 50 lacs for the indignation and humiliation faced by them on account of failed sterilisation procedure performed on petitioner No. 1.

...

3. I have heard the learned counsel for the petitioners at length. Although, the petitioner nos. 1 and 2 have alleged that the attending surgeons/medical staff were negligent and have prayed that the respondents be held liable to compensate the petitioners for the failure of sterilization procedure conducted on petitioner no. 1, however, the grievance of the petitioner as one understands from the arguments that were advanced is not that the petitioners are aggrieved on account of any medical negligence but are distressed on account of the problems faced by them in bringing up a child with a mental disorder.

4. The Supreme Court in the case of *Jacob Mathew v. State of Punjab*: (2005) 6 SCC 1 approved the tests as laid down in the case of *Bolam v. Friern Hospital Management Committee*: (1957) 2 All ER 118 (QBD) with respect to medical negligence...

5. In *State of Punjab v. Shiv Ram*: (2005) 7 SCC 1, the Supreme Court following the decision in *Jacob Mathew* (supra) held as under:-

"We are, therefore, clearly of the opinion that merely because a woman having undergone a sterilisation operation became pregnant and delivered a child, the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy or unwanted child. The claim in tort can be sustained only if there was negligence on the part of the surgeon in performing the surgery. The proof of negligence shall have to satisfy Bolam's test. So also, the surgeon cannot be held liable in contract unless the plaintiff alleges and proves that the surgeon had assured 100% exclusion of pregnancy after the surgery and was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery. As noted in various decisions which we have referred to hereinabove, ordinarily a surgeon does not offer such guarantee."

6. In the present case also, the fact that the sterilisation procedure had failed, does not necessarily indicate that the surgeons/medical practitioners attending petitioner No. 1 were professionally negligent and thus no compensation can be granted to the petitioners in this proceeding. In my view, no compensation for failure of the sterilisation procedure can be awarded also for the reason that the claim is highly belated and has been preferred after a period of 13 years. It is also pertinent to note that the petitioner No. 1 could have terminated the unwanted pregnancy but petitioner Nos. 1 and 2 decided to proceed with the same, which resulted in the birth of petitioner No. 3.

7....While the Court may empathise with the condition of petitioner nos. 1 and 2, there is no judicial principal (sic) which could be adopted to award any compensation to the petitioners on account of bringing up a challenged child.

8. In my view, the reference to Article 21 of the Constitution of India is not apposite in the facts of the present case. While, it is correct that the Supreme Court of India over a period of time has liberally interpreted the words "life and liberty" and Article 21 of the Constitution of India has been read to include "right to live with dignity". However, the same is not applicable in the present case and cannot be extended to assist the petitioners in travails of their life. It is pertinent to note that the focus of the petitioners' arguments was not to seek medical assistance or access to hospital but resources

for the care and development of petitioner No. 3. Undoubtedly, the state must endeavour to provide social security to its citizens, but given the constraints of resources a mandamus to provide the same cannot be issued. The reference of learned counsel for the petitioners to Article 15(3) and Article 21A of the Constitution of India is also misplaced.

9. For the reasons stated above, this Court cannot grant relief to the petitioners. The writ petition is dismissed.”

## IN THE HIGH COURT OF MADRAS

**Sumathi v. Dr. Suganthi**  
**(2014) 3 MWN (Civil) 785**  
**R. Mahadevan, J.**

***The appellant/plaintiff preferred this second appeal as an indigent person challenging the orders passed by the lower courts dismissing her claim for compensation for failed sterilization and birth of an unintended child. The High Court examined the legality of shifting the burden of proving medical negligence onto the plaintiff by the lower courts.***

**Mahadevan, J.:** “...

2. ...The case of the plaintiff is as follows:—

The plaintiff, being mother of two children, had undergone sterilization operation on 10.3.1990 which was done by the first defendant, the then Medical Officer in the Government Hospital, Tiruchengode. But, thereafter, to her surprise, she became pregnant and on 22.11.1991, she gave birth to a male child in Government Hospital, Tiruchengode. According to the plaintiff, the pregnancy was due to surgical failure due to deliberate negligence and wanton carelessness on the part of the first defendant and hence, she claimed a total sum of Rs. 1,00,000/= as damages.

...

5. The second appeal has been admitted identifying the following question to be the substantial question of law involved in the second appeal:

i) Whether the shifting of the burden of proof on the plaintiff that there is medical negligence on the part of the Doctor who performed the surgery, can be legally sustained and if not, does not vitiate the judgments in challenge?

...

7. The suit is one for the relief of damages for the alleged medical negligence on the part of the first defendant, a Doctor in the Government Hospital, Tiruchengode while conducting sterilization on the plaintiff. It is not in dispute that the plaintiff, having blessed with two children, had undergone sterilization surgery with the intention of avoiding further pregnancy due to her family circumstances and her status. The plaintiff is from a remote village. It is contended that she belongs to a poor family and her husband is a driver by profession. The plaintiff is said to have given birth to all the three children only in Government Hospital instead of approaching private hospitals which strengthens her contention that she is from weaker section of the society. The trend in the village, one can see, is that people will not come on their own volition to undergo a sterilization even after giving birth to a number of children. They deem it as a sin and pregnancy should not be avoided as it is blessed by Almighty. Only on wide publicity by the Government and the education offered to the folk people, nowadays, they come forward to venture it. It is an appreciable maturity level in the society from that of fearing even for a vaccination. Birth control has the topmost priority in our nation for its move in the path of development. Therefore, people who want to join in such a move should be encouraged. Such being the situation, a lady with a poor family status is burdened with one more child even after the sterilization.

8. It is relevant to see that in *Keith Allenby v. H.* ((2013) 2 SCC 1), it has been held as under:

“53. If, however, the purpose of the medical treatment is to prevent pregnancy from occurring and by reason of medical error that purpose is not achieved, it does not seem to us that, just because the pregnancy then occurs as a biological process, there should be no cover for the consequences. The development of the foetus following impregnation occurs because of the medical error, just as in

the case of the undetected tumour. It causes significant physical changes to the woman's anatomy, which of course occur naturally but still cause discomfort and, at least ultimately, pain and suffering. If a disease or infection consequential on medical misadventure can be classified by the statute as a personal injury, it does not involve any greater stretching of language to similarly include a pregnancy which has the same cause. We should add that it can make no difference that the direct cause of the pregnancy is an act of sexual intercourse which occurs separately from the negligently performed operation. The pregnancy is still caused by the surgeon's negligence, and would not have happened without that negligence. It is the same in a case of negligent treatment by a health professional falling under s 32(6), where the transmission of the infection occurs separately from the failure to properly treat the patient who passes on the infection, and is directly caused by the proximity of the patient and the person to whom the infection is passed. Another example would be where a medical practitioner negligently carries out a vaccination procedure sought by a patient who later catches from a third person the very disease against which he or she wished to be protected.

60. The next question, and it is a key question in the case, is whether the resulting pregnancy amounts to "personal injury" under and for the purposes of the legislation. That expression is defined to mean "physical injuries... including, for example, a strain or a sprain". The question whether a woman who becomes pregnant as a result of a failed sterilisation operation thereby suffers physical injuries is the same question as that which arises if a pregnancy is the result of rape. The answer must logically be the same in respect of both causes. The fact that one results from medical misadventure and the other from accident cannot make any difference.

61. I am unable to accept that the changes which occur to a woman's body as a result of pregnancy do not come within the compass of the expression "physical injuries" in the context of the legislation in issue. Clearly the bodily changes are of a physical kind. The only issue is whether they represent an injury or injuries for the purposes of the Act. I consider they do. In both cases (rape and failed sterilisation) the bodily changes which ensue qualify as personal injury. They are apt to cause a substantial degree of physical discomfort and, quite often, substantial pain and suffering. The changes produce bodily sensations which are of much greater consequence and duration than the examples given of a strain or a sprain.

62. I am not persuaded to a different view by the argument that pregnancy is "a natural process" and is necessary for the survival of the human species. A woman is entitled to choose whether or not to become pregnant. If she does not wish to do so, the consequences of her becoming pregnant are not to be discounted because pregnancy per se is a natural process. A woman who takes steps to avoid a natural consequence of sexual intercourse ought to be regarded as suffering physical injury when those natural consequences follow as a result of medical misadventure. In the same way, a woman who is raped, and becomes pregnant as a result, thereby suffers physical injury caused by the accident of sexual assault. This reasoning does not lead to all unwanted pregnancies being covered by the Act. In order to attract cover the pregnancy must be caused either, as here, by medical misadventure, or by rape.

...

80. Medical misadventure arises out of medical error or medical mishap. 17 Medical mishap (an adverse consequence of treatment 18) is not in issue here. Rather, it is said that the failed sterilisation resulted from medical error. Medical error does not exist "solely because desired results are not achieved", but must amount to "the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances". 19 Whether the failure in the sterilisation undertaken was because the appellant did not observe the standard of care and skill reasonably to be expected is not conceded or established. It is however assumed for the purposes of the strike out determination that the pregnancy was the result of such medical error."



9. In the case of *Mrs. Vijaya v. The Commissioner, Corporation Of Chennai* (2004-3-LW 201) this court has held as under:—

“7. The decision reported in the case of *State of Haryana v. Santra* ((2000) 5 SCC 182 : 2001-2-LW 58), is more appropriate in the sense that it relates to a case of birth of a child in spite of tubectomy operation. The Supreme Court held that there was negligence on the part of the Doctors and ultimately, the State Government was responsible for the negligence. The award of compensation by the Court below was upheld by the Supreme Court. Ultimately, it was observed:—

[...]

.....

“42. Having regard to the above discussion, we are positively of the view that in a country where the population is increasing by the tick of every second on the clock and the Government had taken up family planning as an important programme for the implementation of which it has created mass awakening for the use of various devices including sterilisation operation, the doctor as also the State must be held responsible in damages if the sterilisation operation performed by him is a failure on account of his negligence, which is directly responsible for another birth in the family, creating additional economic burden on the person who had chosen to be operated upon for sterilisation.”

8. Applying the ratio of the above said decision, it has to be seen whether the petitioner is entitled for any compensation. The main objection raised by the learned counsel for the respondents is to the effect that there is no material on record to establish negligence on the part of the Doctors and in normal course, there can be failure of such operation. It is, of course true that the petitioner has not produced any positive material to show negligence at the time of operation. However, in such case, where the failure rate is negligible, the initial presumption would be regarding the negligence in the operation. Thus, the doctrine of *Res ipsa loquitur* would be applicable to such cases. In other words, where it is found that in spite of undergoing sterilising operation, there is conception and birth of child, the burden would be shifted to the concerned Doctor, to prove that there was no negligence and the fact that “there was conception in spite of tubectomy operation” would speak for itself. In the present case, except a vague denial about the allegations and shifting the blame to the petitioner, no material has been produced on behalf of the respondents to prove that due care had been taken at the time of operation.”

10. ...The courts below have rejected the case of the plaintiff that her pregnancy was only due to medical negligence on the part of the first defendant mainly on the ground that the plaintiff failed to prove the medical negligence. The courts below have, unreasonably expected the plaintiff, a poor folk lady, to prove the medical negligence. In *Savita Garg v. National Heart Institute* ((2004) 8 SCC 56), a Division Bench of the Hon'ble Supreme Court has held that once a claim petition is filed and the complainant has successfully discharged the initial burden that the Hospital/Clinic/Doctor was negligent, and that as a result of such negligence the patient died, then in that case the burden lies on the hospital and the doctor concerned who treated the patient to show that there was no negligence involved in the treatment.

11. In a similar case in *Dr. Alice George v. Lakshmi* (2007 (1) CTC 496), the plaintiff therein underwent the family planning operation in the year 1987, but, gave birth to another child in the year 1990 and claimed damages. The defence of the Medical Officer therein was that even after the sterilization operation, there was approximately 0.5% of pregnancy. The courts below awarded damages and the second appeal preferred by the Medical Officer was dismissed by this court by holding that it is for the medical person to prove that the operation was done carefully and without any negligence whatsoever.

12. The learned counsel for respondents 2 and 3, by pointing out the decision of a Full Bench of the Honourable Supreme Court in *State of Punjab v. Shiv Ram* (CDJ 2005 SC 616), submitted that the Honourable Supreme Court, while allowing an appeal filed by the State against the decree for damages passed by the courts below in a case of alleged medical negligence due to failure of sterilization operation, has clarified the position with regard to claims regarding failure of sterilization and following the decision of the Honourable Apex Court, the claim of the plaintiff has to be rejected.

**13.** Of course, the Full Bench of the Honourable Apex Court has held in the above cited decision that the cause of action for claiming compensation in cases of failed sterilization operation arises on account of negligence of the surgeon and not on account of childbirth; that failure due to natural causes would not provide any ground for claim; that it is for the woman who has conceived the child to go or not to go for medical termination of pregnancy and having gathered the knowledge of conception in spite of having undergone sterilization operation, if the couple opts for bearing the child, it ceases to be an unwanted child and compensation for maintenance and upbringing of such a child cannot be claimed.

**14.** It is also relevant to note that in the above decision, the Full Bench had discussed the post female sterilization pregnancy with the aid of articles from the medical journals and listed out the causes for such failure and pointed out the finding of US study that 1 of every 3 pregnancies after sterilization was ectopic...

**15.** In the above case, the childbirth was after seven years from the date of sterilization operation conducted on the victim lady. But, in the present case, the pregnancy itself took within a year after sterilization operation and the plaintiff gave birth to a child after 19-1/2 months. The rate of risk of post sterilization pregnancy in “pomeroy method” is said to be 2 out of 1000. Even in the above decision, the biological reason for automatic reversal of the sterilization is considered as the last and least cause.

**16.** In the case on hand, the contention of the first defendant before the Trial Court is that had the plaintiff was cautious, she could not have become pregnant. It is also admitted by her in cross-examination that she had not given the warnings and precautions to the plaintiff in writing. Therefore, this court is of the view that the burden heavily lies on the Medical Officer to prove that there was no negligence in performing the surgery. It is too much on the part of the Medical Officer to doubt the genuineness of the plaintiff in contending in the written statement that the plaintiff might have joined the fallopian tube with the intention of having one more child. Such a contention made by the first defendant-Medical Officer when the plaintiff had approached for damages alleging medical negligence on the part of the first defendant itself shows her idea of escapism and lethargic approach. It is beyond imagination that the plaintiff could have ventured to join the fallopian tube by undergoing another process of surgery to get pregnated for the purpose of claiming some damages that too by fighting against the medical world for years together.

**17.** In view of the above discussion, this court is of the view that the courts below have committed error in shifting the burden of proof on the plaintiff, a folk lady, which certainly vitiates the judgments in challenge and the substantial question of law is answered accordingly...”

## IN THE HIGH COURT OF KERALA

**State of Kerala v. Santa & Ors.****(2015) 1 KLJ 509****Thottathil B. Radhakrishnan and Babu Mathew P. Joseph, JJ.**

***A woman belonging to an economically marginalised community underwent a sterilization procedure relying on the assurances given by the doctor and government proclamations that it was a fool-proof method of birth control. Despite this, she became pregnant and delivered a child. In her suit for damages, the trial court gave a finding of negligence on part of the government doctor and held the State vicariously liable for damages. Appeals were preferred by the State challenging the findings of the trial court, as well as the woman questioning the adequacy of relief granted, before the High Court. While disposing these appeals, the High Court also considered whether the State had any liability to compensate persons who undergo the sterilization procedure based on its assurances and suffer owing to its failure, independent of whether such failure resulted from medical negligence.***

**Radhakrishnan, J.:** “Important issues relating to failed sterilisation surgeries conducted in government hospitals or under government programmes are the focal issues for decision in these appeals, which arise from the decree and judgment in a suit for damages instituted by an economically marginalised woman who underwent a mini lap sterilisation surgery in a government hospital, and, thereafter, bore a fourth child, much against the firm belief she entertained, on the basis of the assurance given by the government through its proclamations and by the doctor that she would not conceive after that surgical sterilisation process.

...

5. In setting up her case in that regard, apart from attributing negligence to the doctor, the plaintiff pleaded about the confidence that she had reposed on materials like pamphlets, issued by the government, propagating such sterilisation as an error-free mode of population control. The court below allowed the claim in part and granted her a decree, as against the first defendant, State of Kerala, holding it vicariously liable for the negligence of the doctor.

6. Though a defendant, the doctor who conducted the surgery has not appealed against the impugned verdict; may be because the court below did not decree the suit as against that person. The first defendant - State's appeal is A.S. No. 57 of 1998. Plaintiff sought leave to appeal; as an indigent, on the question of adequacy of damages awarded by the trial court. On being granted leave to do so, her appeal is on file as A.S. No. 263 of 2003.

...

14. If one were to go for a surgical procedure on the particular, assurance as to its credibility, the bare minimum that is required is that the procedure so expounded and extended has to be deemed to be foolproof, to the extent of its such professed nature. Obviously therefore, when it is demonstrated that the surgical procedure carried out on the plaintiff had failed; which is not a fact in dispute; it is an unexplained situation insofar as the plaintiff is concerned. When that happened from the matters under the control of the defendants, it was up to them to prove by cogent evidence, to the satisfaction of the court below, that the situation is not one attributable to the second defendant; as to negligence, neglect, breach of duty and due care and caution. This is inexcusably so, when the situation bespeaks negligence; that is to say, the happening of something which is not warranted or conceived of, by the acumen and diligence expected of the second defendant and the other personnel under the control of first defendant, having particular regard to what stood professed and offered in public domain by the government through Exhibits A7 to A10. In that factual and inferential matrix in the realm of preponderance of probabilities, we are unable to dissuade from concurring with the finding of the court below that the situation bespeaks negligence and that those responsible, had failed to discharge their legal obligation to convincingly explain the situation in hand, to the satisfaction of judicial mind. Therefore, the application of the doctrine of *res ipsa loquitur* by the court below and the resultant findings rendered in that regard are hereby confirmed.

15. Notwithstanding the finding of negligence as affirmed herein above, we see that there are other legal aspects as well which need to be addressed. We may note that in *State of Haryana v. Saritra*, (2000) 5 SCC 182, the Apex Court dilated on different aspects in relation to tortious liability, including vicarious liability arising out of medical negligence.

16. Though the aforementioned precedent thus held that claim for damages on account of medical negligence cannot be denied, we proceed to consider whether in the case in hand, the State would have any liability even independent of its vicarious liability as regards the tort of negligence committed by its servant.

**17.** Pitted here are; in one hand, a couple, of which the plaintiff is the female, belonging to the socially and economically challenged sector of this Nation; in the other hand, the government machinery coupled with the scientific wisdom which cannot but be deemed to be available to it from different legitimate and reliable sources, including, the doctor in government service, who conducted the procedure which has led to this litigation.

**18.** The legitimate expectations of the plaintiff in the situational scenario of her going for the surgical procedure, in absolute faith and confidence that she would be sterile after such procedure cannot but be taken cognizance of. Relying on Exhibits A7, A8, A9 and, A10, the court below held that the defendants had guaranteed the success of the mini lap surgery and had expounded such procedure as a *permanent method* to prevent future pregnancies. The court below specifically noted that *there was no mention* in those pamphlets about the chances of failure of such surgery. *Those pamphlets had carried the clear statement that mini lap surgery is a permanent and successful method of family planning and that there will not be any side effect or defect in that regard.* Those pamphlets had *not even mentioned about the probable chances* of failure of such surgeries. The contents of Exhibits A7, A8, A9 and A10 are declarations made by or on behalf of the Government. They are materials in public domain on which a citizen is well founded in reposing confidence. Clinching evidence was therefore before the court below to conclude that the plaintiff, innocently, bona fide, and, in absolute good faith/acted in complete and firm belief and faith in the institutional guarantee of the State Government; to which she was subject; as to the credibility and reliability of the surgical procedure that was being carried out on her. She was, thereby implicitly surrendering to the assurance given by the State Government on behalf of the Sovereign...

...

**20.** The aforementioned reasons based on the materials on record are clinching to confirm the impugned decree on the ground of promissory estoppel as against the State, through the government; adding on to the conclusion already arrived at as to its vicarious liability.

**21.** The aforesaid position notwithstanding, this is a case here certain larger issues of inexcusable importance in the domain of interpretation and application of the provisions of the Constitution of India, and the laws in India, arise for consideration in the light of the arguments advanced, and having regard to governance and decisions in its executive domain...

**22.** In terms of judicial conscience, we are of the view, that we need to proceed to decide on the aforementioned issues in these appeals which are, primarily civil appeals under Section 96 of CPC. This we do because, Whatever be the jurisdictional content and quality of any statutory proceedings; the Constitution is the pinnacle the bedrock and the guiding beacon for the sustenance (sic) interpretation and application of any law sought to be enforced; substantive or procedural.

...

**27.** The cohesiveness of the provisions of Parts III, IV and IVA of the Constitution of India is such that the fusion of great ideals and principles enshrined as Fundamental Rights, Directive Principles of State Policy and Fundamental Duties excludes any labyrinthine complexity in their understanding and application...The contextual public policy of this Nation is population control and augmentation of food and other resources... In a country where the population is increasing by the tick of every second on the clock and the Government had taken up family planning as an important programme for the implementation of which it had created mass awakening for the use of various devices including sterilisation operation, there is responsibility on the State - See for support *Santra* (supra), particularly paragraphs 37 and 42 thereof as reported in SCC. Though the said judgment rested on foundations as to tortious liability for negligence, the avowed policies relating to population control have other diverse dimensions' as well. The preservation of available resources for the present and future generations has to be ensured. Of equal importance is the fact that the children are given opportunities and facilities to develop in a healthy manner. The State shall strive to promote the welfare of the people by securing and protecting, as effectively as it may, a, social order in which, among other things, economic justice shall inform all the institutions of the, national, life. The State has also the constitutional obligation to raise the level of nutrition and the standard of living of the people and the improvement of public health as among its primary duties. While these salutary provisions flow out of the Constitution of India in its wholesomeness, they are also particularly provided for among the Directive Principles of State Policy as part of Articles 38, 39 and 47 thereof Similarly, Article 4, enjoins, among other things, the constitutional goal to make effective provision for, securing the right to education and to public assistance in cases of undeserved want. Childhood care and education for all children until they complete the age of six years is also a State goal in terms of Article 45 among the Directive Principles. Remember, citizenship is firstly by birth. The constitutional module in which the citizens are placed is such that they have an active role in ensuring the future of the Nation. The cream of the constitutional goals, including the Fundamental Duties of the citizens, are such that when

a citizen lives up to that constitutional expectation, that person would turn to be a vehicle on which the Constitution can safely carry the Nation to its goals. Article 51A enumerates the Fundamental Duties. It; shall be the duty of every citizen of India, among other things, to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement and a parent or guardian is to provide opportunities for education to his child. This is among the dictates of the Constitution of this Nation to the citizenry. Though it would have been natural for the economically, and therefore socially, marginalised couple, which led the plaintiff to offer herself for the sterilisation process, it cannot be ignored that she was induced by the Government through its propaganda, as part of the national need for population control and thereby to, empower the wholesome growth of this Nation, Therefore, where the person involved undergoes the procedure of sterilization on the advice in public domain that it is a foolproof method, natural failure of a sterilization procedure; even one not amounting to medical negligence; would also fall under State liability in the context of balancing the equations between Fundamental Duties, Directive Principles, of State Policy and Fundamental Rights, when the societal interest also gets involved while ensuring the sterilization of a person in cases of this nature. In this constitutional conspectus, in cases like the one in hand, there, is a constitutional responsibility for the Nation to support the victims of such a situation. This responsibility arises out of the sufferance of the individual citizen for the common good. This is the constitutional responsibility of socialist, democratic republic where common good and welfare guides...When such constitutional responsibility remains undischarged, it amounts to breach of legal duty to compensate. As a corollary, it results in a legal liability, which is absolute in nature. The liability in this regard will rest absolutely on the State, in the legal perspective, in accordance with the Constitution of India and the laws. The liability to make good the damage in such a situation would, therefore, fall as liability on the State, notwithstanding that no element of negligence by the doctor who performed procedure established. The citizen in sufferance, the victim, would thus be entitled to for enforcement of such liability of the State.

**28.** Onto the question of quantum of damages, it needs to be noted that the plaintiff had to bring up her fourth child born due to the failure of the mini lap surgery. According to her she was in financial need to provide food and clothing and other basic support for that child including for his education and medical support as and when needed. The court below considered different such 'aspects' and granted an amount of Rs. 64,800/- as damages and a sum of Rs. 10,000/- as damages for pain, mental agony and suffering...We are of the view that on a fair estimate this amount is inadequate. Obviously determination of the amount payable as damages in such a case cannot be on the basis of any hard and fast rule...On the totality of the facts and circumstances we are of the view that an amount of Rs. 500/- per month, also foreseeing, the escalation for expenditure, can be made the basis for determination of damages other than for pain mental agony and suffering...It would only be just arid-reasonable to grant an amount of Rs. 15,000/- (Rupees fifteen thousand only) to the mother for the pain, mental agony and suffering/We may here pause, also to recall that Vishnu, plaintiffs' fourth progeny whom she bore as a result of the failed mini lap surgery is no more. She had to; suffer that loss and agony, as well Hence, total amount of damages due is Rs. 1,23,000/-.

...

**31.** In the result,...

4. A.S. No. 263 of 2003 filed by the plaintiff is allowed in part as above: A.S. No. 57 of 1998. filed by the State is dismissed."

## IN THE HIGH COURT OF HIMACHAL PRADESH

State of H.P. v. Sushma Sharma

2016 SCC OnLine HP 3429

Dharam Chand Chaudhary, J.

***A suit for damages was filed by a woman who became pregnant as a result of failed sterilization and delivered a child. The trial court dismissed the suit as the doctor's negligence was not proved. However, the lower appellate court reversed the decision of the trial court holding the doctor liable for negligence in performance of her duty to inform the woman about the chances of failure of sterilization. In this appeal filed by the doctor and the State Government, the High Court examined whether the doctor had exercised reasonable care and caution in the course of the sterilization procedure.***

**Chaudhary, J.:** "This judgment shall dispose of the present appeal and also the connected one arising out of the judgment and decree dated 16.12.2003 passed by learned District Judge, Solan in Civil Appeal No. 60-S/13 of 2003. It is seen that learned District judge has reversed the judgment and decree passed by learned Senior Sub Judge, Solan in Civil Suit No. 385/1 of 99/97 and decreed the suit in favour of the respondent (hereinafter referred to as the plaintiff) for the recovery of a sum of Rs. 70,000/- with interest @ 9% per annum from the date of filing of the suit against the appellants in these appeals (hereinafter referred to as the defendants) jointly and severally.

2. Plaintiff belongs to village Sainj, Post Office Kandaghat in District Solan, a rural area. She has been married to Ved Prakash of that village. She gave birth to two children out of this wedlock. When in the year 1994, the children born to her were 5 and 1½ years of age, on account of their poverty, the couple decided to undergo sterilization operation. She was advised to undergo family planning operation (tubectomy). The operation was conducted by the 3<sup>rd</sup> respondent, posted at that time in District Hospital, Solan on 8.12.1994 at Kandaghat. The complaint is that the said respondent while conducting the operation had acted negligently and failed to take all precautions. As a result thereof, the operation turned unsuccessful and the plaintiff became again pregnant. She even gave birth to a male child also.

...

15. This appeal has been admitted on the following substantial question of law:

1. Whether as the plaintiff/respondent No. 1 has neither pleaded nor proved the factum of the alleged negligence and the manner in which the appellant/defendant No. 3 failed to take reasonable care and caution while performing the Tubectomy operation, the suit of the plaintiff is required to be dismissed?

...

23. It is seen that like in *Shiv Ram's case* supra, in the case in hand also, it is not the case of the plaintiff that defendant No. 3 was not competent to perform the surgery and still she proceeded to conduct the same. However, here the allegations are that defendant No. 3 and other supporting staff before and after conducting her tubectomy made her to understand that after the operation, she will neither become pregnant nor any other issue born to her. It is how according to her, defendant No. 3 was negligent and failed in her duty to tell that the operation may fail and she again conceive pregnancy and thereby failed to take due care and precautions before and after the operation was conducted. In the case before the apex Court, it was not the case of the plaintiffs that the doctor who conducted the operation had committed breach of any duty casts on her as a surgeon. This, however, is not the position in the case in hand for the reason that the plaintiff herein has specifically averred as under in the plaint:

"3. ....Prior to the operation defendant No. 3 thoroughly checked up the womb as well as other private parts of the plaintiff and she was found normal in all respects and she was advised by the defendant No. 3 to undergo the operation for tubectomy. At the time of above operation the plaintiff had two issues aged about 5 years and 1½ years. The plaintiff was given assurance that after the operation due care and skill is observed and operation is successful one and in future she will not bear any child."

24. Defendant No. 3 in the written statement though has denied the allegations of negligence attributed to her being wrong, however, not responded to the averments in the plaint that after the operation was over, she assured the plaintiff that while conducting operation due care and skill has been observed and that the operation a successful and also that in future she will not bear any child. Therefore, such averments in the plaint remain uncontroverted...

25. Now if coming to the evidence qua this aspect of the matter, the plaintiff while in the witness box as PW-1 in so many words has proved that field staff before she chosen to undergo the operation had assured that after the operation she will not carry any pregnancy...The doctor assured her that she will be operated upon properly and that after the operation, there will be no scope of any pregnancy and of giving birth to any other child...No suggestion was given to the plaintiff in her cross-examination that neither the field staff nor defendant No. 3 ever assured her that operation was successful and that she will not carry any pregnancy after the operation. Meaning thereby that when the assurance was given to the plaintiff that her operation was 100% successful and that she will not carry any pregnancy in future, she may have not even imagined that she is carrying pregnancy when there was menstrual break. The stand of the defendants is that the rate of failure of family planning operation is ranging between 5-7%, however, the present is a case where the plaintiff was not made to understand the same. Defendant No. 3 who performed the surgery has, therefore, committed breach of the duty casts on her to apprise the plaintiff that the chances of failure of family planning operation were also there... Therefore, the present is a case where defendant No. 3 has failed to perform the duty casts on her as a surgeon to apprise the plaintiff that irrespective of the family planning operation conducted, in case the same fails and she become pregnant again and also that in such a situation she should rush to the hospital for further management. Such facts, however, were not in *Shiv Ram's case* supra before the apex Court and the observations in para 8 of that judgment "**the present one is not a case where the surgeon who performed the surgery has committed breach of any duty cast on her as a surgeon**" take out this case from the sweep of the above said judgment of the apex Court.

26. The further observations of the apex Court in para 25 of the judgment that "**So also, the surgeon cannot be held liable in contract unless the plaintiff alleges and proves that the surgeon had assured 100% exclusion of pregnancy after the surgery and was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery**" also take out the present case from the sweep of the judgment supra because as noticed hereinabove, the plaintiff has satisfactorily pleaded and proved that the defendants at the time of persuading her to undergo family planning operation and even after conducting the operation also assured her about 100% success of the operation and also that she will not carry any pregnancy after undergoing the operation in future...

27. True it is that in terms of the ratio of judgment supra, the failure of the family planning operation provides a valid and legal ground for termination of pregnancy. However, in the case in hand, in view of the assurance given to the plaintiff, she seems to have not thought even in dreams also that she can become pregnant again, inspite of having undergone sterilization operation when menses stopped. Even initially the doctor has also ruled-out the possibility of she having become pregnant. It came to her notice that she is pregnant when she went to district hospital, Solan. The pregnancy at that time was 3-4 months old and as such, defendant No. 3 advised her not to go for termination of pregnancy being dangerous to her life. Therefore, the plaintiff had no occasion to terminate the pregnancy. The plaintiff has, therefore, rightly said in the replication that she could know regarding the pregnancy at a very late stage in view of being under a bonafide belief that there was no question of conception by her after having undergone the operation.

28. It is worth mentioning here that the present is not a case where the surgeon Dr. Maya Ahuja, the 3<sup>rd</sup> defendant was not competent to conduct the operation but she has otherwise been found to have committed breach of duty cast upon her to advise or guide the plaintiff before conducting her operation or guided her to take post operative precautions such as rushing to hospital at once, if become pregnant and she rather was made to understand that the operation was 100% successful and that she will not bear any pregnancy in future. It is in this way, defendant No. 3 has committed the breach of duty casted on her as a surgeon. The present as such is a case where it is careless and negligent attitude attributed to defendant No. 3 and for that matter the doctor on duty in the hospital at Kandaghat that the plaintiff had given birth to 3<sup>rd</sup> child. Mr. Verma, learned Senior Advocate representing the plaintiff is, therefore, absolutely justified in claiming that the facts of this case are distinguishable from that in *Shiv Ram's case* before the Hon'ble apex Court.

29. The defendants have heavily relied upon the so called consent form Ext. D-A. It is seen that this document is in English language. The educational qualification of the plaintiff is 9<sup>th</sup> standard. True it is that as per her own version, she had studied English as a subject in 8<sup>th</sup> and 9<sup>th</sup> class, however, in the considered opinion of this Court, a person with qualification as 9<sup>th</sup> standard, cannot understand the contents of a document like consent form, Ext. D-A. In the replication she filed to the written statement, it is denied that she has voluntarily consented for her family planning operation and rather as per her version, she was made to sign some document without letting her know that there were chances of failure of the operation. Also that, she being illiterate, could not go through the contents of the consent form. As per her version, Ext. D-A is not binding upon her...Ext. D-A may have filled in by the motivator/health worker in the family planning department... Being so, version of the plaintiff that she was made only to put her signature on the consent form seems to be nearer to the factual position...It is also not known that he/she had read over and explained the contents of

this document in vernacular to the plaintiff. Therefore, it would not be improper to conclude that the consent form Ext. D-A was got signed from the plaintiff in routine without apprising her about the contents thereof in vernacular. Therefore, on this score also, no case in favour of the defendants is made out. Learned lower appellate Court has considered this aspect of the matter in its right perspective.

...

**31.** Now if coming to the prayer in the suit, the plaintiff has claimed the decree for recovery of a sum of Rs. 2,00,000/-. Learned lower appellate Court in the given facts and circumstances has, however, decreed the suit only for a sum of Rs. 70,000/-. The acts of carelessness and negligence as discussed hereinabove are responsible for giving birth to 3<sup>rd</sup> child by the plaintiff. A sum of Rs. 70,000/- is not even a fraction of the amount required for bringing up a child and to provide him good education as well as settling him in his life, because for this purpose, huge amount is required. It can reasonably be believed that carrying pregnancy and giving birth to a child is a painful process for a woman. Therefore, Rs. 70,000/- is not sufficient to compensate the plaintiff on account of pain and sufferings she had to undergo during the period she was carrying pregnancy and at the time when she gave birth to child. Therefore, in a case of decree of such a meagre (sic) amount, the defendant a welfare state otherwise also should have not raised such a hue and cry. It is observed so by this Court in a case titled the *State of H.P. v. Smt. Satya Devi* RSA No. 43 of 2006 decided on March 11, 2016.

**32.** In view of what has been said hereinabove, both the appeals fail and the same are accordingly dismissed...”



## Endnotes

- 1 (1995) 6 SCC 651.
- 2 (1957) 1 WLR 582.
- 3 Achutao Haribhau Khodwa v. State of Maharashtra, (1996) 2 SCC 634; Vinitha Ashok v. Lakshmi Hospital, (2001) 8 SCC 731; Indian Medical Association v. V.P. Shantha, (1995) 6 SCC 651; Jacob Mathew v. Union of India, (2005) 6 SCC 1.
- 4 Jacob Mathew v. Union of India, (2005) 6 SCC 1.
- 5 (1996) 2 SCC 634.
- 6 2012 SCC OnLine Del 3178.
- 7 Note: Cases relating to constitutional violations from forced sterilisation, and guidelines arising from cases involving substandard sterilisation are dealt with in Chapter 2, "Contraceptive Information and Services and Government Population Policies." This chapter deals with cases where medical negligence was a ground.
- 8 (2000) 5 SCC 182.
- 9 AIR 2003 MP 284.
- 10 2014 SCC OnLine HP 4829.
- 11 (2005) 7 SCC 1.
- 12 Another three judge bench of the Supreme Court followed Shiv Ram in State of Haryana v. Raj Rani, (2005) 7 SCC 22.
- 13 (2009) 3 SCC 1.
- 14 State of Haryana v. Raj Rani, (2005) 7 SCC 22.
- 15 See for instance Balwinder Kaur v. State of Haryana, (2009) 2 RCR (Cri) 104; Bimla Devi v. State of H.P., AIR 2009 HP 73; Mala Devi v. State Govt. of NCT of Delhi, 2014 SCC OnLine Del 4839.
- 16 2016 SCC OnLine HP 3429.
- 17 The Delhi High Court in Laxmi Devi v. Union of India, (2005) 118 DLT 484, dealt with the issue of contributory negligence on part of a woman, who had not approached the hospital in time after discovering that she was pregnant, making termination of pregnancy risky to her health, and hence, not advisable. She had become pregnant, in spite of having undergone a tubectomy surgery. The Court, taking note of the educational status of the woman and her husband, held that there was no contributory negligence on the part of the couple. It ruled that educational background, economic conditions, lack of awareness, and living conditions should be considered in determining whether there was contributory negligence. In doing so, the court distinguished another decision of the Delhi High Court in Shobha v. Government of NCT of Delhi, AIR 2003 Del 399, wherein the Court had held that the couple were negligent since they had not approached the hospital on getting to know about the pregnancy. The Court in Laxmi Devi ruled that since the couple in Shobha were both government employees, they stood on a different footing to the couple in Laxmi Devi, due to their educational background and general awareness.
- 18 (2014) 3 MWN (Civil) 785.
- 19 Achutao Haribhau Khodwa v. State of Maharashtra, (1996) 2 SCC 634.
- 20 (2015) 1 KLJ 509.
- 21 AIR 2015 (NOC 224) 92.
- 22 (2013) 2 CTC 332.
- 23 In Ramakant Rai v. Union of India, (2009) 16 SCC 565, the Supreme Court directed the Union of India to prescribe norms for compensating patients in cases of complications following sterilization procedures. It further directed that these norms should be followed uniformly by all the States. Until such norms were formulated, the Court directed that Rs 1 lakh be paid if the patient sterilized dies, Rs 30,000 if the patient is incapacitated, and the actual cost of treatment, where the patient suffers from postoperative complications (however, a ceiling of Rs. 20,000 was fixed). Subsequently, in Devika Biswas v. Union of India, (2016) 10 SCC 733, the Court noted the quantum of compensation awarded for deaths due to sterilization between 2010-13. It directed that the quantum of compensation given under the Family Planning Indemnity Scheme (FPIS) should be made available on the websites of the Ministry of Health and Family Welfare, Government of India, and the respective State Governments. It also directed that the quantum of compensation fixed under the FPIS should be increased substantially. For a discussion on these cases, and their extracts, See Chapter 2, "Contraceptive Information and Services and Government Population Policies".
- 24 (2008) 2 SCC 1.
- 25 For a discussion on the formula to be applied in cases of medical negligence, see V. Krishnakumar v. State of Tamil Nadu, (2015) 9 SCC 388, 399-404.
- 26 U.N. Office of the High Commissioner for Human Rights, "Status of Ratification Interactive Dashboard—India," <http://indicators.ohchr.org/>.
- 27 *Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained in U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001), Arts. 3-4.*
- 28 Vishaka v. State of Rajasthan, AIR 1997 SC 3011.



# CHAPTER TWELVE

# PREGNANCY, MATERNITY AND CHILD CARE LEAVE, AND EMPLOYMENT

This chapter concerns equality and non-discrimination in employment in the context of pregnancy and child care. The Indian Constitution guarantees women a right to work,<sup>1</sup> as well as equality of opportunity in relation to public employment.<sup>2</sup> It prohibits the State from discriminating against any citizen on the grounds of sex, including in matters relating to public employment.<sup>3</sup> The constitutional guarantee of equality has been interpreted to prohibit pregnancy-based discrimination.<sup>4</sup> Further, Articles 39(e), 42 and 45 provide that the State should direct its policies towards securing the health of workers, ensuring just and humane conditions of work including maternity relief, and providing for early childhood care and education for children below six years.

In consonance with the Directive Principles of State Policy, Parliament has enacted the Maternity Benefits Act 1961 (MB Act 1961) to regulate women's employment during pregnancy, as well as maternity benefits.<sup>5</sup> *Inter alia*, this law secures a woman's right to pregnancy and maternity leave, protects her wages during that time, and requires the employer to provide onsite child care facilities and nursing breaks to female employees.

In addition to the MB Act 1961, rules relating to the pregnancy of employees are governed by the Central Civil Services (Leave) Rules for employees of the Central Government, State Civil Services Rules for employees of the various state civil services, the specific service rules of other public employers and corporations, and employment contracts of various employers.

Despite this constitutional and legislative framework, women often face discriminatory treatment on grounds of pregnancy or childbirth and have approached the courts seeking redressal on issues of:

- Pregnancy Discrimination
- Maternity and Child Care Leave
- Loss of Seniority

## Pregnancy Discrimination

In ***Air India v. Nergesh Meerza***,<sup>6</sup> air hostesses working for Air India and Indian Airlines challenged the constitutionality of employment regulations that provided for employment termination on first pregnancy. The Supreme Court struck down this regulatory requirement as being arbitrary and unreasonable, and thus in violation of Article 14 of the Indian Constitution. Instead, the Court endorsed an amendment that in effect would require retirement of airhostesses with two living children on their third pregnancy and noted that such amendment would be in the interest of women's health and the national family planning program. Recently, in ***Navtej Johar v. Union of India***,<sup>7</sup> Chandrachud J. in his concurring opinion, questioned the correctness of this decision. *Inter alia*, he criticized the Court's approach of placing the entire burden of family planning and upbringing of children on women as a violation of their constitutional guarantee against non-discrimination on grounds of sex under Article 15 since it reinforces stereotypical gender norms.

Along similar lines, the Kerala High Court in ***Neetu Bala v. Union of India***,<sup>8</sup> held that denial of employment to women solely on grounds of pregnancy was arbitrary and illegal and thus violative of Articles 14, 16 and 42 of the Indian Constitution. It further stated that such discrimination would amount to negation of India's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), International Labour Organization's Maternity Protection Convention and the Universal Declaration of Human Rights (UDHR). In this case, the petitioner had challenged the State's decision to deny her appointment to the Short Service Commission only on account of her pregnancy. Likewise, in ***S. Amudha v. Chairman, Neyveli Lignite Corporation***,<sup>9</sup> the Madras High Court invalidated employment regulations that termed women with pregnancy of more than four months as "temporarily unfit" for employment, regardless of the nature of work to be performed by them. Citing this rule, the respondent had sought to defer the appointment of the petitioner in this case, till after childbirth. The Court held that such a restriction violates Articles 14 and 21 of the Indian Constitution.

In **Neera Mathur v. Life Insurance Corporation of India**,<sup>10</sup> a female employee was dismissed from service on account of her failure to correctly declare her last date of menstruation and the existence of her pregnancy on her employment declaration form at the time of joining the service. She approached the Supreme Court on the grounds that her right to equality guaranteed under Article 14 of the Indian Constitution had been violated by the arbitrary order of discharge. The Supreme Court set aside the discharge order stating that the declaration required in the form was embarrassing, humiliating and a violation of the employee's modesty and self-respect. The Court recommended deletion of such requirements from the declaration form and indicated that attempts to evade provision of maternity benefits to a female candidate by not hiring her if she is pregnant would be open to a constitutional challenge.

## Maternity and Child Care Leave

In **Municipal Corporation of Delhi v. Female Workers (Muster Roll)**,<sup>11</sup> female employees who had been working for years as daily wage employees with the Municipal Corporation of Delhi were denied maternity leave because they were classified as temporary workers. The Supreme Court struck down this practice. Relying on fundamental rights enshrined in Articles 14 and 15, the Directive Principles of State Policy reflected in Articles 39, 42 and 43 of the Indian Constitution and India's international law obligations under Article 11 of Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Court held that regardless of the nature of their duties, their avocation and the place where they work, all female workers must be provided the facilities to which they are entitled under the MB Act 1961. It also stated that India's obligations under Article 11 of CEDAW should be read into the employment contract between the Corporation and the Muster Roll workers.

Similarly, the Delhi High Court in **Seema Gupta v. Guru Nanak Institute Management**,<sup>12</sup> held that provisions providing for maternity benefits under the employment and service regulations should be construed in the light of Articles 15, 41 and 42 of the Indian Constitution and the obligations under UDHR and CEDAW. It stated that the case of an employee seeking extension of her maternity leave in line with employment regulations is not to be construed as a traditional case of enforcement of contract of service but an exercise of her fundamental rights.

Recognizing that workplaces often do not pay adequate attention to family care giving responsibilities, and that in a patriarchal society such a working environment serves "overwhelmingly to suit men", the Kerala High Court in **Mini K.T. v. Life Insurance Corporation of India**<sup>13</sup> held that any action taken against a woman employee for her absence from duty on account of such familial obligations would be an affront to her status, dignity and self-respect protected under Article 21, and guarantees of equality and non-discrimination in matters of employment under Articles 14 to 16 of the Indian Constitution.

With the advent of surrogacy, an issue that has come up repeatedly before courts is the entitlement of commissioning mothers to maternity leave. In **K. Kalaiselvi v. Chennai Port Trust**,<sup>14</sup> the Madras High Court held that as is the case with an adoptive mother, even a woman employee who has a child through a surrogacy arrangement is entitled to maternity leave. The Bombay High Court reiterated this position in **Hema Vijay Menon v. State of Maharashtra**.<sup>15</sup> This judgment also recognised the right to motherhood and right of every child to full development under Article 21 of the Indian Constitution. In **P. Geetha v. Kerala Livestock Development Board Limited**,<sup>16</sup> the Kerala High Court clarified that a commissioning mother is entitled only to post-natal statutory benefits that accrue to an employee who herself delivers a child. On the other hand, the Delhi High Court in **Rama Pandey v. Union of India**,<sup>17</sup> held that a commissioning mother is entitled to maternity leave not only in the post-natal period but also in the pre-natal period as she might be required to financially, emotionally and physically support the surrogate through her presence during her pregnancy. Noting that the applicable Central Civil Service (Leave) Rules did not define the term "maternity," the Court held that "maternity" is established once a pregnancy is conceived, even if in a womb other than that of the commissioning mother.

The Maternity Benefits (Amendment) Act, 2017 now clarifies this issue, by expressly providing 12 weeks of maternity leave to commissioning and adoptive mothers from the date on which the child is handed over to them.<sup>18</sup> A commissioning mother is defined in the Act as a woman whose own egg is used to create the embryo that is implanted in the surrogate.<sup>19</sup> Hence, for commissioning mothers who use donor eggs to create the embryo, the principles mentioned in the cases above may still apply, rather than the statutory protections under the Maternity Benefits (Amendment) Act, 2017. Likewise, for other types of benefits, relaxations or exemptions, etc., the distinctions made in these cases may be of relevance.

In **T. Priyadharsini v. The Secretary to Government, Department of School Education, Government of Tamil Nadu**,<sup>20</sup> the Madras High Court was approached by two women government teachers, who had delivered twins in their first pregnancy, and were now being denied maternity leave for their second pregnancy on the ground that they already had two surviving children. The Court struck down the Government Orders based on which maternity leave was denied to the

petitioners on the ground that maternity leave could not be denied on the basis of executive fiat alone. In the absence of any legislative authorization to restrict maternity leave based on the number of children, the Court held that a woman is entitled maternity leave per delivery and not per child, since the intention behind providing maternity leave is to provide protection to women during/after delivery.<sup>21</sup>

## Loss of Seniority

The issue of loss of seniority arose before the Delhi High Court in *Bilju A.T. v. Union of India*,<sup>22</sup> where some officers of the Central Reserve Police Force could not take promotional courses on time because they were pregnant and therefore not considered medically fit for the training involved in the promotional course. However, they were not offered any other promotional courses for over two years after they were declared medically fit post their pregnancies. The Court held that such denial of the opportunity to take promotional courses immediately after becoming medically fit post-pregnancy, and consequent denial of promotion, was discriminatory under Articles 14, 15 and 16 of the Indian Constitution, and hence unconstitutional.

Along similar lines, in another case before the Delhi High Court, *Inspector (Mahila) Ravina v. Union of India*,<sup>23</sup> the petitioner, an inspector with the Central Police Reserve Force, was due for promotion but could not complete a mandatory pre-promotional course as she was pregnant at the time when the course was offered. She completed the next course that was offered after her pregnancy was over and was accordingly promoted. However, she was denied restoration of seniority *vis-à-vis* her other colleagues who had completed the first pre-promotional course on the grounds that she had lost her seniority because of her “unwillingness” to attend the first pre-promotional course. The Court held that pregnancy does not amount to unwillingness to attend the course and that penalising a woman for her pregnancy and forcing her to choose between her career and child violated her rights to reproduction guaranteed under Article 21 of the Indian Constitution and her right to non-discrimination in public employment under Articles 14, 15 (1), 16 (1) and 16 (2) of the Indian Constitution.

## Related Human Rights Standards and Jurisprudence

Below is a selection of human rights standards and jurisprudence relating to state obligations to ensure the rights of women and girls to protection from discrimination in the workplace, including direct and indirect discrimination related to reproductive health, pregnancy, childbirth, and maternity leave. Human rights mechanisms have outlined that states must work to eradicate structural discrimination based on stereotyped roles for women and men and should ensure women’s right to equal wages, merit-based promotions free from discrimination, social security, and a healthy and safe working environment.

The Government of India has committed itself to comply with obligations under various international human rights treaties to protect sexual and reproductive health and rights. These include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Rights of the Child (CRC).<sup>24</sup> Under international law all government organs and authorities, including the judiciary, are obligated to uphold the laws and standards outlined in these treaties.<sup>25</sup> The Supreme Court has held that in light of the obligation to “foster respect for international law” in Article 51 (c) of the Indian Constitution “[a]ny International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [fundamental rights] to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”<sup>26</sup>

### INTERNATIONAL TREATY STANDARDS

#### TREATIES

- **CEDAW, Articles 1–5, 10–12, 13(1), 16(e)** (prohibiting discrimination against women, including by requiring states to eliminate stereotypes of the roles of men and women; noting that protections for maternity are not discriminatory and requiring states to “ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children”; guaranteeing women’s rights to equal education, employment and promotion opportunities, to job security, vocational training, and benefits, to equal pay, paid leave and

social security, and to healthy and safe working conditions, including the safeguarding of the function of reproduction; requiring states to ensure the provision of maternity and family protections and benefits at work, including by prohibiting dismissal on the basis of pregnancy, maternity or marital status, introducing paid maternity leave without loss of seniority, and providing necessary supportive services such as childcare; protecting women's rights to health, to determine the number and spacing of children, and to equality irrespective of marital status; and specifying that the state must "ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation").

- **ICESCR, Articles 2(2), 3, 6–10(2), 12** (prohibiting discrimination based on sex or other status; guaranteeing the rights to social security and insurance and to health; providing for special protection for mothers "during a reasonable period before and after childbirth," during which working mothers should receive paid leave or social security benefits; and protecting the right to gain a living by work and to work under just, favourable, safe and healthy conditions, which include fair and non-discriminatory wages and working conditions for women and men as well as the right to the opportunity for promotion based solely on seniority and competence).
- **ICCPR, Articles 2(1), 3, 8, 17, 23(1), 23(4), 26** (prohibiting discrimination on the basis of sex or other status; and protecting the rights to life and privacy, to found a family, to equality between spouses, and to freedom from servitude, slavery and compulsory labour).
- **CRC, Articles 24(2)(a), 24(2)(d)–(f)** (outlining that States must ensure appropriate pre-natal and post-natal health care).

## SELECTED GENERAL COMMENTS

- **Committee for Economic, Social and Cultural Rights (CESCR), General Comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the ICESCR)**, U.N. Doc. E/C.12/GC/23 (2016), paras. 6, 9, 17, 26, 30-33, 36, 38, 42, 44, 47(a), (f)-(g) and (j), 53, 55, 61-62, 65, 78 (outlining that to ensure the right to just and favourable conditions of work, states must, *inter alia*, provide for paid maternity, paternity, parental and family leave as well as pregnancy and maternity protections; that the right to healthy and safe working conditions includes consideration for pregnancy-related health risks and women's hygiene needs; that measures to reconcile work and family responsibilities are required as part of the obligation to ensure equal opportunity for promotion and that such measures should not reinforce stereotypes about men's and women's roles in the family; that "[w]orkers benefiting from gender-specific measures should not be penalized in other areas"; and maternity, pregnancy and other protections for women in non-traditional workplaces, such as domestic, part-time, and self-employed work).
- **CESCR, General Comment No. 22 (2016) on the right to sexual and reproductive health**, U.N. Doc. E/C.12/GC/22 (2016), paras. 7, 9, 27, 48 (outlining that states must ensure the provision of maternity protections and parental leave in employment, including by prohibiting discrimination based on pregnancy, childbirth, or parenthood; and obliging states to eliminate social misconceptions and prejudices concerning menstruation, pregnancy and fertility).
- **CESCR, General Comment No. 19: The right to social security (article 9 of the ICESCR)**, U.N. Doc. E/C.12/GC/19 (2008), paras. 2, 13, 18-19, 29, 32, 59, 62 (outlining that social security must be available, adequate, and accessible without discrimination and that it must cover, *inter alia*, health, family, and maternity benefits; specifying that medical benefits should cover perinatal, childbirth and postnatal care, and that paid maternity leave should be granted to all, including those involved in atypical work; highlighting the International Labour Organization recommendation that maternity leave cover not less than 14 weeks; and prescribing that state social security schemes should take account of factors that disadvantage women such as intermittent participation in the workforce due to family and child-rearing responsibilities, unequal wage outcomes, and differences in men and women's average life expectancy).
- **CESCR, General Comment No. 18: The Right to Work (article 6 of the ICESCR)**, U.N. Doc. E/C.12/GC/18 (2006), paras. 13, 23, 26, 44 (underlining that in ensuring the equal right of men and women to work, pregnancies must not constitute an obstacle to employment or justification for loss of employment; and that states must combat discrimination and ensure equal access and opportunities to work, economic resources, and vocational training).

- **CESCR, General Comment No. 16 (2005): The equal right of men and women to the enjoyment of all economic, social and cultural rights (article 3 of the ICESCR)**, U.N. Doc. E/C.12/2005/4 (2005), paras. 11-13, 23-26, 29 (requiring states to promote the reconciliation of work and family responsibilities, including through policies providing for care of children and dependent family members; to ensure that women receive equal benefits under pension schemes as well as adequate maternity leave; and to guarantee men and women equal access to all occupations, jobs at all levels, and vocational training and guidance).
- **CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health (article 12 of the ICESCR)**, U.N. Doc. E/C.12/2000/4 (2000), paras. 14-15, 20-21, 44(a), 51-52 (outlining that states must regulate employers to protect the right to health of workers, on a basis of equality between men and women; and must take a gender-sensitive approach to health including taking measures to improve maternal health).
- **Human Rights Committee, General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)**, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), paras. 20, 31 (requiring states to prohibit discrimination by employers, including private actors, such as required pregnancy tests for female job candidates).
- **CEDAW Committee, General Recommendation No. 29 on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)**, U.N. Doc. CEDAW/C/GC/29 (2013), para. 8 (“[A] substantive equality approach must address matters such as discrimination in education and employment, the compatibility of work requirements and family needs, and the impact of gender stereotypes and gender roles on women’s economic capacity.”)
- **CEDAW Committee, General Recommendation No. 26 on women migrant workers**, U.N. Doc. CEDAW/C/2009/WP.1/R (2008), paras. 17-19, 24(a) and (d), 26(b) and (e)-(g), 27 (outlining the duties of countries of origin and destination to protect women migrant workers’ right to health).
- **CEDAW Committee, General Recommendation No. 24: Article 12 of the Convention (women and health)**, U.N. Doc. A/54/38/Rev.1, chap. I (1999), para. 28 (linking women’s right to health with the right to healthy and safe working conditions, including the safeguarding of reproductive function, special protection from harmful types of work during pregnancy, and the provision of paid maternity leave).

## INQUIRIES AND INDIVIDUAL COMPLAINTS

- **CEDAW Committee, Medvedeva v. Russia, Comm. No. 60/2013**, U.N. Doc. CEDAW/C/63/D/60/2013 (2016), paras. 11.2-11.4, 11.7, 13 (where laws banned women from working certain jobs because they might interfere with reproductive capacity: holding that such laws reflect detrimental stereotypes about women and that the State must make jobs safe for both men and women, accounting for biological differences).
- **CEDAW Committee, Elisabeth de Blok et al. v. The Netherlands, Comm. No. 36/2012**, U.N. Doc. CEDAW/C/57/D/36/2012 (2014), paras. 8.1-9 (holding that the abolition of an existing public maternity leave scheme, without establishing an adequate alternative scheme to cover maternity leave for self-employed women, constituted direct sex and gender-based discrimination in violation of the state obligation to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances).

## UNITED NATIONS HUMAN RIGHTS EXPERT AND WORKING GROUP REPORTS

- **Working Group on the issue of discrimination against women in law and in practice, Report of the Working Group on the issue of discrimination against women in law and in practice, Thematic report**, U.N. Doc. A/HRC/26/39 (2014), paras. 81-97 (highlighting that economic and social inequality of women is perpetuated by workplace discrimination in hiring, firing and workplace treatment of pregnant women and mothers, unequal caretaking burdens, and negative stereotyping of mothers and also fathers who care for children; outlining that effective measures are required to guarantee women’s employment security during pregnancy and after birth; and recommending that maternity leave should be extended to self-employed women and women in the informal economy and paid through social insurance or public funds to help prevent employers from discriminating against women to avoid maternity leave costs).



- **Working Group on the issue of human rights and transnational corporations and other business enterprises, *Annex: Gender guidance for the Guiding Principles on Business and Human Rights***, U.N. Doc. A/HRC/41/43 (2019), paras. 1-2, 7, 8(e)-(f), 11, 12(b), 21, 22(a) and (i) (outlining that states must address, including through temporary special measures, root causes of discriminatory power structures that operate against women; recommending that state-owned or –controlled businesses as well as private sector government contractors should protect the sexual and reproductive health and rights of women, including by addressing pregnancy- and maternity/paternity-based discrimination and the gender pay gap).
- **Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover***, U.N. Doc. A/HRC/20/15 (2012), paras. 13-16, 18-19, 47-48, 60(a) (recognizing state responsibility to extend occupational health protections to workers in the informal economy, with special attention to gendered “biological and socio-cultural factors [that] play a significant role in influencing the health of men and women”).
- **Special Rapporteur on violence against women, its causes and consequences, *Violence against women, its causes and consequences: Note by the Secretary-General***, U.N. Doc. A/69/368 (2014), para. 34 (outlining that many forms of gender-based violence, including sexual harassment, prevent women from realizing their right to work or to enjoy just and favourable conditions of work without discrimination, including safe and healthy working conditions, fair and equal remuneration, free choice of profession and employment and non-discrimination on grounds of marriage or maternity).

## SELECTED REGIONAL CASE LAW

### EUROPEAN COURT OF HUMAN RIGHTS

- ***Emel Boyraz v. Turkey*, Application no. 61960/08 (2014)**, paras. 44-45, 48-56, 74-75 (where a woman had been fired from her job as a security officer because she was not a man and had not completed military service: outlining that the job’s security risks and physical requirements did not justify any difference in treatment between men and women, and that the domestic courts’ reliance on gender-based stereotypes violated the rights to non-discrimination in private and family life and to a fair trial).
- ***García Mateos v. Spain*, Application no. 38285/09 (2013)**, paras. 42-49 (where an employee requested and was refused the ability to work reduced hours in order to care for her young son, and she never received reparation or compensation from the subsequent legal judgment in her favour, which found that the employer had discriminated on the basis of sex: finding a breach of her right to non-discrimination in conjunction with the right to access justice).

# RELEVANT EXCERPTS FROM SELECT CASE LAW

(Arranged chronologically)

## IN THE SUPREME COURT OF INDIA

**Air India v. Nergesh Meerza & Ors.**

**(1981) 4 SCC 335**

**S. Murtaza Fazal Ali, A. Varadarajan and A.N. Sen, JJ.**

***Air hostesses working for Air India and Indian Airlines were terminated from service on their first pregnancy as per their employment regulations. They filed writ petitions in the Supreme Court challenging the constitutional validity of these regulations arguing, inter alia, that these regulations violated their right to equality and non-discrimination under Articles 14, 15(1) and 16(2) of the Indian Constitution. The Court examined whether the regulations requiring air hostesses to retire on first pregnancy were arbitrary and unconstitutional.***

**Fazal Ali, J.:** "... For the purpose of brevity, the various petitions, orders, rules, etc. shall be referred to as follows:

"(1) Air India as 'AI'

(2) Indian Airlines Corporation as 'IAC'

(3) Statutory regulations made under the Air Corporations Act, 1953 (27 of 1953) by Air India or the Indian Airlines Corporation would be referred to as 'AI Regulation' and 'IAC Regulation' respectively.

(4) Nergesh Meerza & Others as 'petitioners'.

(5) Declaration by the Central Government under Equal Remuneration Act as 'Declaration' and Equal Remuneration Act, 1976 as '1976 Act'.

(6) Air Corporation Act of 1953 as '1953 Act'.

(7) Justice Khosla Award as 'Khosla Award' and Justice Mahesh Chandra Award as 'Mahesh Award'.

(8) Assistant Flight Pursers as 'AFPs'

(9) Air Hostess as 'AH' and Air Hostesses as 'AHs'.

(10) Air India Cabin Crew as 'AI Crew' and Indian Airlines Corporation Cabin Crew as 'IAC Crew'.

(11) Flight Steward as "FS".

...

**12.** ... [B]y virtue of a notification published in the Gazette of India on 12-4-1980 in Part III, Section 4, Para 3 of the amended Regulation 12 was further amended thus:

"An Air Hostess shall retire from the service of the Corporation upon attaining the age of 35 years or on marriage if it takes place within four years of service or on first pregnancy, whichever occurs earlier."

...

**14.** ... [A]n AH under AI was retired from service in the following contingencies:

(1) on attaining the age of 35 years,

(2) on marriage if it took place within 4 years of the service, and

(3) on first pregnancy.

...

**18.** Mr Atul Setalvad appearing for the AHs in Transfer Case No. 3 of 1981 has submitted some important and interesting points of law which may be summarised as follows:

...

(4) The termination of the services of AHs on the ground of pregnancy or marriage within four years is manifestly unreasonable and wholly arbitrary and violative of Article 14 of the Constitution and should, therefore, be struck down.

....

**19.** For the aforesaid reasons, it was contended that Regulations 46 and 47 of Air India Employees' Service Regulations and Regulation No. 12 of the Indian Airlines (Flying Crew) Service Regulations must be struck down as being discriminatory and ultra vires.

...

**21.** In answer to the contentions raised by Mr Setalvad and the counsel who followed him, Mr Nariman appearing for AI and Mr G.B. Pai for the IAC, adumbrated the following propositions:

“ ...

(4) Having regard to the circumstances prevailing in India and the effects of marriage, the bar of pregnancy and marriage is undoubtedly a reasonable restriction placed in public interest.

(5) If the bar of marriage or pregnancy is removed, it will lead to huge practical difficulties as a result of which very heavy expenditure would have to be incurred by the Corporations to make arrangements for substitutes of the working AHs during their absence for a long period necessitated by pregnancy or domestic needs resulting from marriage.

(6) The court should take into consideration the practical aspects of the matter which demonstrate the fact that a large number of AHs do not stick to the service but leave the same well before the age of retirement fixed under the Regulation.”

...

**62.** In the same token, an additional argument advanced by Mr Setalvad was that certain terms and conditions of AHs were palpably discriminatory and violative of Article 14. For instance, under the Regulations concerned, AHs suffered from three important disabilities — (1) their services were terminated on first pregnancy, (2) they were not allowed to marry within four years from the date of their entry into service, and (3) the age of retirement of AHs was 35 years, extendable to 45 years at the option of the Managing Director, as against the retirement age of AFPs who retired at the age of 55 or 58 years. There can be no doubt that these peculiar conditions do form part of the Regulations governing AHs but once we have held that AHs form a separate category with different and separate incidents the circumstances pointed out by the petitioners cannot amount to discrimination so as to violate Article 14 of the Constitution on this ground. There is no complaint by the petitioners that between the separate class of AHs inter se there has been any discrimination regarding any matter. ...

...

**64.** Coming now to the next limb of the argument of Mr Setalvad that even if there is no discrimination inter se between AHs, the conditions referred to above are so unreasonable and arbitrary that they violate Article 14 and must, therefore, be struck down, we feel that the argument merits serious consideration. Before, however, we deal with the various aspects of this argument, we might mention an important argument put forward by the Corporation that the class of AHs is a sex-based recruitment and, therefore, any discrimination made in their service conditions has not been made on the ground of sex only but due to a lot of other considerations also. Mr Setalvad tried to rebut this argument by contending that the real discrimination is based on the basis of sex which is sought to be smoke-screened by giving a halo of circumstances other than sex...

...

**68.** ...[W]hat Articles 15(1) and 16(2) prohibit is that discrimination should not be made only and only on the ground of sex. These articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations. On this point, the matter is no longer *res Integra* but is covered by several authorities of this Court. In *Yusuf Abdul Aziz v. State of Bombay and Husseinbhoj Laljee* [AIR 1954 SC 321 : 1954 SCR 930] sex was held to be a permissible classification. ...

...

**70.** For these reasons, therefore, the argument of Mr Setalvad that the conditions of service with regard to retirement, etc. amount to discrimination on the ground of sex only is overruled and it is held that the conditions of service indicated above are not violative of Article 16 on this ground.

**71.** This brings us now to the next limb of the argument of Mr Setalvad which pertains to the question as to whether and not the conditions imposed on the AHs regarding their retirement and termination are manifestly unreasonable or absolutely arbitrary. We might mention here that even though the conditions mentioned above may not be violative of Article 14 on the ground of discrimination but if it is proved to our satisfaction that the conditions laid down are entirely unreasonable and absolutely arbitrary, then the provisions will have to be struck down.

...

**79.** We now proceed to determine the constitutional validity of the impugned Regulations. ...

**80.** A perusal of the Regulations shows that the normal age of retirement of an AH is 35 years, or on marriage, if it takes place within four years of service, or on first pregnancy whichever occurs earlier. Leaving the age of retirement for the time being, let us examine the constitutional validity of the other two conditions viz. termination if marriage takes place within four years or on first pregnancy. So far as the question of marriage within four years is concerned, we do not think that the provisions suffer from any constitutional infirmity. According to the Regulations an AH starts her career between the age of 19 to 26 years. Most of the AHs are not only SCC which is the minimum qualification but possess even higher qualifications and there are very few who decide to marry immediately after entering the service. Thus, the Regulation permits an AH to marry at the age of 23 if she has joined the service at the age of 19 which is by all standards a very sound and salutary provision. Apart from improving the health of the employee, it helps a good deal in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal. Thirdly, it has been rightly pointed out to us by the Corporation that if the bar of marriage within four years of service is removed then the Corporation will have to incur huge expenditure in recruiting additional AHs either on a temporary or on ad hoc basis to replace the working AHs if they conceive and any period short of four years would be too little a time for the Corporation to phase out such an ambitious plan.

**81.** Having regard to these circumstances, we are unable to find any unreasonableness or arbitrariness in the provisions of the Regulations which necessitate that the AHs should not marry within four years of the service failing which their services will have to be terminated. Mr Setalvad submitted that such a bar on marriage is an outrage on the dignity of the fair sex and is per se unreasonable. Though the argument of Mr Setalvad is extremely attractive but having taken into consideration an overall picture of the situation and the difficulties of both the parties, we are unable to find any constitutional infirmity or any element of arbitrariness in the aforesaid provisions. The argument of Mr Setalvad as also those who followed him on this point is, therefore, overruled.

**82.** Coming now to the second limb of the provisions according to which the services of AHs would stand terminated on first pregnancy, we find ourselves in complete agreement with the argument of Mr Setalvad that this is a most unreasonable and arbitrary provision which shocks the conscience of the Court. The Regulation does not prohibit marriage after four years and if an AH after having fulfilled the first condition becomes pregnant, there is no reason why pregnancy should stand in the way of her continuing in service. The Corporations represented to us that pregnancy leads to a number of complications and to medical disabilities which may stand in the efficient discharge of the duties by the AHs. It was said that even in the early stage of pregnancy some ladies are prone to get sick due to air pressure, nausea in long flights and such other technical factors. This, however, appears to be purely an artificial argument because once a married woman is allowed to continue in service then under the provisions of the Maternity Benefit Act, 1961 and the Maharashtra Maternity Rules, 1965 (these apply to both the Corporations as their Head Offices are at Bombay), she is entitled to certain benefits including maternity leave. In case, however, the Corporations feel that pregnancy from the very beginning may come in the way of the discharge of the duties by some of the AHs, they could be given maternity leave for

a period of 14 to 16 months and in the meanwhile there could be no difficulty in the Management making arrangements on a temporary or ad hoc basis by employing additional AHs. We are also unable to understand the argument of the Corporation that a woman after bearing children becomes weak in physique or in her constitution. There is neither any legal nor medical authority for this bald proposition. Having taken the AH in service and after having utilised her services for four years, to terminate her service by the Management if she becomes pregnant amounts to compelling the poor AH not to have any children and thus interfere with and divert the ordinary course of human nature. It seems to us that the termination of the services of an AH under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood — the most sacrosanct and cherished institution. We are constrained to observe that such a course of action is extremely detestable and abhorrent to the notions of a civilised society. Apart from being grossly unethical, it smacks of a deep rooted sense of utter selfishness at the cost of all human values. Such a provision, therefore, is not only manifestly unreasonable and arbitrary but contains the quality of unfairness and exhibits naked despotism and is, therefore, clearly violative of Article 14 of the Constitution. In fact, as a very fair and conscientious counsel Mr Nariman realised the inherent weakness and the apparent absurdity of the aforesaid impugned provisions and in the course of his arguments he stated that he had been able to persuade the Management to amend the Rules so as to delete “first pregnancy” as a ground for termination of the service and would see that suitable amendments are made to Regulation 46 (i)(c) in the following manner:

“(a) Regulation 46(i)(c) will be amended so as to substitute for the words ‘or on first pregnancy’, the words ‘or on a third pregnancy’.

(b) There will be a suitably framed Regulation to provide for the above and for the following:

(i) An air hostess having reason to believe that she is pregnant will intimate this to Air India and will also elect in writing within a reasonable time whether or not to continue in service.”

(ii) If such air hostess elects to continue in service on pregnancy, she shall take leave from service for a period not later than that commencing from 90 days after conception and will be entitled to resume service only after confinement (or premature termination of pregnancy) and after she is certified by the Medical Officer of Air India as being fit for resuming her duties as an air hostess after delivery or confinement or prior termination of pregnancy. The said entire period will be treated as leave without pay subject to the air hostess being entitled to maternity leave with pay as in the case of other female employees and privilege leave under the Regulations.

(iii) Every such air hostess will submit to an annual medical examination by the Medical Officer of Air India for certification of continued physical fitness or such other specifications of health and physical condition as may be prescribed by AIR INDIA in this behalf in the interest of maintenance of efficiency.

(iv) It will be clarified that the provisions relating to continuance in service on pregnancy will only be available to married women — an unmarried woman on first pregnancy will have to retire from service.”

**83.** The proposed amendment seems to us to be quite reasonable but the decision of this case cannot await the amendment which may or may not be made. We would, therefore, have to give our decision regarding the constitutional validity of the said provision. Moreover, clause (b)(iv) above, which is the proposed amendment, also suffers from the infirmity that if an unmarried woman conceives then her service would be terminated on first pregnancy. This provision also appears to us to be wholly unreasonable because apart from being revolting to all sacred human values, it fails to take into consideration cases where a woman becomes a victim of rape or other circumstances resulting in pregnancy by force or fraud for reasons beyond the control of the woman and having gone through such a harrowing experience she has to face termination of service for no fault of hers. Furthermore, the distinction of first pregnancy of a married woman and that of an unmarried woman does not have any reasonable or rational basis and cannot be supported.

**84.** In *General Electric Company v. Martha V. Gilbert* [50 L Ed 2d 343 : 429 US 125 (1976)] although the majority of the Judges of the U.S. Supreme Court were of the opinion that exclusion of pregnancy did not constitute any sex discrimination in violation of Title VII nor did it amount to gender-based discrimination; three judges, namely Brennan, Marshall and Stevens, JJ. dissented from this view and held that the pregnancy disability exclusion amounted to downgrading women's role in labour force. The counsel for the Corporation relied on the majority judgments of

Rehnquist, Burger, Stewart, White and Powell, JJ. while the petitioners relied strongly on the dissenting opinion. We are inclined to accept the dissenting opinion which seems to take a more reasonable and rational view. Brennan, J. with whom Marshall, J. agreed, observed as follows:

“(1) the record as to the history of the employer's practices showed that the pregnancy disability exclusion stemmed from a policy that purposefully downgraded women's role in the labour force, rather than from gender-neutral risk assignment considerations.”

**85.** Stevens, J. while endorsing the view of Brennan, J. observed thus:

“The case presented only a question of statutory construction, and the employer's rule placed the risk of absence caused by pregnancy in a class by itself, thus violating the statute as discriminating on the basis of sex, since it was the capacity to become pregnant which primarily differentiated the female from the male.”

**86.** In the instant case, if the Corporation has permitted the AHs to marry after the expiry of four years then the decision to terminate the services on first pregnancy seems to be wholly inconsistent and incongruous with the concession given to the AHs by allowing them to marry. Moreover, the provision itself is so outrageous that it makes a mockery of doing justice to the AHs on the imaginative plea that pregnancy will result in a number of complications which can easily be avoided as pointed out by us earlier. Mr Setalvad cited a number of decisions of the U.S. Supreme Court on the question of sex but most of these decisions may not be relevant because they are on the question of denial of equality of opportunity. In view of our finding, however, that AHs form a separate class from the category consisting of AFPs, these authorities would have no application particularly in view of the fact that there is some difference between Articles 14, 15 and 16 of our Constitution and the due process clause and the 14th Amendment of the American Constitution. This Court has held that the provisions of the American Constitution cannot always be applied to Indian conditions or to the provisions of our Constitution. While some of the principles adumbrated by the American decisions may provide a useful guide yet this Court did not favour a close adherence to those principles while applying the same to the provisions of our Constitution, because the social conditions in this country are different. ...

...

**88.** At any rate, we shall refer only to those authorities which deal with pregnancy as amounting to per se discriminatory or arbitrary. In *Cleveland Board of Education v. Jo Carol La Fleur* [39 L Ed 2d 52 : 414 US 632 (1974)] the U.S. Supreme Court made the following observations:

“As long as the teachers are required to give substantial advance notice of their condition, the choice of firm dates later in pregnancy would serve the board's objectives just as well, while imposing a far lesser burden on the women's exercise of constitutionally protected freedom.

\* \* \*

While it might be easier for the school boards to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month, of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law. The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals....

While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster under the due process clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child.”

**89.** The observations made by the U.S. Supreme Court regarding the teachers fully apply to the case of the pregnant AHs. In *Sharron A. Frontiero v. Elliot L. Richardson* [36 L Ed 2d 583 : 411 US 677 (1973)] the following observations were made:

“Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility.’

**90.** What is said about the fair sex by the Judges fully applies to a pregnant woman because pregnancy also is not a disability but one of the natural consequences of marriage and is an immutable characteristic of married life. Any distinction, therefore, made on the ground of pregnancy cannot but be held to be extremely arbitrary.

**91.** In *Mary Ann Turner v. Department of Employment Security* [46 L Ed 2d 181 : 423 US 44 (1975)] the U.S. Supreme Court severely criticised the maternity leave rules which required a teacher to quit her job several months before the expected child. In this connection the Court observed as follows:

"The Court held that a school board's mandatory maternity leave rule which required a teacher to quit her job several months before the expected birth of her child and prohibited her return to work until three months after childbirth violated the Fourteenth Amendment... the Constitution required a more individualised approach to the question of the teacher's physical capacity to continue her employment during pregnancy and resume her duties after childbirth since 'the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter,

It cannot be doubted that a substantial number of women are fully capable of working well into their last trimester of pregnancy and resuming employment shortly after childbirth....

We conclude that the Utah unemployment compensation statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid under the principles of the *La Fleur* case."

**92.** We fully endorse the observations made by the U.S. Supreme Court which, in our opinion, aptly apply to the facts of the present case. By making pregnancy a bar to continuance in service of an AH the Corporation seems to have made an individualised approach to a woman's physical capacity to continue her employment even after pregnancy which undoubtedly is a most unreasonable approach.

**93.** Similarly, very pregnant observations were made by the U.S. Supreme Court in *City of Los Angeles, Department of Water & Power v. Marie Manhart* [55 L Ed 2d 657 : 435 US 702 (1978)] thus:

"It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less... The question, therefore, is whether the existence or non-existence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics. A 'stereotyped' answer to that question may not be the same as the answer that the language and purpose of the statute command.

\* \* \*

Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals."

**94.** These observations also apply to the bar contained in the impugned regulation against continuance of service after pregnancy. In *Bombay Labour Union v. International Franchises Pvt. Ltd.* [(1966) 2 SCR 493 : (1966) 1 LLJ 417 : 28 FJR 233] this Court while dealing with a rule barring married women from working in a particular concern expressed views almost similar to the views taken by the U.S. Supreme Court in the decisions referred to above. In that case a particular rule required that unmarried women were to give up service on marriage — a rule which existed in the Regulations of the Corporation also but appears to have been deleted now. In criticising the validity of this rule this Court observed as follows [(1966) 2 SCR 493 : (1966) 1 LLJ 417 : 28 FJR 233] :

"We are not impressed by these reasons for retaining a rule of this kind. Nor do we think that because the work has to be done as a team it cannot be done by married women. We also feel that there is nothing to show that married women would necessarily be more likely to be absent than unmarried women or widows. If it is the presence of children which may be said to account for

greater absenteeism among married women, that would be so more or less in the case of widows with children also. The fact that the work has got to be done as a team and presence of all those workmen is necessary, is in our opinion no disqualification so far as married women are concerned. It cannot be disputed that even unmarried women or widows are entitled to such leave as the respondents rules provide and they would be availing themselves of these leave facilities.”

**95.** These observations apply with equal force to the bar of pregnancy contained in the impugned Regulation.

**96.** It was suggested by one of the Corporations that after a woman becomes pregnant and bears children there may be lot of difficulties in her resuming service, the reason being that her husband may not permit her to work as an AH. These reasons, however, do not appeal to us because such circumstances can also exist even without pregnancy in the case of a married woman and if a married woman leaves the job, the Corporation will have to make arrangements for a substitute. Moreover, whether the woman after bearing children would continue in service or would find it difficult to look after the children is her personal matter and a problem which affects the AH concerned and the Corporation has nothing to do with the same. These are circumstances which happen in the normal course of business and cannot be helped. Suppose an AH dies or becomes incapacitated, it is manifest that the Corporation will have to make alternative arrangements for her substitute. In these circumstances, therefore, we are satisfied that the reasons given for imposing the bar are neither logical nor convincing.

**97.** In view of our recent decision explaining the scope of Article 14, it has been held that any arbitrary or unreasonable action or provision made by the State cannot be upheld. In *Dwarka Prasad Laxmi Narain v. State of Uttar Pradesh* [AIR 1954 SC 224 : 1954 SCR 803] this Court made the following observations:

“Legislation, which arbitrarily or excessively invades the right, cannot be said to contain the quality of reasonableness, and unless it strikes a proper balance between the freedom guaranteed under Article 19(1)(g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in reasonableness.”

**98.** In *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248 : AIR 1978 SC 597 : (1978) 2 SCR 621] Beg, C.J. observed as follows: (SCC p. 400, para 217)

“The view I have taken above proceeds on the assumption that there are inherent or natural human rights of the individual recognised by and embodied in our Constitution.... If either the reason sanctioned by the law is absent, or the procedure followed in arriving at the conclusion that such a reason exists is unreasonable, the order having the effect of deprivation or restriction must be quashed.”

and Bhagwati, J. observed thus:

“Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.... It must be ‘right and just and fair’ and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied.”

**99.** In an earlier case in *E.P. Royappa v. State of Tamil Nadu* [(1974) 4 SCC 3 : 1974 SCC (L&S) 165 : (1974) 2 SCR 348 : (1974) 1 LLJ 172 : 1974 Lab IC 427] similar observations were made by this Court thus:

“In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.”

**100.** In *State of Andhra Pradesh v. Nalla Raja Reddy* [AIR 1967 SC 1458 : (1967) 3 SCR 28] this Court made the following observations:

“Official arbitrariness is more subversive of the doctrine of equality than statutory discrimination. In respect of a statutory discrimination one knows where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately.”



The impugned provisions appear to us to be a clear case of official arbitrariness. As the impugned part of the regulation is severable from the rest of the regulation, it is not necessary for us to strike down the entire Regulation.

**101.** For the reasons given above, we strike down the last portion of Regulation 46(i)(c) and hold that the provision “or on first pregnancy which-ever occurs earlier” is unconstitutional, void and is violative of Article 14 of the Constitution and will, therefore, stand deleted. It will, however, be open to the Corporation to make suitable amendments in the light of our observations and on the lines indicated by Mr Nariman in the form of draft proposals referred to earlier so as to soften the rigours of the provision and make it just and reasonable. For instance, the Rule could be suitably amended so as to terminate the services of an AH on third pregnancy provided two children are alive which would be both salutary and reasonable for two reasons. In the first place, the provision preventing third pregnancy with two existing children would be in the larger interest of the health of the AH concerned as also for the good upbringing of the children. Secondly, as indicated above while dealing with the Rule regarding prohibition of marriage within four years, same considerations would apply to a bar of third pregnancy where two children are already there because when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of over-population which, if not controlled, may lead to serious social and economic problems throughout the world.

...

**121.** So far as the case of AHs employed by IAC is concerned, the same reasons which we have detailed in the case of AHs employed by AI would apply with slight modifications which we shall indicate hereafter. ...

...

**126.** So far as the age of retirement and termination of service on first pregnancy is concerned a short history of the Rules made by the IAC may be given. Regulation 12, as it stood may be extracted thus:

“Flying Crew shall be retained in the service of the Corporation only for so long as they remain medically fit for flying duties.... Further, an Air Hostess shall retire from the service of Corporation on her attaining the age of thirty years or when she gets married whichever is earlier. An unmarried Air Hostess may, however, in the interest of the Corporation be retained in the service of the Corporation up to the age of 35 years with the approval of the General Manager.”

**127.** It is obvious that under this Rule an AH had to retire at the age of 30 years or when she got married and an unmarried AH could continue up to 35 years. The Rule was obviously unjust and discriminatory and was therefore amended by a Notification published in the Gazette of India dated July 13, 1968. The amended rule ran thus:

“An Air Hostess shall retire from the service of the Corporation on her attaining the age of 30 years or when she gets married, whichever is earlier. The General Manager, may, however, retain in the service an unmarried Air Hostess up to the age of 35 years.”

**128.** This amendment continued the bar of marriage but gave discretion to the General Manager to retain an unmarried AH up to 35 years. In order, however, to bring the provision in line with the AI Regulation, the IAC Regulation was further amended by a Notification dated April 12, 1980 published in Part III, Section 4, Gazette of India by which para 3 of Regulation 12 was substituted thus:

“An Air Hostess shall retire from the service of the Corporation upon attaining the age of 35 years or on marriage if it takes place within four years of service or on first pregnancy, whichever occurs earlier.”

...

**130.** ...the Notification as also the Rules suffer from two serious constitutional infirmities which are present in the case of Regulation 46 framed by the AI The clauses regarding retirement and pregnancy will have to be held as unconstitutional and therefore struck down. ...

...”

## IN THE HIGH COURT OF MADRAS

**S. Amudha v. Chairman, Neyveli Lignite Corporation****1989 SCC OnLine Mad 234****S. Mohan, O.C.J. and S. Ramalingam, J.**

***The petitioner had been employed as a contract worker earning daily wage, by the respondent. As a result of previous litigation, the respondent sought to regularize the services of contract workers. The petitioner was called to appear for selection to the regular post, but was denied appointment on grounds of her pregnancy of more than four months. The respondent cited relevant employment rules under which a woman who was more than four months pregnant would be declared temporarily unfit for employment and her appointment would be deferred till after she gave birth. The petitioner challenged her non-selection only on the ground that she was pregnant as violative of Articles 14, 15 and 21 of the Indian Constitution. A single judge ruled in favour of the respondents. The present writ appeal was filed against this order.***

**Mohan, O.C.J.:** “The short facts leading to the writ appeal are as follows :

1. The appellant herein is a B.Sc, Chemistry graduate of the University of Madras and she secured second class in the annual examination. She got married to one Mr. Palanivelu in the year 1979. Presently she is the mother of two daughters and she was in the family way by four months at the time of filing the writ petition.

2. The appellant was entertained as a Junior Chemist on and from 1-1-1986 on contract basis and Babu Engineering Corporation was given the contract pertaining to chemical test of soil, clay, water, oil and metal within the precincts of the Neyveli Lignite Corporation Ltd., Neyveli. Though the work involving chemical test by the chemist is necessarily throughout the year, the management of the Neyveli Lignite Corporation Ltd. extracted the work from the Chemists numbering about forty through Babu Engineering Corporation who paid at the rate of Rs. 10 per day to each chemist and in that capacity, the appellant worked for about three years.

3. The appellant filed W.P. 3920 of 1988 against the respondent to regularise her services and to abolish the contract labour system and the said writ petition has been admitted by this Court.

...

6. The appellant was asked to fill up a pro forma in order to appoint her as a Junior Chemist. In column No. 7, the appellant had categorically stated that she was having CARD (Centre for Applied Research and Development) for entry into the Centre for Applied Research and Development wing of the respondent. She had in fact worked as junior Chemist from 1-1-1986, to 28-12-1988, and even today she is working as a casual contract labourer on a daily wage of Rs. 15. Her duty involved chemical test of articles and her name has also been registered in the local Employment Exchange.

7. The appellant was called for an interview for selection as Junior Chemist on 11-2-1989 by a communication dated 28-1-1989. However, that interview did not take place and it was postponed. Therefore, by another communication dated 18-3-1989, the appellant was asked to attend the interview to be held on 4-4-1989. By a communication dated 14-5-1989, she was asked to appear before the Medical Officer of the respondent—Industrial Medical Officer, on 19-5-1989. On that date, about forty persons were medically examined. By another communication dated 29-5-1989 she was asked to appear before the Industrial Medical Officer on 2-6-1989. Accordingly, she appeared. Though appointment orders were issued to all the thirty-nine persons who were working along with the appellant under the contract labour system, the appellant alone was singled out. When the appellant approached the respondent, she was informed that she was in the family way carrying a child of sixteen weeks. Thereupon, the appellant and her husband met Mr. Mani Iyer, Mr. Krishnan and others and the appellant was informed that the appointment order will be issued only after the appellant giving birth to the child and that too after a period of three months from the date of birth of the child.

8. On 4-6-1989, the appellant issued a lawyer's notice detailing all the facts. She informed the respondent Corporation that she had worked as Junior Chemist during her second pregnancy till the eve of giving birth to the child, that she was prepared to work in the same manner and that she will not claim any monetary benefits by reason of her pregnancy if the respondent Corporation objects to the same. For this no reply was sent by the respondent. It is under these circumstances, the writ petition was filed alleging that her non-selection only on the ground that she was in the family way by sixteen weeks is violative of Art, 14, 15 and 21 of the Constitution of India. At no point of time, the appellant was let known about this temporary unfitness. In so far as there is no stipulation when the application was made that a pregnant

woman cannot be considered, that ground cannot prevail. The appellant would also be entitled to the benefits under the Maternity Benefit Act, 1961. When there is no physical hindrance while the appellant was working under the contract labour system, pregnancy cannot be a ground even to temporarily disqualify her.

**9.** A counter affidavit was filed on behalf of the Neyveli Lignite Corporation wherein it is stated that the Medical Officer of the Corporation had a discretion to declare a person temporarily unfit in terms of R. 8 of the Medical Benefit Rules. Regulation 21 of the Medical Examination Rules states that “the duration of pregnancy, if any, should be recorded in case of female candidates. The women in advanced stages of pregnancy should be deemed to be temporarily unfit. For this purpose, pregnancy of four months and over may be taken as advanced stage of pregnancy.” Such a clause is not peculiar to the respondent Corporation. Other major public Sector Undertakings like Bharat Heavy Electricals Ltd, and the National Thermal Power Corporation also follow similar pattern. The Medical Officer alone is competent to declare the physical fitness of a candidate. The other contentions of the appellant are untenable.

**10.** The matter came up before our learned brother, Baktavatsalam, J. The learned Judge was of the view that the court cannot issue a writ as prayed for since the Medical Officer alone was competent to say whether a person was physically fit for appointment or not. The Court cannot sit in appeal over such a decision. The learned Judge dismissed the writ petition for mandamus. It is against this order, the present writ appeal has been filed.

**11.** Mr. Prakash, learned counsel for the appellant, would urge that such a Regulation based on pregnancy is violative of Art. 14 of the Constitution of India. Further, in so far as the Regulation does not classify the category of services, it could arbitrarily be applied and therefore it suffers from the vice of arbitrariness, as well. Looked at from the point of view of Art. 21 of the Constitution, the appellant has a right to life. Such a life does not mean a mechanical one, but based on personal freedom. In the case of a woman, certainly she has every freedom to have a child and the Constitutional right cannot be taken away by a regulation of this character. The right to beget children is a very valuable right... Learned counsel submitted that if the working of the appellant under a contract labour is not hazardous, the same could be so if she is obliged to work under the Corporation as well. Therefore, this cannot be a valid ground at all. Lastly it is submitted that the Maternity Benefit Act, 1961 itself has not thought of medical unfitness for a pregnancy of 16 weeks old and the Regulation in question cannot exceed a parliamentary legislation and lay down a prescription which cannot be supported even from the medical point of view.

**12.** Mr. R. Krishnaswami, learned counsel for the respondent after referring to the Regulations states that this is one conceived in the interest of the employees themselves. Further, such a regulation requiring medical examination at the time of the first appointment is not peculiar. Such regulations are there in police organisation as well. Where the work is of a hazardous nature, it becomes necessary for the employer to lay down such a condition like this. In any event, as the counter affidavit states, this is only a temporary unfitness. After the delivery of the child, the appellant is entitled to join and her seniority will not in any way be interfered with. This position has been fully clarified in the counter affidavit filed in the writ appeal.

**13.** Having regard to the above submissions made on both sides, the only question that arises for our consideration is, whether the regulation in question in relation to medical examination of a female candidate is violative of any of the provisions of the Constitution and is therefore liable to be struck down. We will now straightway, extract the said regulation as under :—

“R. 21: The duration of pregnancy, if any, should be recorded in case of female candidates. The woman in advanced stages of pregnancy should be deemed to be temporarily unfit. For this purpose, pregnancy of four months and over may be taken as advanced stage of pregnancy.”

**14.** It is admitted that the appellant was interviewed and she was also selected. However, her selection was withheld on the only ground that she was in the family way by 16 weeks. The counter affidavit filed in the writ appeal in paragraphs 6 and 7 states as follows :—

“She was in the advanced stage of pregnancy as per rules in force of the respondent company and she was temporarily disqualified from joining duty immediately. She was also advised to report before the Medical Committee after six weeks of confinement. It is also submitted that the appellant is not likely to lose any benefit such as seniority, etc., and as the seniority would be reckoned based upon her position in the selection panel as recommended by the committee. Orders were issued to 19 outside general candidates out of which the appellant's position is 16 in order of merit as recommended by the selection committee. It is submitted that her position is 16 out of the 19

outside general candidates issued with the offer of appointment (*sic*) will hold good notwithstanding her joining later than the candidates whose place in the panel are below her. The notional seniority for the appellant would be maintained. The only loss that the appellant has to suffer is the loss of wages for the period during which she was not employed and this is inevitable because of the rules in force. She is not actually working during that period.

It is further submitted that the area of work where the appellant has to work as Junior Chemist will be either CARD (Centre for Applied Research) or Fertilizer, B & C factory. In all these areas, a Junior Chemist has to handle chemicals and has to be exposed to the different chemicals and gases which are likely to endanger the health of a pregnant lady. While a normal person can withstand these hazards, a lady carrying the baby is quite likely to be affected by exposure to these elements and which may endanger the life of the child or result in miscarriage. This statement is based upon the medical opinion.”

15. We may at once state that we are not in a position to accept what is stated in paragraph 7 of the counter because this was not the stand taken by the respondent before the learned single Judge and this is an ingenious attempt by the respondent to defeat the claim of the appellant. In this connection it should be remembered that the appellant was working as a contract labourer in the very post for which she was selected and the post has not been considered as one involving health hazard, If the ground of ‘health hazard’ has not been pressed into service when the appellant was working under the contract labour, how could the same be projected at the time of her permanent appointment? We find great difficulty in accepting this argument, and therefore, the rejection of the claim of the appellant for appointment on the ground of ‘health hazard’ is not sustainable. Regarding the argument that such ‘temporary unfitness’ is not anything peculiar to the respondent Corporation, but is also there in similar public sector Corporations like Bharat Heavy Electricals Ltd, and National Thermal Power Corporation, we would refer to a passage occurring at page 166 of Swamy's Complete Manual on Establishment and Administration. The passage reads as under:

“Employment of women candidates in a state of pregnancy—

(a) For appointment against posts carrying hazardous nature of duties—Where a pregnant woman candidate is to be appointed against a post carrying hazardous nature of duties, e g, in Police Organisations, etc., and she has to complete a period of training as a condition of service and who as a result of tests is found to be pregnant of twelve weeks standing or over shall be declared temporarily unfit and her appointment held in abeyance until the confinement is over.

She should be re-examined for a fitness certificate six weeks after the date of confinement, subject to the production of medical certificate of fitness from a registered medical practitioner. The vacancy against which the woman candidate was selected should be kept reserved for her. If she is found fit, she may be appointed to the post kept reserved for her and allowed the benefit of seniority in accordance with para 4 of Annexure to MHA O.M. No. 9/11/55—R.S. dated the 22nd December, 1959.

(b) For appointments against posts which do not prescribe any elaborate training.—it shall no longer be necessary to declare a woman candidate ‘compulsorily unfit’ if she is found to be pregnant during medical examination before appointment against posts which do not prescribe any elaborate training, i.e, she can be appointed straightway on the job.”

16. The question now is, whether there could be a prescription of this type in the light of the fundamental rights conferred under Art. 21 of the Constitution of India. That Article reads as follows :—

“Art. 21. No person shall be deprived of his life or personal liberty except according to procedure established by law.”

‘Life’ in this article cannot be considered to be a mechanical one. It is attendant with all that is required to make the life blossom and all enjoyment within the permissible limits of law. Here is the case of a married woman. If she chooses to have a child, can the State or an authority like the respondent corporation impose itself and curtail this life or the personal freedom of the appellant? In this connection, we find the various American decisions relied on by the learned counsel for the appellant throw a good deal of light.

...

24. ...The right to personal life and liberty enshrined in Art. 21 of the Constitution must receive its full scope and meaning and therefore the resolution of this character would be violative of Art. 21...

25. ...What we want to emphasise here is a State within the meaning of Art. 12 of the Constitution wanting to interfere with the free married life. So long as the right to beget a child is considered to be a fundamental right on which we have not the slightest doubt, such a regulation must be held to be not only archaic, but also opposed to even civilised life.

26. An attempt was made to call the restriction as 'temporary unfitness' and that she could join duty after the birth of the child. On this aspect of the matter, we have already extracted paragraphs 6 and 7 of the counter affidavit. This stand, to our mind, appears to be a ruse, to get over a difficult situation. The maintaining of the original seniority and her obtaining the proper place is poor consolation indeed. As the respondent himself has categorically stated, she will have to suffer the loss of wages for the period during which she was not in employment. Who is to compensate her for the loss of money? Does it not mean deprivation of livelihood which is a fundamental right contemplated under Art. 21 of the Constitution? In these days of acute unemployment, to deprive a woman of her right to earn in spite of her selection is something which we cannot appreciate at all. To say that she is temporarily unfit is something which cannot stand scrutiny from the medical point of view. It is not an uncommon sight in India to see a woman in advanced stages of pregnancy working in agricultural fields, on roads or even in mines where there is every risk. Yet, they dare work, compelled by poverty and by the dire necessity of life.

...

28. The Regulation since so far as it does not classify the category of services, and it is made applicable to all services whether a stenographer or an assistant doing desk work, undoubtedly suffers from the vice of arbitrariness. Therefore, it is violative of Art. 14 of the Constitution as well.

29. To our mind, conclusion, we would only say that what this Regulation wants to perpetuate is: 'Bachelors, wives and old maid's children are always perfect'. Let it be remembered that where children are, there is the golden age. One begets children not merely to keep up the race, but to enlarge our hearts and make us unselfish and full of kindly sympathies and affections, to give our souls higher aims, to call out all our faculties to extended enterprise and exertion and to bring round our fireside a bright faces, happy smiles, and loving, tender hearts. If this is sought to be deprived by the Regulation in question what hesitation there could be in declaring the same to be violative of the fundamental rights guaranteed under Art. 21, as well as Art. 14 of the Constitution?

30. In the result, the order of the learned Judge is set aside and the appeal will stand allowed with cost. Counsel's fee Rs. 1000."

## IN THE SUPREME COURT OF INDIA

**Mrs. Neera Mathur v. Life Insurance Corporation of India & Anr.**

**(1992) 1 SCC 286**

**K. Jagannatha Shetty and Yogeshwar Dayal, JJ.**

***The petitioner challenged her termination from employment for going on maternity leave during the initial probation period of six months. While no reasons were given by the respondent for the termination, in Court it was argued that the petitioner was discharged inter alia on the ground that she had not correctly stated her last date of menstruation on the employee declaration form, while joining the employment. The Supreme Court discussed whether the respondent's request for information regarding menstruation on the employee declaration form was appropriate.***

**Shetty, J.:** " ...

2. When we are moving forward to achieve the constitutional guarantee of equal rights for women the Life Insurance Corporation of India seems to be not moving beyond the status quo. The case on hand illustrates this typical attitude of the Corporation.

3. The petitioner applied for the post of Assistant in the Life Insurance Corporation of India ("the Corporation")...She was successful in both the tests. She was asked to fill a declaration form which she did and submitted to the Corporation on May 25, 1989. On the same day, she was also examined by a lady doctor and found medically fit for the job. The doctor who examined the petitioner was in the approved panel of the Corporation.

4. ...After successful completion of the training she was given an appointment letter dated September 25, 1989...She was put on probation for a period of 6 months. She was entitled to be confirmed in the service subject to satisfactory work report.

5. The petitioner took leave from December 9, 1989 till March 8, 1990. In fact, she applied for maternity leave on December 27, 1989 followed by medical certificate dated January 6, 1990. She was admitted to the Nursing Home of Dr Hira Lal on January 10, 1990. She delivered a full-term baby on January 11, 1990. She was discharged from Nursing Home on January 19, 1990.

6. On February 13, 1990, the petitioner was discharged from the service. It was during the period of her probation. It would appear from the order of discharge that no ground was assigned in it and it seems to be a discharge simpliciter. The petitioner moved the High Court under Article 226 of the Constitution challenging that order on the ground that it was not a discharge simpliciter but based on some discrepancy in the declaration made by her before joining the service. The Corporation in the counter resisted the case stating that the petitioner's work was not satisfactory and as such under the terms of the appointment she was discharged without notice and without assigning any reason. The High Court refused to interfere with the termination. The High Court observed that the petitioner's work during the period of probation was found to be not satisfactory.

7. The petitioner has now appealed to this Court. When the appeal was listed for preliminary hearing this Court issued notice for final disposal and made an order as follows:

“The facts of the case compel us to issue an interim mandamus directing the respondents to put the petitioner back to service and we accordingly issue a direction to the respondent to reinstate the petitioner within 15 days from the date of receipt of this order.

8. The Corporation upon service has filed the counter seeking to justify the termination of the petitioner's services. It has been stated that the Corporation discharged the service of the petitioner while she was still a probationer. At the time of discontinuing her services as a probationer, no reasons were given and it was an order of discharge simpliciter. No stigma was imputed to the petitioner. The petitioner was on leave from December 9, 1989 till March 8, 1990. The petitioner had deliberately withheld to mention the fact of being in the family way at the time of filling up the declaration form before medical examination for fitness... This was revealed later when she informed the Corporation that she had given birth to a daughter.

9. The Corporation also made reference to the terms of the declaration as filled in by the petitioner on May 25, 1989:

“6. To be filled in by female candidates only in the presence of the Medical Examiner:

(a) Are you married — Yes.

(b) If so, please state:

(i) Your husband's name in full and occupation.

Mr Pradeep Mathur, Law Officer, Central Pollution Control Board, Nehru Place, New Delhi.

(ii) State the number of children, if any, and their present ages: One daughter: 1 year and 6 months.

(iii) Have the menstrual periods always been regular and painless, and are they so now? ... Yes.

(iv) How many conceptions have taken place?

How many have gone full-term? One.

(v) State the date of last menstruation: ... April 29, 1989.

(vi) Are you pregnant now? ... No.

(vii) State the date of last delivery: November 14, 1987.

(viii) Have you had any abortion or miscarriage? ... No.”

10. It was further alleged in the counter-affidavit that the declaration given by the petitioner was false to the knowledge of the petitioner inasmuch as, as per her own averment she had delivered a full term baby on January 11, 1990. The petitioner to her own knowledge, could not have had a menstruation cycle on April 29, 1989 as stated by her in the declaration on May 25, 1989. Dr S.K. Gupta, M.D., of Dr Hira Lal Child and Maternity Home, where the petitioner was admitted for delivery has certified that the petitioner had LMP on April 3, 1989...[T]he decision to discharge the petitioner from the service of the Corporation was on 2 grounds: (1) because of a false declaration given by her at the very initial stage of her service; and (2) her work during the period of probation was not satisfactory.

11. Reference was also made to the Instruction 16 issued by the Corporation as to the medical examination for recruitment of class III and class IV staff. Clause 16 of the Instructions reads as under:

“16. *Medical Examination.*— No person shall be appointed to the services of the Corporation unless he/she has been certified to be of sound constitution and medically fit for discharging his/her duties. The certificates in the form given in Annexure IX should be from a doctor, duly authorised for the purpose by the Appointing Authority. If at the time of medical examination, any lady applicant is found to be pregnant, her appointment to the Corporation shall be considered three months after the delivery. This would be subject to a further medical examination at the candidate's cost and subject to the ranking list continuing to be valid.”

12. We have examined the matter carefully. We have nothing on record to indicate that the petitioner's work during the period of probation was not satisfactory. Indeed, the reason for termination seems to be different. It was the declaration given by her at the stage of entering the service. It is said that she gave a false declaration regarding the last menstruation period with a view to suppress her pregnancy.

13. It seems to us that the petitioner cannot be blamed in this case. She was medically examined by the doctor who was in the panel approved by the Corporation. She was found medically fit to join the post. The real mischief though unintended is about the nature of the declaration required from a lady candidate. The particulars to be furnished under columns (iii) to (viii) in the declaration are indeed embarrassing if not humiliating. The modesty and self-respect may perhaps preclude the disclosure of such personal problems like whether her menstrual period is regular or painless, the number of conceptions taken place; how many have gone full term etc. The Corporation would do well to delete such columns in the declaration. If the purpose of the declaration is to deny the maternity leave and benefits to a lady candidate who is pregnant at the time of entering the service (the legality of which we express no opinion since not challenged), the Corporation could subject her to medical examination including the pregnancy test.

14. In the circumstances the interim order already issued is made absolute...”

## IN THE SUPREME COURT OF INDIA

### **Municipal Corporation of Delhi v. Female Workers (Muster Roll) & Anr. (2000) 3 SCC 224**

**S. Saghir Ahmad and D.P. Wadhwa, JJ.**

***The Municipal Corporation of Delhi denied maternity benefits to female muster roll workers since their services were not regularized, even though they performed the same duties as regular workers. On a reference to the Industrial Tribunal, the Tribunal allowed the claim of maternity benefits by muster roll workers who had worked for 3 years or more. A challenge to the tribunal's order was dismissed by the Delhi High Court. In this special leave petition, the Supreme Court determined whether denial of maternity benefits to female muster roll workers was constitutional in light of fundamental rights enshrined in Articles 14 and 15, Directive Principles of State Policy reflected in Articles 39, 42 and 43 of the Indian Constitution, and India's obligations under Article 11 of CEDAW.***

**Ahmad, J.:** “1. Female workers (muster roll), engaged by the Municipal Corporation of Delhi (for short “the Corporation”), raised a demand for grant of maternity leave which was made available only to regular female workers but was denied to them on the ground that their services were not regularised and, therefore, they were not entitled to any maternity leave. Their case was espoused by the Delhi Municipal Workers’ Union (for short “the Union”) and, consequently, the following question was referred by the Secretary (Labour), Delhi Administration to the Industrial Tribunal for adjudication:

“Whether the female workers working on muster roll should be given any maternity benefit? If so, what directions are necessary in this regard?”

2. The Union filed a statement of claim in which it was stated that the Municipal Corporation of Delhi employs a large number of persons including female workers on muster roll and they are made to work in that capacity for years together though they are recruited against the work of perennial nature. It was further stated that the nature of duties and responsibilities performed and undertaken by the muster-roll employees are the same as those of the regular employees.

The women employed on muster roll, which have been working with the Municipal Corporation of Delhi for years together, have to work very hard in construction projects and maintenance of roads including the work of digging trenches etc. but the Corporation does not grant any maternity benefit to female workers who are required to work even during the period of mature pregnancy or soon after the delivery of the child. It was pleaded that the female workers required the same maternity benefits as were enjoyed by regular female workers under the Maternity Benefit Act, 1961. The denial of these benefits exhibits a negative attitude of the Corporation in respect of a humane problem.

3. The Corporation in their written statement, filed before the Industrial Tribunal, pleaded that the provisions under the Maternity Benefit Act, 1961 or the Central Civil Services (Leave) Rules were not applicable to the female workers, engaged on muster roll, as they were all engaged only on daily wages. It was also contended that they were not entitled to any benefit under the Employees' State Insurance Act, 1948. It was for these reasons that the Corporation contended that the demand of the female workers (muster roll) for grant of maternity leave was liable to be rejected.

4. The Tribunal, by its award dated 2-4-1996, allowed the claim of the female workers (muster roll) and directed the Corporation to extend the benefits under the Maternity Benefit Act, 1961 to muster-roll female workers who were in the continuous service of the Corporation for three years or more. The Corporation challenged this judgment in a writ petition before the Delhi High Court which was dismissed by the Single Judge on 7-1-1997. The Letters Patent Appeal (LPA No. 64 of 1998), filed thereafter by the Corporation was dismissed by the Division Bench on 9-3-1998 on the ground of delay.

5. ...Since the High Court has already exercised its discretion and has not condoned the delay in filing the appeal, we find it difficult to enter into that controversy and examine the reasons why the appeal was filed before the Division Bench after the expiry of the period of limitation. However, since the question involved in this case is important, we deem it fit to express ourselves on the merits of the matter as we have heard the counsel for the Corporation on merits also.

6. Not long ago, the place of a woman in rural areas had been traditionally her home; but the poor illiterate women forced by sheer poverty now come out to seek various jobs so as to overcome the economic hardship. They also take up jobs which involve hard physical labour. The female workers who are engaged by the Corporation on muster roll have to work at the site of construction and repairing of roads. Their services have also been utilised for digging of trenches. Since they are engaged on daily wages, they, in order to earn their daily bread, work even in an advanced stage of pregnancy and also soon after delivery, unmindful of detriment to their health or to the health of the new-born. It is in this background that we have to look to our Constitution which, in its Preamble, promises social and economic justice. We may first look at the fundamental rights contained in Part III of the Constitution. Article 14 provides that the State shall not deny to any person equality before law or the equal protection of the laws within the territory of India. Dealing with this article vis-à-vis the labour laws, this Court in *Hindustan Antibiotics Ltd. v. Workmen* [AIR 1967 SC 948 : (1967) 1 SCR 652 : (1967) 1 LLJ 114] has held that labour to whichever sector it may belong in a particular region and in a particular industry will be treated on equal basis. Article 15 provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Clause (3) of this article provides as under:

“15. (3) Nothing in this article shall prevent the State from making any special provision for women and children.”

7. In *Yusuf Abdul Aziz v. State of Bombay* [AIR 1954 SC 321 : 1954 SCR 930] it was held that Article 15(3) applies both to existing and future laws.

8. From Part III, we may shift to Part IV of the Constitution containing the Directive Principles of State Policy. Article 38 provides that the State shall strive to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political shall inform all the institutions of the national life. Sub-clause (2) of this article mandates that the State shall strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities.

9. Article 39 provides, inter alia, as under:

“39. *Certain principles of policy to be followed by the State.*—The State shall, in particular, direct its policy towards securing—

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood;

(b)-(c)\*\*\*

(d) that there is equal pay for equal work for both men and women;



(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;

(f) \*\*\*”

10. Articles 42 and 43 provide as under:

“42. *Provision for just and humane conditions of work and maternity relief.*—The State shall make provision for securing just and humane conditions of work and for maternity relief.

43. *Living wage, etc., for workers.*—...”

11. It is in the background of the provisions contained in Article 39, specially in Articles 42 and 43, that the claim of the respondents for maternity benefit and the action of the petitioner in denying that benefit to its women employees has to be scrutinised so as to determine whether the denial of maternity benefit by the petitioner is justified in law or not.

12. Since Article 42 specifically speaks of “just and humane conditions of work” and “maternity relief”, the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of.

13. Parliament has already made the Maternity Benefit Act, 1961. It is not disputed that the benefits available under this Act have been made available to a class of employees of the petitioner Corporation. But the benefit is not being made available to the women employees engaged on muster roll, on the ground that they are not regular employees of the Corporation. As we shall presently see, there is no justification for denying the benefit of this Act to casual workers or workers employed on daily-wage basis.

14. Section 2 of the Maternity Benefit Act, 1961 deals with the applicability of the Act. Section 3 contains definitions. The word “child” as defined in Section 3(b) includes a “stillborn” child. “Delivery” as defined in Section 3(c) means the birth of a child. “Maternity benefit” has been defined in Section 3(h), which means the payment referred to in sub-section (1) of Section 5. “Woman” has been defined in clause (o) of Section 3 which means “a woman employed, whether directly or through any agency, for wages in any establishment”. “Wages” have been defined in clause (n) of Section 3 which provides, inter alia, as under:

“3. (n) ‘wages’ means all remuneration paid or payable in cash to a woman...”

15. Section 5 provides, inter alia, as under:

“5. *Right to payment of maternity benefit.*—(1) Subject to the provisions of this Act, every woman shall be entitled to, and her employer shall be liable for, the payment of maternity benefit at the rate of the average daily wage for the period of her actual absence, that is to say, the period immediately preceding the day of her delivery, the actual day of her delivery and any period immediately following that day.

*Explanation.*—For the purpose of this sub-section, the average daily wage means the average of the woman’s wages payable to her for the days on which she has worked during the period of three calendar months immediately preceding the date from which she absents herself on account of maternity, the minimum rates of wages fixed or revised under the Minimum Wages Act, 1948 or ten rupees, whichever is the highest.

(2) No woman shall be entitled to maternity benefit unless she has actually worked in an establishment of the employer from whom she claims maternity benefit, for a period of not less than eighty days in the twelve months immediately preceding the date of her expected delivery:

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*Explanation.*—For the purpose of calculating under this sub-section the days on which a woman has actually worked in the establishment, the days for which she has been laid off or was on holidays declared under any law for the time being in force to be holidays with wages during the period of twelve months immediately preceding the date of her expected delivery shall be taken into account.

(3) The maximum period for which any woman shall be entitled to maternity benefit shall be twelve weeks of which not more than six weeks shall precede the date of her expected delivery:

\*\*\*”

**16.** The Objects and Reasons as set out in Government of India Gazette, Part II, Section 2, dated 6-12-1960 (p. 817), provide as under:

“This clause entitles a woman to receive maternity benefit at the rate of her average daily wage subject to a minimum of seventy-five naye paise per day for a maximum period of 12 weeks, including six weeks following the day of her delivery. The qualifying condition is employment for 240 days in the 12 months immediately preceding the expected date of delivery, but there is no such restriction as to entitlement in the case of an immigrant woman who is pregnant when she first arrives in Assam.”

**17.** With regard to the period of 240 days, the Select Committee remarked as under:

“The Committee are of the view that the qualifying condition of employment for a period of 240 days during the 12 months immediately preceding the expected date of delivery to entitle a worker to maternity benefit is too rigorous and the period should be reduced to 160 actual working days inclusive of the period of ‘lay-off’, if any.”

**18.** Section 5-A provides that if the Employees' State Insurance Act, 1948 is applied or becomes applicable to the establishment where a woman is employed, such woman shall continue to be entitled to receive the maternity benefits under this Act so long as she does not become qualified to claim maternity benefits under Section 50 of that Act.

**19.** It may be stated that Section 50 of the Employees' State Insurance Act, 1948 provides as under:

“50. *Maternity benefit.*—The qualification of an insured woman to claim maternity benefit, the conditions subject to which such benefit may be given, the rates and period thereof shall be such as may be prescribed by the Central Government.”

**20.** Section 5-B of the Maternity Act speaks of payment of maternity benefit in certain cases. Section 6 provides notice of claim for maternity benefit and payment thereof. Section 8 provides that every woman entitled to maternity benefit under this Act shall also be entitled to receive from her employer a medical bonus of 250 rupees, if no pre-natal confinement or post-natal care is provided by the employer free of charge.

...

**27.** The provisions of the Act which have been set out above would indicate that they are wholly in consonance with the Directive Principles of State Policy, as set out in Article 39 and in other articles, specially Article 42. A woman employee, at the time of advanced pregnancy cannot be compelled to undertake hard labour as it would be detrimental to her health and also to the health of the foetus. It is for this reason that it is provided in the Act that she would be entitled to maternity leave for certain periods prior to and after delivery. We have scanned the different provisions of the Act, but we do not find anything contained in the Act which entitles only regular women employees to the benefit of maternity leave and not to those who are engaged on casual basis or on muster roll on daily-wage basis.

**28.** The Industrial Tribunal, which has given an award in favour of the respondents, has noticed that women employees have been engaged by the Corporation on muster roll, that is to say, on daily-wage basis for doing various kinds of works in projects like construction of buildings, digging of trenches, making of roads, etc., but have been denied the benefit of maternity leave. The Tribunal has found that though the women employees were on muster roll and had been working for the Corporation for more than 10 years, they were not regularised. The Tribunal, however, came to the conclusion that the provisions of the Maternity Benefit Act had not been applied to the Corporation and, therefore, it felt that there was a lacuna in the Act. It further felt that having regard to the activities of the Corporation, which had employed more than a thousand women employees, it should have been brought within the purview of the Act so that the maternity benefits contemplated by the Act could be extended to the women employees of the Corporation. It felt that this lacuna could be removed by the State Government by issuing the necessary notification under the proviso to Section 2 of the Maternity Act. This proviso lays down as under:

“Provided that the State Government may, with the approval of the Central Government, after giving not less than two months' notice of its intention of so doing, by notification in the Official Gazette, declare that all or any of the provisions of this Act shall apply also to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise.”

**29.** It consequently issued a direction to the management of the Municipal Corporation, Delhi to extend the benefits of the Maternity Benefit Act, 1961 to such muster-roll female employees who were in continuous service of the management for three years or more and who fulfilled the conditions set out in Section 5 of the Act.

**30.** ...This direction is fully in consonance with the reference made to the Industrial Tribunal.

...

**32.** Learned counsel for the Corporation contended that since the provisions of the Act have not been applied to the Corporation, such a direction could not have been issued by the Tribunal. This is a narrow way of looking at the problem which essentially is human in nature and anyone acquainted with the working of the Constitution, which aims at providing social and economic justice to the citizens of this country, would outrightly reject the contention. The relevance and significance of the doctrine of social justice has, times out of number, been emphasised by this Court in several decisions. ...

**33.** A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Women who constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work, they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomenon in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the workplace while carrying a baby in the womb or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre-or post-natal period.

**34.** Next it was contended that the benefits contemplated by the Maternity Benefit Act, 1961 can be extended only to workwomen in an “industry” and not to the muster-roll women employees of the Municipal Corporation. This is too stale an argument to be heard. Learned counsel also forgets that the Municipal Corporation was treated to be an “industry” and, therefore, a reference was made to the Industrial Tribunal, which answered the reference against the Corporation, and it is this matter which is being agitated before us.

**35.** Now, it is to be remembered that the municipal corporations or boards have already been held to be “industry” within the meaning of “the Industrial Disputes Act”. ...

...

**37.** Delhi is the capital of India. No other city or corporation would be more conscious than the city of Delhi that India is a signatory to various international covenants and treaties. The Universal Declaration of Human Rights, adopted by the United Nations on 10-12-1948, set in motion the universal thinking that human rights are supreme and ought to be preserved at all costs. This was followed by a series of conventions. On 18-12-1979, the United Nations adopted the “Convention on the Elimination of all Forms of Discrimination against Women”. Article 11 of this Convention provides as under:

*“Article 11*

*...*

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States/parties shall take appropriate measures:

*(a) to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;*

*(b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;*

*(c) to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;*

*(d) to provide special protection to women during pregnancy in types of work proved to be harmful to them.*

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.”

(emphasis supplied)

38. These principles which are contained in Article 11, reproduced above, have to be read into the contract of service between the Municipal Corporation of Delhi and the women employees (muster roll); and so read these employees immediately become entitled to all the benefits conceived under the Maternity Benefit Act, 1961. We conclude our discussion by providing that the direction issued by the Industrial Tribunal shall be complied with by the Municipal Corporation of Delhi by approaching the State Government as also the Central Government for issuing necessary notification under the proviso to sub-section (1) of Section 2 of the Maternity Benefit Act, 1961, if it has not already been issued. In the meantime, the benefits under the Act shall be provided to the women (muster roll) employees of the Corporation who have been working with them on daily wages.

39. For the reasons stated above, the special leave petition is dismissed.”

## IN THE HIGH COURT OF DELHI

**Seema Gupta v. Guru Nanak Institute of Management**

**2006 SCC OnLine Del 1421**

**S. Ravindra Bhat, J.**

***The petitioner was employed as a lecturer in the respondent college, a non-State institution governed by Central Civil Service Rules (CCS Rules). After the expiry of her initial maternity leave of 135 days and further extended leave, the petitioner applied for further periods of leave. She was served show-cause notices, asking her to rejoin service. The petitioner sought continuation of maternity leave relying on the CCS Rules that provided for such extension up to a period of one year without production of any medical certificate. However, the petitioner's service was terminated on grounds of unauthorized leave. While deciding on the legality of such termination, the Court considered the State's obligations to provide maternity relief arising from Articles 14, 15 and 42 of the Indian Constitution, Universal Declaration of Human Rights and CEDAW, and its horizontal application to non-State institutions.***

Bhat, J: “...

18. It would be essential, before discussing the merits of the case, to notice the relevant provisions. Rule 43 of the CCS Rules, which governs the situation, as per the version of both parties, reads as follows:

“Chapter V

*Special kinds of leave other than study leave*

43. *Maternity Leave*

(1) A female Government servant (including an apprentice) with less than two surviving children may be granted maternity leave by an authority competent to grant leave for a period of (135 days) from the date of its commencement.

(2) During such period, she shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

*Note.*—In the case of a person to whom the Employees' State Insurance Act, 1948 (34 of 1948) applies, the amount of leave salary payable under this rule shall be reduced by the amount of benefit payable under the said Act for the corresponding period.

(3) Maternity leave not exceeding 45 days may also be granted to a female Government servant (irrespective of the number of surviving children) during the entire service of that female government servant in case of miscarriage including abortion on production of medical certificate as laid down in

Rule 19:

Provided that the maternity leave granted and availed of before the commencement of the CCS (Leave) Amendment Rules, 1995 shall not be taken into account for the purpose of this sub-rule.

(4) (a) Maternity leave may be combined with leave of any other kind.

(b) Notwithstanding the requirement of production of medical certificate contained in Sub-rule (1) of Rule 30 or Sub-rule (1) of Rule 31, leave of the kind due and admissible (including commuted leave for a period not exceeding 60 days and leave not due) upto a maximum of one year may, if applied for, be granted in continuation of maternity leave granted under Sub-rule (1).

(5) Maternity leave shall not be debited against the leave account.”

**19.** Article 15(3) of the Constitution empowers the State to make special provisions *inter alia*, for women. Article 42 provides for just and humane conditions of work and maternity relief. The State is directed to make provision for securing just and humane conditions of work and for maternity relief.

**20.** The Maternity Leave Benefit Act was enacted to fulfil the mandate of Article 42 of the Constitution of India. Section 12 Act prohibits the dismissal of a woman during or on account of her absence from work due to her pregnancy. Section 21 provides for penalty for discharge or dismissal of such woman of during or on account of her absence from work connected with the birth of a child.

**21.** Long ago, the Universal Declaration of Human Rights, by Article 25 had declared that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Article 25(2) provides that:

“(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

**22.** It would, while on the topic, also be essential to quote relevant provisions of the Convention for Elimination of All Forms of Discrimination Against Women (CEDAW). They are as follows:

“11(2). In order to prevent discrimination against women on the ground of marriage or maternity and to ensure their effective right to work, states parties shall take appropriate measures;

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.”

**23.** The facts here show that the petitioner was initially granted 135 days maternity leave. The trouble, however seems to have started after expiry of that period. It is alleged (and not denied by the respondent) that the leave due to the petitioner, including medical leave was not credited to her. She sought extension of leave, which was granted up to end of June, 2004. Thereafter, she joined duties, but had applied for leave on 7 occasions. The management took exception, and issued three memos, on different dates. The petitioner replied, again, on several dates, refuting allegations of absenteeism, and claiming that she ought to be given leave as per Rule 43, for one year. The management, however, treated this as an instance of wilful and truant behaviour, and granted a final opportunity to report for duties. After that, the termination letter was issued.

**24.** The entire correspondence between parties discloses that the petitioner's request was on account of her erratic, and indifferent health condition as well as that of her infant child. It is an undisputed fact that Rule 43 of the CCS Rules applies as a term or condition of her service. No doubt, the request for one full years' leave was initially not made by the petitioner; she made the request after she rejoined duties, in July 2004. Yet she did make an application for the purpose, after being served with repeated show cause notices alleging habitual absenteeism.

**25.** The importance of treating female employees who avail of maternity leave and who might face problems in raising infants, was foreseen by the rule making authority, when Rule 43(4)(b) was framed. The provision enables the employer to grant, and the employee to seek up to one years' leave in continuation of the initial maternity leave. The concern shown may be gauged by the fact that the employee is absolved of the normal requirement of having to produce a certificate—which implies that medical concerns alone are not determinative in granting such extended leave. The provision, in my

opinion, has to be construed in the background of the Universal Declaration of Human Rights and CEDAW, as an integral part of the State's obligation to promote the Directive Principle embodied in Article 42, of the Constitution.

**26.** The nature of the right, in the above rule, to my mind, also constitutes a special provision under Article 15(3). Although the respondent institution is not 'State' yet, it is admittedly governed by the CCS Rules. In these circumstances, it has a duty to fulfil those conditions. The present case, and application of Rule 43, falls into what may be justly described as a 'horizontal' application of the fundamental right, viz. Article 15(3) in order to give effect to Article 42. Fundamental rights are ordinarily enforceable against State or State agencies, or those 'authorities' acting as instrumentalities of the state. Yet, once the object of a fundamental right, such as for instance, the equality clause, or protective legislation relating to gender, is sought to be given shape through some statute, and made applicable to non-State 'actors' such intervention is known as horizontal application of the concerned fundamental right. In this case, Rule 43 is an instance of application of gender protective rights to public, but non state entities like the respondent institution. In another sense, the rule has to be understood as a larger social concern for extending special care to employees who are given maternity benefits. It promotes non-discriminatory practices, and forces employers to give reasonable accommodation to female employees.

**27.** Viewed from this perspective, the contentions of the respondents about the application of the rule in the Executive Committee of *Vaish Degree College case* (supra) and the *Indian Oil Corporation case* (supra) are inapt. This is not a traditional case of an employee seeking enforcement of her contract of service, but her lament that in spite of protective provisions, relating to maternity, and in spite of her request for extended leave, which was permissible, the employer, in disdain of those norms, terminated her from the service. I am also not impressed with the submission that the petitioner was an employee with lesser rights, since she was on *ad hoc* basis. As per the version of the respondent, she was entitled to the benefits under Rule 43.

**28.** The respondent, in my considered opinion treated the request for extension of leave by five months, as a normal request, without applying its mind to the peculiarities of the case. It has not furnished any reasons or justification as to why the right to claim the extended period, of one years' leave, a valuable one at that, had to be rejected. Exigencies of service bind all employers; that reason would be available in all cases where a request for extended maternity leave is sought. If such reasons given in a routine manner are to be upheld, the right for extended maternity leave of up to one year, would be meaningless, as every employer can cite that as a ground for denial. The special nature of the right then would exist only on paper, in negation.

..."

## IN THE HIGH COURT OF MADRAS

**K. Kalaiselvi v. Chennai Port Trust**

**(2013) 3 Mad LJ 493**

**K. Chandru, J.**

***In this case, the Madras High Court examined whether a woman employee who had a child born through surrogacy arrangement was entitled to maternity leave as available to adoptive mothers under Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987.***

**Chandru, J.:** "1. The short question that arises for consideration in this writ petition is whether a woman employee working in the Chennai Port Trust is entitled to avail maternity leave even in case where she gets the child through arrangement by Surrogate parents?

2. The petitioner is working as an Assistant Superintendent in the Traffic department of the Chennai Port Trust...[S]he in order to have a child had entered into an arrangement with Prashanth Multispeciality hospital, Chennai to have a baby through surrogate procedure...In order to look after the newly born baby, she had applied for maternity leave. But she was informed that she was not entitled for maternity leave (post delivery) for having a child through surrogate procedure though such a rejection was not possible in case of a person adopting a child. The petitioner, therefore, requested for sanction of maternity leave to look after the newly born girl child and reimburse the medical expenses and also to issue the FMI Card incorporating the newly born child through her representation, dated 17.6.2011...However, by proceedings, dated 22.11.2011, she was informed that the Chairman of the Port Trust had granted her two months period leave as

a special case, which will be treated as an eligible leave. But the leave granted on 17.9.2011 for a period of 59 days from 08.02.2011 to 07.04.2011 vide medical certificate dated 17.09.2011 was subsequently cancelled. Her request for inclusion of the female child in the FMI card was also rejected. She was informed by a letter dated 05.12.2011 that inclusion of her daughter name G.K. Sharanya in the FMI Card does not arise. The petitioner produced before the respondent Port Trust all documents relating to surrogate arrangement, hospital expenditures incurred by her as well as the birth certificate given by the Corporation of Chennai evidencing that the female child was born on 08.02.2011. The name of the parents are described as the petitioner being the mother and her husband as her father. It is under these circumstances, writ petition came to be filed seeking to set aside the order dated 05.12.2011 and for a consequential direction to the Chennai Port Trust to grant leave to the petitioner on equal footing in terms of Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987, which benefit was granted to adoptive parents.

3. In order to appreciate the contentions, it is necessary to extract Rule 3A, which reads as follows:

“3-A. Leave to female employees on adoption of a child:

A female employee on her adoption [*sic*] a child may be granted leave of the kind and admissible (including commuted leave without production of medical certificate for a period not exceeding 60 days and leave not due) upto one year subject to the following conditions:

- (i) the facility will not be available to an adoptive mother already having two living children at the time of adoption;
- (ii) the maximum admissible period of leave of the kind due and admissible will be regulated as under:
  - (a) If the age of the adopted child is less than one month, leave upto one year may be allowed.
  - (b) If the age of the child is six months or more, leave upto six months may be allowed.
  - (c) If the age of the child is nine months or more leave upto three months may be allowed.”

...

5. ...The Ministry in their letter dated 20.9.2011 informed the Port Trust that there was no provision/guidelines available in the CCS (Leave) Rules for the grant of maternity leave to a female Government employee for looking after her baby obtained through surrogate procedure. It was based upon the advice given by the Ministry, the leave given to her was cancelled and it was treated as eligible leave. Her further request to include the child in the FMI card was also rejected and it was informed that it cannot be considered. It was further stated that it was a peculiar case. In our Country getting a child through surrogate procedure is at a nascent stage. There are no rules or guidelines available. There are no provision in the Chennai Port Trust (Leave) Regulations, 1987 granting maternity leave to an employee who underwent surrogate procedure. No inspiration can be drawn from the Maternity Benefit Act, 1961. Apart from referring to the practice in the [*sic*] Australia where surrogacy was never treated as legal and in U.K., where surrogacy arrangement was legal, but advertising and other aspects of commercial surrogacy was prohibited under the Surrogacy Arrangements Act, 1985. Strangely the respondent in paragraph 18 made the following averments:

“18. It is submitted that apart from legal, other issues such as moral, ethical, psychological and religious are involved in surrogacy procedure. Hence, in India a comprehensive legislation is very much the need of the hour to address the complex legal issues related to surrogacy.”

6. The question of becoming parents through surrogacy came to be considered by the Supreme Court in a judgment in *Baby Manji Yamada v. Union of India* reported in (2008) 13 SCC 518. Though in that case, there was a dispute between biological parents and host, the matter was directed to be taken to the Commission for Protection of Child Rights Act, 2005. But, however various forms of surrogacy was discussed in the said judgment from paragraph 8 to 16 and it was stated as follows:...

7. Mr. Srinath Sridevan, learned counsel for the petitioner also referred to a judgment of the Supreme Court of California in a case relating to *Anna Johnson v. Mark Calvert et al.*, reported in 5 Cal 4th 84, wherein the court affirmed the judgment of the lower court that genetic parents were the natural parents of child gestated through surrogate. He also drew attention of this court to the Universal Declaration of Human Rights evolved by the United Nations and adopted by the General Assembly on 10.12.1948. He placed reliance upon Article 25(2) which reads as follows:

“(2) Motherhood and childhood are entitled to special care and assistance. All children whether born in or out of wedlock, shall enjoy the same social protection.”

**8.** He also referred to the Beijing Declaration and Platform for Action Fourth World Conference on Women, dated 15.09.1995, wherein the right of all women to control all aspects of their health, in particular their own fertility is basic to their empowerment was reaffirmed. Articles 17 and 33 reads as follows:

“17. The explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment;

33. Ensure respect for international law, including humanitarian law, in order to protect women and girls in particular;”

**9.** He further referred to the Convention on the Rights of the Child by United Nations General Assembly by a resolution on 20.11.1989, wherein Article 6 reads as follows:

“Article 6.

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.”

**10.** In the light of this, he submitted that the petitioner is undoubtedly the mother of a minor girl child and she is entitled to develop a bondage with the child obtained through surrogate agreement and there is no moral issue involved in this matter. In the interest of the child, the petitioner is entitled to have the leave granted in her favour and in future also she is entitled to have the name included as her daughter in the FMI card as she is the legitimate daughter of the petitioner. He further contended that even if the rule do not contemplate the surrogate arrangement, at the time of enacting of Maternity Benefit Act, 1961, such a practice was not there. What was not recognised by the law, at some point of time need not be the same in the light of the changed situation.

...

**13.** Alternatively, he contended that if law can provide child care leave in case of adoptive parents as in the case of Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987, then they should also apply to parents like the petitioner who obtained child through surrogate agreement since the object of such leave is to take care of the child and developing good bond between the child and the parents.

**15.** In the light of these rival contentions, it has to be seen whether the petitioner is entitled for a leave similar to that of the leave provided under Rule 3-A and whether her child's name is to be included in the FMI Card for availing future benefits?

**16.** This court do not find anything immoral and unethical about the petitioner having obtained a child through surrogate arrangement. For all practical purpose, the petitioner is the mother of the girl child G.K. Sharanya and her husband is the father of the said child. When once it is admitted that the said minor child is the daughter of the petitioner and at the time of the application, she was only one day old, she is entitled for leave akin to persons who are granted leave in terms of Rule 3-A of the Leave Regulations. The purpose of the said rule is for proper bonding between the child and parents. Even in the case of adoption, the adoptive mother does not give birth to the child, but yet the necessity of bonding of the mother with the adoptive child has been recognised by the Central Government. Therefore, the petitioner is entitled for leave in terms of Rule 3-A. Any other interpretation will do violence to various international obligations referred to by the learned counsel for the petitioner. Further, it is unnecessary to rely upon the provisions of the Maternity Benefit Act for the purpose of grant of leave, since that act deals with actual child birth and it is mother centric. The Act do not [*sic*] deal with leave for taking care of the child beyond 6 weeks, i.e., the post natal period. The right for child care leave has to be found elsewhere. However, this court is inclined to interpret Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987 also to include a person who obtain child through surrogate arrangement.

**17.** It will not be unnecessary if a reference is made to the All India Services (Leave) Rules, 1955, wherein the Central Government had recognised even paternity leave to be granted. Rule 18(D) was introduced with effect from 21.09.2011. The child care leave is given to a female member of the service. Rule 18(D) reads as follows:

“18(D) Child Care Leave to a female member of the Service—(1) A female member of the Service having minor children below the age of eighteen years may be granted child care leave by the competent authority for a maximum of 730 days during her entire service for taking care of upto two children.

(2) During the period of child care leave, such member shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.



- (3) Child care leave may be combined with leave of the kind due and admissible.
- (4) (Notwithstanding the requirement of production of medical certificates contained in sub-rule (1) of rule 13 or rule 14, leave of the kind due and admissible (including commuted leave not exceeding 60 days and leave not due) up to a maximum of one year, if applied for, be granted in continuation of child care leave granted under sub-rule(1).
- (5) Child care leave may be availed in more than one spell.
- (6) Child care leave shall not be debited against the leave account of the member of the Service.”

18. In the result, the writ petition will stand allowed.

The respondent Chennai Port Trust is directed to grant leave to the petitioner in terms of Rule 3-A recognising the child obtained surrogate procedure. Further a direction is issued to the respondent to include the name of the child G.K. Sharanya, as a member of the petitioner's family and also include her name in the FMI card forthwith...”

## IN THE HIGH COURT OF DELHI

**Bilju A.T. v. Union of India & Ors.**

**2013 SCC OnLine Del 2152**

**Gita Mittal and J.R. Midha, JJ.**

***In the instant case, petitioners challenged Rules and practices of the Central Reserve Police Force (“CRPF”), on grounds that these rules and practices discriminated against women employees of CRPF and as such violated Articles 14 and 16 of the Indian Constitution. Inter alia, the Delhi High Court was called upon to decide the constitutionality of denying seniority to women who could not complete mandatory promotional courses due to pregnancy, by denying them the opportunity to complete these courses immediately after being declared medically fit post-delivery.***

**Mittal and Midha, JJ.:** “ ...

3. The challenge, as premised by the petitioner, inter alia, is on the grounds of violation of Article 14, 16 and 21 of the Constitution of India...

...

22. ...[T]he petitioner in WP (C) No. 1368/2012 as well as the writ petitioner No. 4 in WP (C) No. 8744/2011 (newly added) were...asked in August, 2008 to submit their willingness for the promotional course to be held from 6th October, 2008 to 2nd January, 2009. However, these petitioners were unable to give their willingness at that stage on account of their pregnancy and as such were not permitted to undertake the course. Shortly, after their delivery and after being upgraded to medical category SHAPE-I they requested for being detailed for next course for SSICC but their request was not acceded to. These writ petitioners were detailed for the 46th SSICC course only in June, 2011 and as such were denied further promotion for a further period of almost two years. They successfully completed the SSICC course, yet till date, are continuing to work as SI/GD while their male batchmates, as noted above, stand promoted as Inspectors in the year 2007 and have further been appointed as Assistant Commandants since, 2010.

The injustice done to these women has been further exacerbated on account of their pregnancies and they have suffered double discrimination inasmuch as even their female counter parts have been granted promotion much before they have even been considered for the same.

...

49. The above narration of fact would also show that the respondents are causing grave prejudice to women who are unable to undergo a promotional course on account of pregnancy. Instead of enabling such female Sub-Inspectors to undertake the course immediately after she delivers her child, she is made to wait for several years even to undergo the promotional course resulting in denial of promotion to her for several years. In fact the petitioner in WP(C) No.1368/2012 were so denied an opportunity to undergo a promotional course even though they were permitted to undergo the SSIC course. We are informed that they are still continuing to work as Sub-Inspector only because they could not be detailed for the SSIC promotional course in August, 2008 on account of their pregnancy and were sent for this course only in June, 2011.

...

**53.** We find that so far as the placement in temporary low medical category of male officers is concerned, immediately after upgradation of their medical category, the respondents place the male officials at the appropriate place in their seniority gradation which is being unfairly denied to the women SI/GDs who were placed in temporary low medical category, not on account of sickness, but only on account of their pregnancy. Yet they are denied promotion or placement at the appropriate place in the seniority list after their deliveries. Such female personnel have not been permitted to undertake the promotion course for several years as noted herein above. The specific pleas of the petitioners in this regard have not been disputed by the respondents. This treatment of the female incumbents, who were denied participation for a promotional course because of the pregnancy, is not provided in any statutory authority or rule framed therein and is certainly not sustainable.”

## IN THE HIGH COURT OF KERALA

### **P. Geetha v. Kerala Livestock Development Board Limited**

**(2015) 1 KLJ 494**

**Dama Seshadri Naidu, J.**

***The petitioner's request for maternity leave for taking care of a child born through surrogacy was denied by the respondent board on the grounds that the Staff Rules and Regulations permitted maternity leave only for childbirth under "normal circumstances". In this challenge to the Board's decision, the Kerala High Court examined whether a woman who has a child through surrogacy is entitled to all statutory benefits that accrue to an employee after delivering a child.***

**Naidu, J.:** “ ...

#### **FACTS:**

**3.** Briefly stated, having joined just about a year ago, the petitioner is a Deputy General Manager working in the first respondent Board, a Government of Kerala undertaking. ...[T]he petitioner, along with her husband, had recently entered into an arrangement with a fertility clinic in Hyderabad, Telengana State, to have a baby through surrogate procedure...

**4.** With a view to looking after the new born baby, the petitioner is said to have submitted Exhibit P1 application for leave with effect from 19.06.2014 ‘as applicable for child birth in the normal process’. The first respondent, however, through Exhibit P2 letter dated 10.07.2014, informed the petitioner that the Staff Rules and Regulations do not permit any leave to the employees on maternity ground other than the maternity leave envisaged under ‘normal circumstances’.

**5.** It appears that the first respondent has further informed the petitioner through Exhibit P3 letter dated 16.07.2014 that the petitioner could avail herself of loss of pay leave on medical ground. Under those circumstances, being aggrieved by the refusal of the first respondent to grant leave for the petitioner to look after her baby born through surrogacy process, the petitioner has filed the present writ petition.

...

#### **ISSUES:**

- i. Whether the petitioner is entitled to maternity leave, having had a child through the process of surrogacy, she herself being the genetic or biological mother?
- ii. Whether, in the face of a particular legislative field having been occupied by an extant domestic enactment, the International Law conventions and treaty obligations can be enforced through Municipal Courts?
- iii. Whether the dichotomy in maternity is admissible, so that pre-natal and post-natal periods can be viewed distinctly in relation to two different women?

#### **DISCUSSION:**

In re: Issue No. 1

**27.** The issues of surrogacy and the dichotomous motherhood have their birth pangs as nascent aspects of law; they seek to be reared in the cradle of common law, i.e., case law, in the absence of the comfort of the statute law.

**28.** The issue is simple: the petitioner, being the genetic mother commissioning a surrogate to bear her child, sought maternity leave as if she underwent the maternity, for her child rearing is as vital as child bearing.

...

**33.** ...The employees of the first respondent Board are governed by the provisions of the Kerala Livestock Development Board Limited Staff Rules & Regulations, 1993 ('the Staff Rules' for brevity)...Rule 50 provides for maternity leave as under:

**"MATERNITY LEAVE:**

i. Maternity leave may be granted to a female employee, not covered by the ESI Act, up to 90 days from the date of commencement of leave.

ii. Maternity leave for a period not exceeding 42 days may be granted in case of miscarriage including medical termination of pregnancy.

iii. Application for Maternity leave should be supported by medical certificate from a Government Medical Officer or Medical Practitioner registered in Part-A/Class-A of the Register of Modern Medicines, Indigenous Medicines or Homoeopathic Medicines.

iv. Maternity leave may be combined with leave of any kind other than casual leave and special casual leave. Leave applied for in continuation of the Maternity leave may be granted for the continued medical attention of the mother or child. Application for the continuation of such leave should be supported by a medical certificate.

v. Maternity leave under this rule shall not be allowed if the employee has three or more living children.

vi. An employee on Maternity leave will be eligible to draw during the period of leave, the full pay and allowances at the rate she had been drawing prior to her proceeding on Maternity leave.

(emphasis added)

...

**35.** Now, we may examine the statutory scheme of the Maternity Benefit Act, 1961 ('the Act' for brevity)...

...

**39.** It can be seen that the Act focuses on conception, gestation and delivery. It intends to protect the health of the pregnant woman and collaterally the in-vitro child. The leave is not for bringing up the child. If it were so, a leave of a few days and compensation of a few thousand rupees are woefully inadequate to serve the said purposes.

**40.** Section 11 deals with nursing breaks, and it is as follows:

"11. Nursing Breaks: Every woman delivered of a child who returns to duty after such delivery shall, in addition to the interval for rest allowed to her, be allowed in the course of her daily work two breaks of the prescribed duration for nursing the child until the child attains the age of fifteen months."

**41.** During the post-natal period, we may observe, apart from having leave for the purpose of convalescing from the labour related health deficiencies, the mother can also have nursing breaks, which are of short duration. Any provision, analogous to Rule 3-A of Madras Port Trust (Leave) Regulations, 1987, as seen in Kalaiselivi, which is discussed more elaborately below, is not to be found either under the Act or the Staff Rules.

**42.** Indeed, there cannot be any discrimination regarding the genetic mother in extending the statutory benefits to the extent they are applicable, as is evident from the discussion on issue No. 3 below.

...

**IN RE: ISSUE NO. 3:**

**57.** The gravamen of the submissions of the learned counsel for the petitioner is that motherhood is an integral and inherent part of womanhood and that with advanced reproduction techniques, one cannot cling on to the traditional meaning of maternity. She also contends that there ought not to be any discrimination on account of woman getting a child through surrogacy, for all practical purposes, that woman shall be treated as the natural biological mother with all the rights flowing from the acceptance of the said factum, unhindered. All the international covenants and the domestic declarations only go to establish that there ought not be any discrimination based on the method of maternity, or in other words, merely on the ground that the mother did not actually bear the child in her womb...

**58.** ...Now, the proposition is that a genetic mother is required to be placed on the same pedestal as the natural, biological mother is placed...In this case, as a matter of legal fiction, if the petitioner is to be treated as the woman who has undergone the pregnancy and has been delivered of the baby, what rights accrue to her?

**59.** Taking this legal fiction a little further, we have to inevitably confront the dichotomy of the maternity - pre and post-natal. Admittedly, the petitioner has not undergone any pre-natal phase, which in fact was undergone by the surrogate mother, whose rights are not in issue before this Court. From day one, after the delivery, the petitioner is required to be treated as the mother with a newborn baby. Thus, without discriminating, it can be held that the petitioner is entitled to all the benefits that accrue to an employee after the delivery, as have been provided under the Act or the Staff Rules. Nothing more; nothing less, for the petitioner cannot compel the employer to place her on a higher pedestal than a natural mother could have been placed, after undergoing the pregnancy.

#### **KALAISELVI:**

**60.** It is pertinent to refer to *Kalaiselvi* (supra), a decision rendered by the High Court of Madras.... A learned Single Judge of the Hon'ble High Court of Madras likened the obtaining of a child through surrogacy to adoption and held that the benefit of Rule 3-A ought to be extended to the said employee as well. Referring to All India Services (Leave) Rules, 1955, it is observed that the Central Government has recognised even paternity leave to be granted.

**61.** In my considered view, the High Court of Madras has justly interpreted Rule 3-A expansively to take into the fold of adoption even the child obtained through surrogacy. Thus, the court has declared that a female employee on her getting a child through surrogacy, instead of adoption, be granted leave of the kind and admissible (including commuted leave without production of medical certificate for a period not exceeding 60 days and leave not due) up to one year subject to the conditions provided in the Rule itself.

**62.** I am afraid, there is no analogous provision in the Staff Rules governing the petitioner;...I am unable to persuade myself to hold that *Kalaiselvi* (supra) has any relevance in the present factual and legal matrix.

...

**71.** In the absence of any leave provided for bringing up a child, this Court cannot direct the first respondent Board to provide any leave to the petitioner for that purpose. In fact, the respondent Board has been considerate enough to allow the petitioner to go on extraordinary leave for a specified period.

**72.** The relief sought by the petitioner reads thus:

"To direct the first respondent to grant leave to the petitioner on equal footing in terms of Rule 50 of the Staff Rules and Regulations applicable to the staff and officers of the first respondent which benefit was granted to employees who got child[ren] under normal circumstances."

**73.** I do not see any difficulty in acceding to the above prayer, provided the dichotomy is applied and only the benefit, namely, the leave that can be given post-delivery, is extended. Admittedly, the petitioner did not physically bear the child; as such, she cannot insist on having any leave for convalescing and regaining her health. For child rearing, no specific provision is made a la Rule 3-A of Madras Port Trust (Leave) Regulations, 1987. Resultantly, the only option left for the petitioner is to avail herself of leave under other heads, as has been specified under Rule 44 of the Staff Rules. In fact, it has already been noted that the petitioner has been given extraordinary leave, as a special case.

**74.** Thus, to conclude, this Court declares that there ought not to be any discrimination of a woman as far as the maternity benefits are concerned only on the ground that she has obtained the baby through surrogacy. It is further made clear that, keeping in view the dichotomy of maternity or motherhood, the petitioner is entitled to all the benefits an employee could have on post-delivery, sans the leave involving the health of the mother after the delivery. In other words, the child specific statutory benefits, if any, can, and ought to, be extended to the petitioner..."

## IN THE HIGH COURT OF DELHI

**Rama Pandey v. Union of India**

**(2015) 221 DLT 756**

**Rajiv Shakdher, J.**

***A commissioning mother, whose application for maternity leave had been rejected by the central government on the ground that she was not a biological mother, invoked the Delhi High Court's writ jurisdiction for relief. The Court was to adjudicate on the issue of whether a commissioning mother is eligible for maternity leave under the Central Civil Services (Leave) Rules, 1972. In its decision, the Court also examined the impact of the principle of "best interests of the child" in determining the entitlement to maternity leave for a commissioning mother.***

Shakdher J.: "...

2. The fact that the surrogacy agreement reached fruition, is exemplified by the birth of twins, as indicated above, on 09.02.2013...

...

2.3 In sum, it was conveyed to the petitioner that there was no provision for grant of maternity leave in cases where the surrogacy route is adopted. The petitioner was, however, informed that the CCL could be sanctioned, in her favour, under Rule 43-A, which was applicable to "female government servants". It now transpires that reference ought to have been made to Rule 43 and not Rule 43-A; a fact which was confirmed by the counsel for respondent no. 2 and 3.

...

3. The petitioner being aggrieved, approached this court by way of the instant petition, filed, under Article 226 of the Constitution.

...

### SUBMISSIONS OF COUNSELS

5. The counsel for the petitioner has equated the position of a commissioning mother to that of a biological mother who bears and carries the child till delivery. It is the submission of the learned counsel for the petitioner, that more often than not, as in this case, the commissioning parents have a huge emotional interest in the well-being of both the surrogate mother and the child, which the surrogate mother carries, albeit under a contractual arrangement. The well-being of the child and the surrogate mother can best be addressed by the commissioning parents, in particular, the commissioning mother. This object, according to the learned counsel, can only be effectuated, if maternity leave is granted to the commissioning mother.

5.1 The fact that a commissioning mother has been judicially recognized as one who is similarly circumstanced, as an adoptive mother, was sought to be established by placing reliance on the judgement of the Madras High Court in the case of *K. Kalaiselvi v. Chennai Port Trust*, dated 04.03.2013, passed in W.P (C) No. 8188/2012.

6. Counsels for the respondents, on the other hand, while being sympathetic to the cause of the petitioner, expressed their disagreement with the submission that maternity leave could be extended to the petitioner or female employees who are similarly circumstanced.

6.1 Mr. Rajappa, who appeared for respondent no. 2 and 3, in particular, made submissions, which can be, broadly, paraphrased as follows:

(i) There is no provision under the extant rules for granting maternity leave to women who become mothers via the surrogacy route. Therefore, in law, no entitlement to maternity leave, in these circumstances, inhered in the petitioner.

(ii) The prime objective for grant of maternity leave is to protect the health and to provide safety to pregnant women in workplace, both during pregnancy and after delivery. Lactating mothers, who need to breast-feed their children, fall within a "specific risk group", and hence, are given maternity leave, based on factors which are relatable to safety and health parameters.

(iii) A woman, who gives birth to a child, undergoes mental and physical fatigue and stress and, is often, subjected to confinement both during and after pregnancy. These circumstances do not impact the commissioning mother, who takes recourse to the surrogacy route. Therefore, there is no justification for according maternity leave in such like cases.

(iv) If leave is granted to the commissioning mother, it could set a precedent for grant of leave in future to a single male or female parent or to same sex parents as well, who may take recourse to the surrogacy route.

(iv)(a) Therefore, the legislature would be the best forum for the enactment of necessary rules/regulations to deal with such like situations, including the situation which arose in the present case.

(v) In the *K. Kalaiselvi's* case, the Madras High Court was interpreting Rule 3-A of the Madras Port Trust (Leave) Regulations, 1987, pertaining to leave, made available, to female employees on adoption of a child. The court, in that case, equated the circumstances which arise in the case of the adoptive mother with those which emerge in the case of a female employee, who takes recourse to a surrogacy route. ...Such parity, in principle, was erroneous for the following reasons: Firstly, in the absence of a valid adoption, the relevant Rule, in the instant case, does not get triggered. Secondly, such an interpretation would involve re-writing of the Rules by reading adoptive parent as the Commissioning Parent.

## REASONS

**7.** I have heard the learned counsels for the parties. According to me, what needs to be borne in mind, is this: there are two stages to pregnancy, the pre-natal and post-natal stage. Biologically pregnancy takes place upon union of an ovum with spermatozoon. This union results in development of an embryo or a foetus in the body of the female. A typical pregnancy has a duration of 266 days from conception to delivery. The pregnancy brings about physiological changes in the female body which, inter alia, includes, nausea (morning sickness), enlargement of the abdomen etc.

**7.1** Pregnancy brings about restriction in the movement of the female carrying the child as it progresses through the term. In case complications arise, during the term, movement of the pregnant female may get restricted even prior to the pregnancy reaching full term. It is for these reasons that maternity leave of 180 days is accorded to pregnant female employees.

**7.2** Those amongst pregnant female employees, who are constitutionally strong and do not face medical complications, more often than not, avail of a substantial part of their maternity leave in the period commencing after delivery. Rules and regulations framed in this regard by most organizations, including those applicable to respondent no. 3, do not provide for bifurcation of maternity leave, that is, division of leave between pre-natal and post-natal stages.

**7.3** The reason, perhaps, why substantial part of the leave is availed of by the female employees (depending on their well-being), post delivery, is that, the challenging part, of bringing a new life into the world, begins thereafter, that is, in the post-natal period. There are other factors as well, which play a part in a pregnant women postponing a substantial part of her maternity leave till after delivery, such as, family circumstances (including the fact she is part of a nuclear family) or, the health of the child or, even the fact that she already has had successful deliveries; albeit without sufficient time lag between them.

**8.** Thus, it is evident that except for the physiological changes and difficulties, all other challenges of child rearing are common to all female employees, irrespective of the manner, she chooses, to bring a child into this world.

**9.** But the law, as it stands today, and therefore, the rules and regulations as framed by most organisations do not envisage attainment of parenthood via the surrogacy route.

**9.1** It is not unknown, and there are several such examples that legislatures, usually, in most situations, act ex-post facto. Advancement in science and change in societal attitudes, often raise issues, which require courts to infuse fresh insight into existing law. This legal technique, if you like, is often alluded to as the “updating principle”. Simply put, the court by using this principle, updates the construction of a statute bearing in mind, inter alia, the current norms, changes in social attitudes or, even advancement in science and technology. The principle of updating resembles another principle which the courts have referred to as the “dynamic processing of an enactment”...

...

**11.** With the advent of New Reproductive Technologies (NRT) or what are also known as Assisted Reproductive Technologies (ART), (after the birth of the first test-tube baby Louise Joy Brown, in 1978), there has been a veritable explosion of possibilities for achieving and bringing to term a pregnancy. It appears that in future one would have three kinds of mothers:

- (i) a genetic mother, who donates or sells her eggs;
- (ii) a surrogate or natal mother, who carries the baby; and
- (iii) a social mother, who raises the child.

...

**11.3** Rule 43 implicitly recognises that there are two principal reasons why maternity leave is accorded. First, that with pregnancy, biological changes occur. Second, post childbirth “multiple burdens” follow. (See: C-366/99 *Griesmar*, [2001] ECR I-9383)

**11.4** Therefore, if one were to recognise even the latter reason the commissioning mother, to my mind, ought to be entitled to maternity leave.

**11.5** It is clearly foreseeable that a commissioning mother needs to bond with the child and at times take over the role of a breast-feeding mother, immediately after the delivery of the child.

**11.6** In sum, the commissioning mother would become the principal care giver upon the birth of child; notwithstanding the fact that child in a given situation is bottle-fed.

**11.7** It follows thus, to my mind, that the commissioning mother's entitlement to maternity leave cannot be denied only on the ground that she did not bear the child. This is de hors the fact that a commissioning mother may require to be at the bed side of the surrogate mother, in a given situation, even at the pre-natal stage; an aspect I have elaborated upon in the latter part of my judgment.

...

**12.2** The rules as framed do not restrict the grant of leave to only those female employees, who are themselves pregnant...

**12.3** The word ‘maternity’ has not been defined in the Central Civil Services (Leave) Rules, 1972 (in short the Leave Rules), which respondents say are applicable to the petitioner.

...

**12.5** A perusal of Rule 43 would show that a female employee including an apprentice with less than two surviving children, can avail of maternity leave for 180 days from the date of its commencement. Sub-rule (3) of Rule 43 is indicative of the fact that where the female employee has suffered a miscarriage, including abortion, she can avail of maternity leave not exceeding 45 days. Importantly, clause (a) of sub-rule (4) of Rule 43, states that maternity leave can be combined with leave of any other kind. Furthermore, under clause (b) of sub-rule (4) such a female employee is entitled to leave of the kind referred to in Rule 31(1) notwithstanding the requirement to produce a medical certificate, subject to a maximum of two years, if applied for, in continuation of maternity leave granted to her. Sub-rule (5) of Rule 43 states that, maternity leave shall not be debited against leave account.

...

**13.7** Rule 43-B, which enables the female employee with fewer than two surviving children, to avail of child adoption leave for a period of 180 days affixes, inter alia, a condition that there should be in place a “valid adoption” of a child below the age of one year. The period of 180 days commences immediately after the date of valid adoption. [See sub-rule (1) of Rule 43-B]

...

**14.** Thus, a reading of Rule 43 would show that while it is indicated in sub-rule (1) as to when the period of leave is to commence, that is, from the date of maternity; the expression ‘maternity’ by itself has not been defined...

**15.** There are two ways of looking at Rule 43. One, that the word, ‘maternity’ should be given the same meaning, which one may argue inheres in it, on a reading of sub-rule (3) of Rule 43; which is the notion of child bearing. The other, that the word “*maternity*”, as appearing in sub-rule (1) of Rule 43, with advancement of science and technology, should

be given a meaning, which includes within it, the concept of motherhood attained via the surrogacy route. The latter appears to be more logical if, the language of Rule 43-A, which deals with paternity leave, is contrasted with sub-rule (1) of Rule 43. Rule 43-A makes it clear that a male employee would get 15 days of leave “**during the confinement of his wife for child birth**”, either 15 days prior to the event, or thereafter, i.e after child birth, subject to the said leave being availed of within 6 months of the delivery of the child.

**15.1** There is no express stipulation in sub-rule (1) of Rule 43 to the effect that the female employee (applying for leave) should also be one who is carrying the child. The said aspect while being implicit in sub-rule (1) of Rule 43, does not exclude attainment of motherhood via surrogacy. The attributes such as “confinement” of the female employee during child birth or the conditionality of division of leave into periods before and after child birth do not find mention in Rule 43(1).

**15.2** Having regard to the aforesaid position emanating upon reading of the Rules, one is required to examine the tenability of the objections raised by the respondents.

**16.** The argument of the respondents, in sum, boils down to this: that the word ‘maternity’ can be attributed to only those female employees, who conceive and carry the child during pregnancy. In my view, the argument is partially correct, for the reason that the word ‘maternity’ pertains to the ‘character, condition, relation or state of a mother’. In my opinion, where a surrogacy arrangement is in place, the commissioning mother continues to remain the legal mother of the child, both during and after the pregnancy. To cite an example: suppose on account of a disagreement between the surrogate mother and the commissioning parents, the surrogate mother takes a unilateral decision to terminate the pregnancy, albeit within the period permissible in law for termination of pregnancy - quite clearly, to my mind, the commissioning parents would have a legal right to restrain the surrogate mother from taking any such action which may be detrimental to the interest of the child. The legal basis for the court to entertain such a plea would, in my view, be, amongst others, the fact that the commissioning mother is the legal mother of the child. The basis for reaching such a conclusion is that, surrogacy, is recognized as a lawful agreement in the eyes of law in this country. [See *Baby Manji Yamada v. Union of India*, (2008) 13 SCC 518]. In some jurisdictions though, a formal parental order is required after child birth.

**16.1** Therefore, according to me, maternity is established vis-a-vis the commissioning mother, once the child is conceived, albeit in a womb, other than that of the commissioning mother.

**16.2** It is to be appreciated that Maternity, in law and/or on facts can be established in any one of the three situations: First, where a female employee herself conceives and carries the child. Second, where a female employee engages the services of another female to conceive a child with or without the genetic material being supplied by her and/or her male partner. Third, where female employee adopts a child.

**16.3** In so far as the third circumstance is concerned, a specific rule is available for availing leave, which as indicated above, is provided for in Rule 43-B. In so far as the first situation is concerned, it is covered under sub-rule (1) of Rule 43. However, as regards the second situation, it would necessarily have to be read into sub-rule (1) of Rule 43.

**16.4** To confine sub-rule (1) of Rule 43 to only to that situation, where the female employee herself carries a child, would be turning a blind eye to the advancement that science has made in the meanwhile. On the other hand, if a truncated meaning is given to the word ‘maternity’, it would result in depriving a large number of women of their right to avail of a vital service benefit, only on account of the choice that they would have exercised in respect of child birth.

**17.** The argument of the respondents that the underlying rationale, for according maternity leave (which is to secure the health and safety of pregnant female employee), would be rendered nugatory - to my mind, loses sight of the following:

- (i) First, that entitlement to leave is an aspect different from the right to avail leave.
- (ii) Second, the argument centres, substantially, around, the interest of the carrier, and in a sense, gives, in relative terms, lesser weight to the best interest of the child.

**17.1** In a surrogacy arrangement, the concern of the commissioning parents, in particular, the commissioning mother is to a large extent, focused on the child carried by the gestational mother. There may be myriad situations in which the interest of the child, while still in the womb of the gestational mother, may require to be safeguarded by the commissioning mother. To cite an example, a situation may arise where a commissioning mother may need to attend to the surrogate/gestational mother during the term of pregnancy; because the latter may be bereft of the necessary wherewithal. The lack of wherewithal could be of: financial nature (the arrangement in place may not suffice for whatever reasons), physical condition or emotional support or even a combination of one or more factors stated above. In such like



circumstances, the commissioning mother can function effectively, as a care-giver, only if, she is in a position to exercise the right to take maternity leave. To my mind, to curtail the commissioning mother's entitlement to leave, on the ground that she has not conceived the child, would work, both to her detriment, as well as, that of the child.

**18.** The likelihood of such right, if accorded to the commissioning mother, being misused can always be curtailed by the competent leave sanctioning authority.

**18.1** At the time of sanctioning leave the competent authority can always seek information with regard to circumstances which obtain in a given case, where application for grant of maternity leave is made...If conditions do not commend that leave be given at the pre-natal stage, then the same can be declined.

**18.2** In so far as post-natal stage is concerned, ordinarily, leave cannot be declined as, under most surrogacy arrangements, once the child is born, its custody is immediately handed over to the commissioning parents. The commissioning mother, post the birth of the child, would, in all probability, have to play a very crucial role in rearing the child.

**18.3** However, these are aspects which are relatable to the time and the period for which maternity leave ought to be granted. The entitlement to leave cannot be denied, to my mind, on this ground.

**19.** In this context, I may only refer to a judgement of the Labour Court of South Africa, in Durban in *MIA v. State Information Technology Agency (Pty) Ltd.*, (D312/2012) [2015] ZALCD 20 (dated: 26 March 2015). The applicant before the court, who was a male employee, challenged the refusal by his employer to grant him maternity leave on the ground that he was not the biological mother of the child under the surrogacy agreement.

...

**19.5** The ruling of the Court sheds some light, in my view, on the issue at hand. The observations made in the judgment being relevant, are extracted hereinbelow.

"...[13] This approach ignores the fact that the right to maternity leave as created in the Basic Conditions of Employment Act in the current circumstances is an entitlement not linked solely to the welfare and health of the child's mother but must of necessity be interpreted to and take into account the best interests of the child. Not to do so would be to ignore the Bill of Rights in the Constitution of the Republic of South Africa and the Children's Act...

**20.** In our Constitution, under Article 39(f), which falls in part IV, under the heading Directive Principles of the States policy, the state is obliged to, inter alia, ensure that the children are given opportunities and facilities to develop in a healthy manner. Similarly, under Article 45, State has an obligation to provide early childhood care.

**20.1** Non-provision of leave to a commissioning mother, who is a employee, would, to my mind, be in derogation of the stated Directive Principles of State Policy as contained in the Constitution.

**21.** In this context, regard may also be had to Article 6 of the United Nations Convention on Rights of Child (UNCRC).

**21.1** Article 6 of the UNCRC provides that the States, which are party to the Convention, shall recognize that every child has the inherent right to life. A State-party is thus obliged to ensure, to the maximum extent possible, the survival and development of the child...

...

**22.** The Madras High Court in *K. Kalaiselvi's* case equated the position of an adoptive parent to that of a parent who obtains a child via a surrogacy arrangement...

**22.1** The ratio of the judgement, to my mind, is that, an adoptive parent is no different from a commissioning parent, which seeks to obtain a child via a surrogacy arrangement.

**23.** In the instant case, in so far as Rule 43-B obtains, the situation is somewhat similar to that which prevailed in *K. Kalaiselvi's* case.

...

**23.2** For the sake of completeness I must refer to the judgement of the Kerala High Court on somewhat similar issue in the matter of *P. Geetha v. The Kerala Livestock Development Board Ltd.* 2015 (1) KLJ 494. However, the gamut of rules that this court is called upon to examine are not, in their entirety, similar to the ones that were before the Kerala High Court...

...

24. In view of the discussion above, the conclusion that I have reached is as follows:-

- (i). A female employee, who is the commissioning mother, would be entitled to apply for maternity leave under sub-rule (1) of Rule 43.
- (ii). The competent authority based on material placed before it would decide on the timing and the period for which maternity leave ought to be granted to a commissioning mother who adopts the surrogacy route.
- (iii). The scrutiny would be keener and detailed, when leave is sought by a female employee, who is the commissioning mother, at the pre-natal stage. In case maternity leave is declined at the pre-natal stage, the competent authority would pass a reasoned order having regard to the material, if any, placed before it, by the female employee, who seeks to avail maternity leave. In a situation where both the commissioning mother and the surrogate mother are employees, who are otherwise eligible for leave (one on the ground that she is a commissioning mother and the other on the ground that she is the pregnant women), a suitable adjustment would be made by the competent authority.
- (iv). In so far as grant of leave qua post-natal period is concerned, the competent authority would ordinarily grant such leave except where there are substantial reasons for declining a request made in that behalf. In this case as well, the competent authority will pass a reasoned order..."

## IN THE HIGH COURT OF BOMBAY

**Hema Vijay Menon v. State of Maharashtra & Ors.**

**2015 SCC OnLine Bom 6127**

**Vasanti A. Naik and A.M. Badar, JJ.**

***The petitioner was denied maternity leave on the grounds that there was no provision under the Maharashtra Civil Services (Leave) Rules, 1981 for granting such leave to a woman who commissions a child through surrogacy. The rules, however, provided maternity leave for adoptive mothers. While examining the validity of the communication rejecting the petitioner's maternity leave, the Bombay High Court observed that at least, no distinction should be drawn between an adoptive mother and a mother who has a child through surrogacy.***

**Naik, J.:** " ...

2. The short question that arises for consideration in this petition is, whether a mother is entitled to avail maternity leave, though she begets the child through surrogacy.

3. ...[T]he petitioner decided to have a child through surrogacy arrangement...With a view to look after the newly born baby, the petitioner applied for maternity/child care leave to the Principal of the respondent No. 4 - College as according to the petitioner, the petitioner was entitled to maternity leave in view of the provisions of Maharashtra Civil Services (Leave) Rules, 1981, which recognize the right of a woman to maternity leave and are applicable to the Lecturers like the petitioner. The petitioner also sought support from the Government Resolution dated 28.07.1995, that provides for maternity leave to the adoptive mother in the same manner as is available to a natural mother. The Principal of the respondent No. 4 - College approved the leave and the proposal was forwarded to the Joint Director of Higher Education, for necessary action. To the surprise of the petitioner, the Respondent No. 3 - the Joint Director of Higher Education, Nagpur informed the respondent No. 4 - Principal of the College, by the impugned communication dated 07.05.2015, that there was no provision for granting maternity leave to a mother who begets a child through surrogacy procedure, in the Government Resolution dated 28.07.1995. The petitioner has challenged the communication dated 07.05.2015, by this petition.

...

7. On hearing the learned counsel for the parties, it appears that the Joint Director of Higher Education, Nagpur, was not justified in refusing maternity leave to the petitioner. According to Oxford English Dictionary, maternity means - motherhood. Maternity means the period during pregnancy and shortly after the child's birth. If Maternity means motherhood, it would not be proper to distinguish between a natural and biological mother and a mother who has

begotten a child through surrogacy or has adopted a child from the date of his/her birth. The object of maternity leave is to protect the dignity of motherhood by providing for full and healthy maintenance of the woman and her child. Maternity leave is intended to achieve the object of ensuring social justice to women. Motherhood and childhood both require special attention. Not only are the health issues of the mother and the child considered while providing for maternity leave but the leave is provided for creating a bond of affection between the two. It is said that being a mother is one of the most rewarding jobs on the earth and also one of the most challenging. To distinguish between a mother who begets a child through surrogacy and a natural mother who gives birth to a child, would result in insulting womanhood and the intention of a woman to bring up a child begotten through surrogacy, as her own. A commissioning mother like the petitioner would have the same rights and obligations towards the child as the natural mother. Motherhood never ends on the birth of the child and a commissioning mother like the petitioner cannot be refused paid maternity leave. A woman cannot be discriminated, as far as maternity benefits are concerned, only on the ground that she has obtained the baby through surrogacy. Though the petitioner did not give birth to the child, the child was placed in the secured hands of the petitioner as soon as it was born. A newly born child cannot be left at the mercy of others. A maternity leave to the commissioning mother like the petitioner would be necessary. A newly born child needs rearing and that is the most crucial period during which the child requires the care and attention of his mother. There is a tremendous amount of learning that takes place in the first year of the baby's life, the baby learns a lot too. Also, the bond of affection has to be developed. A mother, as already stated hereinabove, would include a commissioning mother or a mother securing a child through surrogacy. Any other interpretation would result in frustrating the object of providing maternity leave to a mother, who has begotten the child.

**8.** As rightly pointed out on behalf of the petitioner, there is nothing in Rule 74 of the Maharashtra Civil Services (Leave) Rules, 1961, which would disentitle a woman, who has attained motherhood through the surrogacy procedure to maternity leave. Rule 74 provides for maternity leave to a female government employee. We do not find anything in Rule 74 which disentitles the petitioner to maternity leave, like any other female government servant, only because she has attained motherhood through the route of surrogacy procedure. It is worthwhile to note that by the Government Resolution dated 28.07.1995, maternity leave is not only provided to a natural mother but is also provided to an adoptive mother, who adopts a child on its birth. The only reason for refusing maternity leave to the petitioner is that there is nothing in the Government Resolution, dated 28.07.1995 for providing maternity leave to the mother who begets the child through surrogacy. If the Government Resolution, dated 28.07.1995 provides maternity leave to an adoptive mother, it is difficult to gauge why maternity leave should be refused to the mother, who secures the child through surrogacy. In our view, there cannot be any distinction whatsoever between an adoptive mother that adopts a child and a mother that begets a child through a surrogate mother, after implanting an embryo in the womb of the surrogate mother. In our view, the case of the mother who begets a child through surrogacy procedure, by implanting an embryo created by using either the eggs or sperm of the intended parents in the womb of the surrogate mother, would stand on a better footing than the case of an adoptive mother. At least, there cannot be any distinction between the two. Right to life under Article 21 of the Constitution of India includes the right to motherhood and also the right of every child to full development. If the government can provide maternity leave to an adoptive mother, it is difficult to digest the refusal on the part of the Government to provide maternity leave to a mother who begets a child through the surrogacy procedure. We do not find any propriety in the action on the part of the Joint Director of Higher Education, Nagpur, of rejecting the claim of the petitioner for maternity leave. The action of the respondent Nos. 1 to 3 is clearly arbitrary, discriminatory and violative of the provisions of Articles 14 and 21 of the Constitution of India. It is useful to refer to the unreported judgment of the Delhi High Court in the case of *Rama Pande v. Union of India*, and relied on by the learned counsel for the petitioner, in this regard.

**9.** Hence, for the reasons aforesaid, the writ petition is allowed. The impugned communication dated 07.05.2015 is quashed and set aside. It is hereby declared that the petitioner is entitled to the maternity leave for a period of one year from the date of the birth of the child i.e. 04.12.2014. Rule is made absolute in the aforesaid terms with no order as to costs."

## IN THE HIGH COURT OF DELHI

Inspector (Mahila) Ravina v. Union of India &amp; Ors.

MANU/DE/3946/2015

S. Ravindra Bhat and V.K. Shali, JJ.

***The petitioner was unable to attend a pre-promotional course as she was pregnant. She had cleared the course in the next batch after her pregnancy was over. However, she was denied restoration of her seniority to the position that she would have been in, had she cleared the first course. The CRPF justified the denial of seniority on grounds of the petitioner's "unwillingness" to attend the first pre-promotional course. While deciding whether the petitioner's pregnancy signified her unwillingness or inability to attend the course, the Court examined whether penalising the petitioner for her pregnancy and forcing her to choose between having a child and her career violated her rights under Articles 21, 14, 15 (1) and 16 (2) of the Indian Constitution.***

Bhat, J.: "...

7. The main question which this court has to decide is whether the Petitioner's pregnancy would amount to unwillingness or signify her inability to attend a required promotional course and if she is entitled to a relaxation of rules to claim seniority at par with her batchmates.

8. The facts are not in controversy; the petitioner had to approach this court, on an earlier occasion, along with her colleagues, due to the CRPF's stand that she lacked two years' experience in an operational post. The promotion list dated 06.09.2007 omitted her name. This was set right pursuant to W.P. (C) No. 617/2011 and the CRPF restored the Petitioner's seniority and consequential benefits w.e.f. 06.09.2007. In the meanwhile, the pre-promotional courses were conducted; the petitioner could not attend those, on account of pendency of dispute. Her colleagues/batchmates got the first opportunity to do so, when Batch No. 85 was sent for the course. She could not attend the course - not on account of her volition, but for medical reasons (she was declared Shape III as she was pregnant). She ultimately cleared the course in the next batch.

9. To conclude that pregnancy amounts to mere unwillingness - as the respondents did in this case- was an indefensible. The choice to bear a child is not only a deeply personal one for a family but is also a physically taxing time for the mother. This right to reproduction and child rearing is an essential facet of Article 21 of the Constitution; it is underscored by the commitment of the Constitution framers to ensure that circumstances conducive to the exercise of this choice are created and maintained by the State at all times. This commitment is signified by Article 42 ("Provision for just and humane conditions of work and maternity relief- The State shall provide conditions for securing just and humane conditions of work and for maternity relief") and Article 45 ("Provision for early childhood care and education to children below the age of six years- The State shall endeavour to provide for early childhood care... "). The Maternity Benefits Act, 1976 protects the expecting mother's interests in employment. Provisions of the Factories Act, 1948 and the Central Civil Service (Leave) Rules, 1972 provide for post-natal care leave enabling mothers to spend time with infants who need early childhood care.

10. The International Covenant on Economic, Social and Cultural Rights (ICESCR), which has been ratified by India, spells out in greater detail the various facets of the broad right to health. Article 10 of ICESCR which is relevant, reads as under:

"Article 10

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits..."

The ruling of the Supreme Court in *Suchita Srivastava v. Chandigarh Administration*, AIR 2010 SC 235 upholds the autonomy of a woman's right to make a choice of parenting. The Court held that:

“11. ... There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children...”

**11.** It would be a travesty of justice if a female public employee were forced to choose between having a child and her career. This is exactly what the CRPF's position entails. Pregnancy is a departure from an employee's "normal" condition and to equate both sets of public employees- i.e. those who do not have to make such choice and those who do (like the petitioner) and apply the same standards mechanically is discriminatory. Unlike plain unwillingness- on the part of an officer to undertake the course, which can possibly entail loss of seniority- the choice exercised by a female employee to become a parent stands on an entirely different footing. If the latter is treated as expressing unwillingness, CRPF would clearly violate Article 21. As between a male official and female official, there is no distinction, in regard to promotional avenues; none was asserted. In fact, there is a common pre-promotional programme which both have to undergo; both belong to a common cadre. In these circumstances, the denial of seniority benefit to the petitioner amounts to an infraction of Article 16 (1) and (2) of the Constitution, which guarantee equality to all in matters of public employment, regardless of religion, caste, sex, descent, place of birth, residence etc. A seemingly "neutral" reason such as inability of the employee, or unwillingness, if not probed closely, would act in a discriminatory manner, directly impacting her service rights. That is exactly what has happened here: though CRPF asserts that seniority benefit at par with the petitioner's colleagues and batchmates (who were able to clear course No. 85) cannot be given to her because she did not attend that course, in truth, her "unwillingness" stemmed from her inability due to her pregnancy. In this present situation the course was in Coimbatore. Travelling and living in an alien area without support was not a feasible proposition for an expecting mother; besides, the CRPF had determined that her medical category was SHAPE III. Mercifully, the CRPF does not contend that its regulations imposed any restrictions on a female employee's pregnancy at the stage of the Petitioner's career. That the petitioner exercised her right therefore to become a parent should not operate to penalise her, and her "choice" to do so was irrelevant, in the circumstances of the case; the CRPF should have taken the reasons for the unwillingness into account given the admitted fact that she was pregnant.

**12.** Standing Order dated 19.03.1999, by clause (J), clothes the Director General, CRPF with discretion – through non-obstante and overriding power. This case was eminently suitable for the Director General to exercise his powers on a compassionate basis, enabling the petitioner to catch up on lost opportunity due to her involuntary condition (on account of her exercise of reproductive rights) and regain her seniority with her batchmates who cleared the 85th course. ... The lack of an express plea of pregnancy based discrimination does not in any way stop this court from doing complete justice, to further the rights of the petitioner under Articles 14, 15 (1), 16 (2) and 21 of the Constitution of India.

**13.** For the foregoing reasons, this Court hereby directs the Respondents to restore seniority of the Petitioner from 10.07.2010, the completion date of SICC SL. No. 83- as in the case of her other batchmates who completed that course, and consequently promote as well as assign her consequential seniority. Consequential seniority and all pay benefits including fixation of pay and arrears of pay shall also be disbursed to the petitioner within twelve weeks. The writ petition is allowed in the above terms. No costs.”

## IN THE HIGH COURT OF KERALA

**Neetu Bala v. Union of India**

**2016 SCC OnLine P&H 602**

**Harinder Singh Sidhu, J.**

***The petitioner was declared “unfit” for appointment to the Short Service Commission in the Army Medical Corps on account of her pregnancy. Respondents did not reply to her request to keep a vacancy for her to join service after delivery of the child. In this writ petition, the Court examined the legality of denial of appointment on grounds of pregnancy, in light of the constitutional guarantees of equality and non-discrimination on grounds of sex under Articles 14, 15 and 16 (1) of the Indian Constitution and obligations under international conventions.***

Sidhu, J.: “...

10. In the aforesaid facts, the question that arises is whether the denial of appointment to the petitioner holding her to be ‘unfit’ solely on account of pregnancy is legal and justified? Consequently, is Page 5 of the Appendix to DGAFMS/DG 3A letter No. 9450/USG Abd/DGAFMS/DG 3A dated 22.10.2009 to the extent it lays down that detection of pregnancy would render a candidate UNFIT for commissioning legal and Constitutional?

### CONSTITUTIONAL PROVISIONS AND THE SUPREME COURT:

11. The Constitution of India accords socio economic and political justice, equality of status and of opportunity assuring the dignity of individual. Article 14 guarantees equality by providing that ‘The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India’. Article 15(1) abolishes discrimination on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15(2) requires that there shall be no disability, liability or restriction on grounds of sex and ensures equality of status. Article 15(3) enables the State to make special provisions for women and children. Article 16(1) accords equality of opportunity in public service for appointment or employment to an office or post under the State and ordains that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. There is thus a specific prohibition against gender discrimination in matters relating to public employment.

12. It is in the light of these Constitutional provisions that the validity of the impugned action has to be judged.

13. At the outset, it would be helpful to refer to two important decisions of the Hon'ble Supreme Court on the issue of gender discrimination in the context of marriage and pregnancy.

14. In *C.B. Muthamma v. Union of India*, (1979) 4 SCC 260, Rule 8(2) of Indian Foreign Service (Conduct and Discipline) Rules, 1961, was challenged by Miss Muthamma, a member of the Indian Foreign Service. As per this Rule, a woman member of the service was required to obtain the permission of the Government in writing before her marriage was solemnized. Further, as per this Rule, at any time after the marriage, a woman member of the Service could be required to resign from service, if the Government was satisfied that her family and domestic commitments were likely to come in the way of the due and efficient discharge of her duties.

15. Though, the Court was saved of the necessity to strike down the Rule, as it was stated that the Rule had been deleted, but it made very pertinent observations regarding the invalidity thereof. The Court observed that gender discrimination was patent in the Rule, that sex prejudice against Indian Womanhood was writ large in the Rule and that it was in violation of Article 16 of the Constitution.

*“This writ petition by Miss Muthamma, a senior member of the Indian Foreign Service, bespeaks a story which makes one wonder whether Articles 14 and 16 belong to myth or reality. The credibility of constitutional mandates shall not be shaken by governmental action or inaction but it is the effect of the grievances of Miss Muthamma that sex prejudice against Indian womanhood pervades the service rules even a third of a century after Freedom. There is some basis for the charge of bias in the rules and this makes the ominous indifference of the executive to bring about the banishment of discrimination in the heritage of service rules. If high officials lose hopes of equal justice under the rules, the legal lot of the little Indian, already priced out of the expensive judicial market, is best left to guess. This disturbing thought induces us to make a few observations about the two impugned*

*rules which appear prima facie, discriminatory against the female of the species in public service and have surprisingly survived so long, presumably, because servants of government are afraid to challenge unconstitutional rule making by the Administration.....*

*3. If a fragment of these assertions were true, unconstitutionality is writ large in the administrative psyche and masculine hubris which is the anathema for Part III haunts the echelons in the concerned Ministry. If there be such gender injustice in action, it deserves scrupulous attention from the summit so as to obliterate such tendency.....*

*5. Discrimination against women, in traumatic transparency, is found in this rule. If a woman member shall obtain the permission of government before she marries, the same risk is run by the Government if a male member contracts a marriage. If the family and domestic commitments of a woman member of the Service are likely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of a male member. In these days of nuclear families, inter, continental marriages and unconventional behaviour, one fails to understand the naked bias against the gentler of the species. Rule 18 of the Indian Foreign Service (Recruitment, Cadre, Seniority and Promotion) Rules, 1961, runs in the same prejudicial strain:*

*“(1), (3) \* \* \**

*(4) No married woman shall be entitled as of right to be appointed to the service.”*

*6. At the first blush this rule is in defiance of Article 16. If a married man has a right, a married woman, other things being equal, stands on no worse footing. This misogynous posture is a hangover of the masculine culture of manacled the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thralldom. Freedom is indivisible, so is Justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis, a, vis half of India's humanity viz. our women, is a sad reflection on the distance between Constitution in the book and law in action. And if the executive as the surrogate of Parliament, makes rules in the teeth of Part III especially when high political office, even diplomatic assignment has been filled by women, the inference of diehard allergy to gender parity is inevitable.”*

**16.** The next case is *Air India v. Nergesh Meerza*, (1981) 4 SCC 335, which is a locus classicus on the issue.

**17.** In this case, challenge was to the Constitutional validity of Regulation 46(1)(c) of the Air India Employees Service Regulations, as per which, as against the normal age of retirement of the employees of the Air India Corporation of 58 years, an Air Hostess was to be retired upon attaining the age of 35 years or on marriage if it took place within four years of service or on first pregnancy, whichever occurs earlier. This Regulation was challenged on the ground of being arbitrary and unreasonable and violative of Article 14 of the Constitution.

...

**19.** The Court held that as marriage after four years was not prohibited, there was no reason as to why pregnancy should stand in the way of the Air Hostesses continuing in service. It negated the argument that from the very beginning of pregnancy women may be prone to sickness during long flights. It was observed that, in any case, the difficulty in discharge of duties by pregnant Air Hostesses could be mitigated by granting them maternity leave even up to periods of 14 to 16 months and making alternative arrangements on temporary or ad hoc basis. Termination of service in such circumstances was held to be callous and cruel. It was termed as an insult to Indian Womanhood and violative of Article 14 of the Constitution.

**20.** It was emphatically held that pregnancy is not a disability but one of the natural consequences of marriage. Any distinction made on the ground of pregnancy was held to be arbitrary.

...

**24.** Thus, as per this decision, in cases where a married woman is not disqualified for appointment, the fact that she is pregnant, cannot be a disqualification for continuing with appointment. Nor can pregnancy, in such circumstances, be treated as a bar to be appointed. Any inability to discharge duties during the months, before and after child birth, can be taken care of by granting maternity leave for the period required.

**25.** Apart from Articles 14 and 16 which were the basis of the Supreme Court decisions, discriminatory treatment of pregnant women would also fall foul of Article 42 of the Constitution which requires the State to make provision for securing just and humane conditions of work and for maternity relief. In *Municipal Corpn. of Delhi v. Female Workers (Muster Roll)*, (2000) 3 SCC 224, it has been held that the validity of an executive or administrative action in denying maternity benefit has to be examined on the anvil of Article 42 which, though not enforceable at law, is nevertheless available for determining the legal efficacy of the action complained of.

## INTERNATIONAL CONVENTIONS.

**26.** While in the earlier decisions reliance was only on the provisions of the Constitution, an additional dimension to Constitutional adjudication, of gender discrimination/gender justice issues has emerged in view of the increasing reference by the Hon'ble Supreme Court to International Conventions. It has declared that International Conventions would be enforceable when they elucidate and effectuate the fundamental rights and that the Courts are obliged to apply them when there is no inconsistency with the domestic law.

**27.** India is a signatory to various international covenants and treaties. The Universal Declaration of Human Rights, adopted by the United Nations on 10.12.1948, set in motion the universal thinking that human rights are supreme and ought to be preserved at all costs. There have followed a series of conventions, which reflect the broad international consensus on important issues of global concern.

**28.** Of the International Conventions, two which are very relevant for the present issue are “*Convention on the Elimination of all Forms of Discrimination against Women*” (CEDAW) and “*ILO: Maternity Protection Convention 2000*”.

## CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW):

...

**33.** Article 11 of this Convention which requires States/parties to take all appropriate measures to eliminate discrimination against women in the field of employment is of particular relevance. It is reproduced below:

“Article 11:

1. States/parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) the right to work as an inalienable right of all human beings;

(b) the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

(c) the right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

(d) the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

(e) the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

(f) the right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States/parties shall take appropriate measures:

(a) to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;



*(c) to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child, care facilities;*

*(d) to provide special protection to women during pregnancy in types of work proved to be harmful to them.*

*3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary."*

**34.** By its provisions CEDAW attempts to ensure substantive equality as against merely formal equality. Towards this end, it requires the State/parties to take all appropriate measures to eliminate discrimination against women in the field of employment and provide the same employment opportunities, including the application of the same criteria for selection in matters of employment. To prevent discrimination against women on the grounds of marriage or maternity, it requires States/parties to take appropriate measures to prohibit dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status. It also requires the introduction of maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowance.

## **ILO:MATERNITY PROTECTION CONVENTION 2000:**

**35.** As noted in the preamble to this convention, it takes into account the circumstances of women workers and the need to provide protection for pregnancy, which are the shared responsibility of government and society and seeks to further promote equality of all women in the workforce and the health and safety of the mother and child.

**36.** This Convention has entered into force on 7<sup>th</sup> February, 2002. Thirty countries have ratified it, though India is not amongst them.

**37.** Article 8 of this Convention is concerned with 'Employment Protection and Non Discrimination'. It makes it unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave on that account except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. Article 9 requires members to take measures to ensure that pregnancy does not constitute a source of discrimination in employment.

...

**39.** CEDAW, in particular, has been invoked by the Hon'ble Supreme Court in numerous cases while deciding different issues of gender discrimination.

...

## **CONCLUSION:**

**67.** Based on the aforesaid discussion, there can be no conclusion other than to hold that the action of the respondents in denying appointment to the petitioner merely on account of her pregnancy is arbitrary and illegal. It is violative of Articles 14 and 16 of the Constitution. It is against the express provisions of the International Conventions referred to above. It is against the weight of the judicial precedents from major jurisdictions across the globe interpreting laws prohibiting gender discrimination. Most of all by forcing a choice between bearing a child and employment, it interferes both, with her reproductive rights and her right to employment. Such an action can have no place in modern India.

**68.** Page 5 of the Appendix to DGAFMS/DG 3A letter No. 9450/USG Abd/DGAFMS/DG 3A dated 22.10.2009 to the extent it lays down that pregnancy would render a candidate UNFIT for commissioning is also illegal and unconstitutional and is so declared.

**69.** However, keeping in view the nature and responsibilities of the job in question, it would be open to the respondents to devise any appropriate procedure to either give appointment on selection and grant maternity leave or keep a vacancy against which the woman candidate who is pregnant was selected, reserved for her to be offered to her after confinement.

..."

## IN THE HIGH COURT OF MADRAS

**T. Priyadharsini v. The Secretary to Government, Department of School Education,  
Government of Tamil Nadu & Ors.,**  
and

**R. Gayathri v. The Secretary to Government, Education Department, Fort St. George & Ors.,**  
**2016 SCC OnLine Mad 30096**  
**S. Vimala, J.**

***The petitioners, each having delivered twin children in their first pregnancy, applied for maternity leave for their second pregnancy. Their application was denied on account of the orders issued by the Tamil Nadu government restricting maternity leave and benefits up to two surviving children. In this decision, the validity of these government orders was examined by the Madras High Court.***

Vimala, J.: “ ...

## BRIEF FACTS:-

4. The petitioner in W.P. (MD) No. 9274 of 2015, R. Gayathri, was appointed as Graduate Teacher, on 26.12.2011, and at present working at the third respondent School. This petitioner given birth to twin (girl) children, in the year 2010 and she got conceived again in the year 2015 and delivered a boy baby, on 06.04.2015. Therefore, she applied for maternity leave from 01.04.2015 onwards. The third respondent has forwarded the leave application to the second respondent, on 22.04.2015, for availing the maternity benefits invoking G.O.Ms. No. 237, dated 29.06.1993, but the second respondent has informed the petitioner orally that, as already there are two girl children for the petitioner, she could not avail the benefit of the said Government Order and hence, she could not opt for maternity leave and instead, she should opt for medical leave.

4.1. Similarly placed persons like that of the petitioner, one Mary Josephine Angeli had been granted the benefit of maternity leave for her second delivery, after the delivery of twin babies during the first delivery.

4.2. The intention of the said Government Order is only to grant maternity leave for two deliveries and not for number(s) of children in each delivery.

...

5.1. As per the proceedings of the second respondent, dated 04.01.2003 and G.O. No. 51 (P&AR) Department, dated 16.05.2011 and G.O.Ms. No. 237, dated 29.06.1993, a woman Government servant with less than two surviving children are allowed to take maternity leave for a period of 180 days from the date of its commencement.

5.2. This petitioner (T. Priyadharsini) gave birth to twin children (one male and one female) on 08.07.2011 and then applied for second maternity leave on 12.10.2014. As per G.O.Ms. No. 51, dated 16.05.2011, maternity leave was sanctioned to the petitioner for 179 days, i.e., from 13.10.2014 to 09.04.2015 and after leave, she was permitted to join duty on 10.04.2015. But to the shock and dismay of the petitioner, she received the impugned proceedings of the sixth respondent, dated 21.04.2015, on the basis of the proceedings of the fourth respondent, dated 09.04.2015, stating that in the maternity leave application of the petitioner, dated 07.04.2015, the petitioner has not furnished the fact that she already had two surviving children, therefore, she is not entitled to avail maternity leave for the second time.

...

6. The issue, whether a married woman Government Servant is entitled to get fully paid maternity leave, if she has already two surviving children, when the Government order in G.O.Ms. No. 173, dated 27.06.1997, stipulates that on and from 29.06.1993, maternity leave shall be granted to a woman Government servant with less than two surviving children has been answered by this Court, in detail, in W.P. (MD) No. 13555 of 2009 (*J. Sharmila v. The Secretary to Govt. Education Department, Govt. of Tamil Nadu*).

7. According to the petitioners, the said order is squarely applicable to the facts of the case and the petitioner is entitled to avail 180 days of maternity leave, as per G.O.Ms. No. 237, dated 29.06.1993 and G.O.Ms. No. 51, dated 16.05.2011...

...

**16.** The object of the Maternity leave has been highlighted by the Hon'ble Supreme Court in the decision reported in *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*, on 8 March, 2000, in Special Leave Petition (Civil) 12797 of 1998, where-under it has been held as follow:—

“A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. Women who constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work; they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre or post-natal period.”

**17.** In this background, this Court has to consider whether the two children norm discovered and adumbrated by the Government in G.O.Ms. No. 237, School Education Department, dated 29.06.1993, is valid.

**17.1.** Executive instructions cannot replace the substantive law. If the concern of the State Government is to afford protection to the women during/at or after delivery, then the rule cannot be based upon the number of children delivered in each delivery and it should be based on the delivery itself.

**17.2.** The interpretation of law cannot defeat the very purpose for which the law was enacted. Therefore, the orders passed by the respondents, declining maternity leave and ordering recovery of salary paid for the eligible maternity period, have to be set-aside.

**18.** Unless there is a law prohibiting/restricting the number of delivery [*sic*] in order to have indirect control over population, then the Government cannot decline maternity leave, fixing the number of children delivered in each delivery as the basis.

**19.** It is appropriate to quote the highlights of the Maternity Benefit (Amendment) Bill, 2016, as passed by Rajya Sabha, on 11<sup>th</sup> August 2016, which reads as under:—

Highlights of the Bill:

The Act provides maternity leave up to 12 weeks for all women. The Bill extends this period to 26 weeks. However, a woman with two or more children will be entitled to 12 weeks of maternity leave.

An employer may permit a woman to work from home, if the nature of work assigned permits her to do so. This may be mutually agreed upon by the employer and the woman.

**19.1.** From the amendment proposed, it is evident that the law is marching towards upholding of rights of women in equal opportunities in employment sector and the increase in the period of maternity leave would reflect the concern for the proper growth and development of the child. When the legislation is progressive, the interpretation cannot be retrogressive.

**19.2.** When the employment opportunity is at global level, the interpretation of welfare laws should be towards attracting competent workforce towards India and not to repel them away from India.

**20.** For the foregoing reasons,...the writ petitions are allowed as prayed for. No costs.”

## IN THE HIGH COURT OF KERALA

Mini K.T. v. Life Insurance Corporation of India

2017 SCC OnLine Ker 41588

Muhammed Mustaque, J.

***The petitioner's employment was terminated by the respondent on grounds of unauthorised absence, disregarding her request for extension of leave and transfer to her husband's place of employment for the purpose of availing effective care facilities for their disabled child. The appellate authority, although sympathetic to the petitioner's case, upheld the order of termination of employment in light of the larger organisational interest. In this writ petition, the High Court examined whether women had a right to non-discrimination in employment on the basis of compelling family care giving responsibility under the fundamental rights guaranteed under Articles 14, 15, 16 and 21 of the Indian Constitution and the international human rights framework.***

Mustaque, J: "...

2. A child born to a family sees the world first through the eyes of his mother and develops his cognitive skills through the vision of his family. In earlier centuries, predominantly, in agrarian society, the role of woman was limited to taking care of children, household and family. Social conditions of modern family underwent transformation due to industrialisation and urbanisation. As a result, the social and legal concept related to the society also got changed. Motherhood then has become a contentious issue in the modern society, particularly, in economic frontier, as the competing market interests override notions of culture and social justice like gender equity. Identity of a women is often tangled within the patriarchal structure of a commercially or profit motivated enterprise which dare to see mothering or family responsibility remain subordinate to their interest. Complexity of working environment as above is designed by an architecture without adhering to rules of gender equality; often overwhelmingly to suit men. In this writ petition, a distressed mother, a working woman, finds herself confronted with the institutional structure of her employer. She was thrown out of her service for continuous absence for taking care of her differently abled child. The disciplinary authority after enquiry found that absence from employment to take care of such child cannot be a reason to remain out of service. Treating unauthorised absence from service as misconduct, not justifying her continuation in service, she was removed.

3. Brief facts which are not in dispute are as follows:

The petitioner Smt. K.T. Mini, Assistant with the Life Insurance Corporation of India (hereinafter referred to as the "Corporation"), a State owned Insurance group, had unblemished and uninterrupted 17 years of service before she was removed. She joined service as an Assistant on 24.11.1989. All her trouble seems to have started on the birth of her second girl child. She was born on 14.11.2001. She was afflicted with chicken pox after two years. Later she developed speech impairment and abnormal behavior. According to the petitioner, doctors treating her, diagnosed her condition as mild autism. She was at that time working at Calicut. She took her daughter to Chennai sometime in the year 2007 on the firm belief that the child would get a better treatment. Child was admitted in Priya Speech and Hearing Centre, Madippakam Chennai. She applied for transfer to Chennai on 20.6.2007. She also applied for extra ordinary leave before proceeding for leave on 29.6.2007. Her husband, at that time, appears to be working as the Manager of a private Bank at Tirupur. It appears that she was granted LWA till 30.4.2008. In the meanwhile, her husband got a job in Bahrain in Middle East. Therefore, during the period of leave, on 28.1.2008, Mini made another request to cancel her request for transfer to Chennai and permit her to go abroad. She also requested for issuance of no objection certificate. No objection certificate was issued for obtaining passport. On 21.4.2008, she sought an extension of leave of 60 days on the ground that she has to join her husband abroad. In the meanwhile, the petitioner's request for extension has been rejected from 1.5.2008. This appears to have been communicated to her as per Ext.P6 dated 15.7.2008. The petitioner was directed to join duty within 15 days. The petitioner by Ext.P7 dated 27.7.2008 narrated the circumstances under which she has to stay back in Bahrain. The reason being that she need to take care of her child and she found the facilities in Bahrain, of par excellence and she could do well with the support of her husband. Ignoring her request, she was proceeded under disciplinary action. In a response to show cause notice, she reiterated the circumstances for granting her special

leave to take care of her child. She also moved the Chairman of LIC narrating her grievance. She even requested to get a transfer to any of the Branches in Bahrain. All that ended in vain for the simple reason that overstay of the petitioner without sanction of leave is found in violation of LIC (Staff) Regulations, 1960. After enquiry, the petitioner has been ordered to be removed from service. As I adverted earlier, there is no dispute regarding the facts involved. Interestingly, the appellate authority was considerate regarding the petitioner's reason for not joining duty, however, finding that such sympathetic approach is against organisational interest, did not interfere with the order passed by the disciplinary authority. It is appropriate to reproduce the findings of the appellate authority in this regard which would better tell how conflict between identity of a woman; organisational interest and motherhood of working women remain incongruous for want of protective measures under law.

"...in her appeal, the appellant has mainly contended that her prolonged unauthorised absence was mainly for the treatment of her daughter who was suffering from certain developmental disabilities and that she had to leave for Bahrain only for her husband's moral support and also for availing effective training/therapies for her sick child. In this regard, I may state that the appellant's problems, as a mother, are quite understandable and deserve all pity. On the other hand, viewing broader interest of the Organisation, Office cannot run without the support of its employees and long absence from work of any employee is sure to deter our services to customers. It was for this reason that the appellant was advised repeatedly to report for duty. Records reveal that the appellant had been given ample leniency in the matter of availing leave which only shows that Office had been considerate and sensitive to her problems. However, as pointed out earlier, viewed from the office angle, organisational interest overweighs individual interest. I have also gone through the representations dated 08/06/2010 and 18/10/2010 subsequent to her preferring the appeal against the Order of the Disciplinary Authority. I have only come to conclusion that in spite of being advised with all seriousness to join duty, she had not heeded to our advice and had taken her own time to settle down in India and prefer a representation. While leaving India, she did not obtain prior permission from the Office and it only shows that she had taken the Office for granted in the matter of extending her absence. Although her problems may be genuine, it is not possible for the Office to grant leave indefinitely to every employee who is undergoing similar problems. Therefore, from the Organisational point of view, her unauthorized absence cannot be justified."

(emphasis supplied)

4. In the light of the undisputed facts, this court is called upon to adjudicate on a unique problem related to working women in Constitutional context of fundamental rights. Can a State or its instrumentality as an employer discriminate a woman employee based on compelling family care giving responsibility?

5. Though, there is no protective legislation to protect a working woman against compelling family responsibility discrimination, the Constitutional court cannot ignore involvement of fundamental rights as against the State. The question of legality of disciplinary proceedings should not be assessed in the narrow compass of rules or regulations of the Corporation, but rather within the framework of fundamental rights qua principles relating to family responsibility developed through International Human Rights Law embedded into our constitutional principles. The standards and norms enunciated under the International Human Rights Law can be juxtaposed while assimilating Fundamental Rights of citizens which are not inconsistent with domestic law in India. (See judgments in *Vishaka v. State of Rajasthan* [(1997) 6 SCC 241]; *Pratap Singh v. State of Jarkhand* [(2005) 3 SCC 551] and *National Legal Services Authority v. Union of India* [(2014) 5 SCC 438].

...

## RELEVANT INTERNATIONAL LAWS AND ITS IMPACT:

12. Any debate on human rights begins with principles enunciated in universal declaration of human rights. Article 16 of UDHR states as follows:

"Article 16(3). The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

**13.** Article 25(2) of UDHR provides as follows:

“Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

**14.** In International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966:

“Article 10 The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also 14 The Core International Human Rights Treaties set age-limits below which the paid employment of child labour should be prohibited and punishable by law.”

**15.** International Covenant on Civil and Political Rights (ICCPR) was ratified by India on 11.12.1977. ICCPR provides as follows:

“Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”

**16.** Convention on the Rights of the Child adopted by General Assembly resolution 44/25 of 20 November 1989 states:

“Article 5 States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 23(4). States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.”

**17.** Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the United Nations General Assembly on 18.12.1979. This convention had significant place for evolving legal principles to determine rights of women.

**18. Article 1 of CEDAW provides as follows:**

“Article 1

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

**19. Articles 2(d) & 2(e) of CEDAW states as follows:**

“Article 2

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;”

**20. Article 11 of CEDAW contemplates elimination of discrimination against women in employment under broader rights of human rights law. Article 11 reads as follows:**

“Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
- (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.”

**21.** Relying on CEDAW convention in *Vishaka's Case* (supra), the Apex Court held that provisions of the above conventions are binding and enforceable as such in India. It is appropriate to refer para 8 of *Vishaka's case*, which reads as follows:

“8. Thus, the power of this Court under Article 32 for enforcement of the fundamental rights and the executive power of the Union have to meet the challenge to protect the working women from sexual harassment and to make their fundamental rights meaningful. Governance of the society by the rule of law mandates this requirement as a logical concomitant of the constitutional scheme...”

**22.** The Apex Court in, *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*, [(2000) 3 SCC 224], while considering a matter arising under the Maternity Benefit Act, 1961, referred to Article 11 of CEDAW and observed that the principles contained in Article 11 are to be read into with contract of service between Municipal Corporation of Delhi and the women employees (muster roll) working therein. Therefore, there may not be any difficulty in incorporating standards and norms referred in the International Human Rights Law not repugnant to any domestic law to have a vision on justice as enshrined under the Constitution or the Statutory Laws.

**23.** Status, dignity and self respect of a woman as mother; evolution of her rights in India: Motherhood is all about love, care, affection, protection, nurturing of child etc. It is a dignity inherent in a woman. Dignity means the quality that holds her in esteem. She is considered to be noble and honourable on account of the status as above. Motherhood is perhaps the most important challenging job in the world. The principles enunciated through the Human Rights Law demand the dignity of the individual is protected. On account of her social status as above, a woman shall not be discriminated while competing with men in the field of employment or in any other segment. The issue involved in this writ petition calls for determination based on the status, dignity and self respect and also on the ground of discrimination. The status essentially involves a question whether motherhood is integral to the dignity of a woman or not. In *Justice K.S. Puttaswamy's case* (supra), the Hon'ble Supreme Court while adverting to the privacy of individual observed that privacy is an essential aspect of dignity. It is further observed that dignity has both intrinsic and instrumental values. According to the Apex Court an intrinsic value of human dignity is an entitlement or a constitutional protection interest in itself. Thus, it was concluded that the family, marriage, procreation and sexual orientation etc are integral to the dignity of individual. To understand the dignity of a woman, the societal background has to be considered. The value cherished and nourished by a society that matters for recognition of such dignity. As adverted above, this court has to consider the issue in the light of Articles 21 and 14, 15 and 16 of the Constitution. For deciding the issue within the scope of Article 21, the Court has to find how Indian society viewed motherhood.

...

**32.** As seen from the discussions as above, motherhood is an integral part of dignity of a woman. Motherhood encompass status, dignity and self respect as elements. Article 21 protects life and personal liberty. It can be deprived only in accordance with the procedure established by law. Motherhood is an option. In this Universe life of everyone is an option of his parents, but that does not mean that motherhood has to be subjugated to any other interest. Right to procreation is intrinsically associated with right to live. It is a basic right of man. Thus, choice of option does not change character of such right as fundamental right. In general, employer has no legal obligation to have concern over employee's private affairs. However, this has an exception, if those private affairs are interest protected as fundamental rights. To understand the nature of fundamental rights, in fact, in the foregoing paragraph, this court had adverted to the standards and norms developed through international human rights law.

**33.** Coming back to the question of dignity, those dignity has to be understood in the societal background. Indian cultural and traditional practices would go to show that motherhood is an essential part of family responsibility. International Human Rights Law thus protect dignity of woman and also family. The Constitution thus demand interpretation of its provisions in that background. Person-hood of a woman as mother is her acclaim of individuality essentially valued as liberty of her life. This was so designed by culture, tradition and civilisation. Mother's role in taking care of the child has been considered as an honour; she enjoyed such status because of her position in respect of the child. If on any reason she could not attend her workplace due to her duties towards child (compelling circumstances), the employer has to protect her person-hood as “mother”. If not that, it will be an affront to her status and dignity. No action is possible against a woman employee for her absence from duty on account of compelling circumstances for taking care of her child. No service Regulations can stand in the way of a woman for claiming protection of her fundamental right of dignity as a mother. Any action by an employer can be only regarded as a challenge against the dignity of a woman. Motherhood is not an excuse in employment but motherhood is a right which demands protection in given circumstances. What employer has to consider is whether her duty attached to mother prevented her from attending employment or not. As already adverted above, motherhood is an inherent dignity of woman, which cannot be compromised.



**34.** A mother cannot be compelled to choose between her motherhood and employment. A woman employee is not expected to surrender her self respect fearing action against her for not being able to attend duty for compelling family responsibility. John Rawls in the book, “A Theory of Justice”, identifies that in a just Society, self respect is not subject to political bargaining while parties in original position thrust for justice as fairness. He describes self respect thus:

“67. SELF-RESPECT, EXCELLENCES, AND SHAME

...We may define self-respect (or self-esteem) as having two aspects. First of all, as we noted earlier, it includes a person's sense of his own value, his secure conviction that his conception of his good, his plan of life, is worth carrying out. And second, self-respect implies a confidence in one's ability, so far as within one's power, to fulfill one's intentions. When we feel that our plans are of little value, we cannot pursue them with pleasure or take delight in their execution. Nor plagued by failure and self-doubt can we continue in our endeavors. It is clear then why self-respect is a primary good. Without it nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them. All desire and activity becomes empty and vain, and we sink into apathy and cynicism. Therefore the parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect. The fact that justice as fairness gives more support to self-esteem than other principles is a strong reason for them to adopt it.”

...

**36.** In patriarchy, woman belonged to kitchen. It needs to be realised that girls do have a dream and woman do have a vision, and motherhood cannot be seen as a burden on them to pursue such dreams and visions. The court while considering amplitude and meaning of life under Article 21 of the Constitution has to embrace its full meaning in the societal background on which the court is called upon to decide such disputes. Thus, a woman employee cannot be thrown out from service for remaining absent on account of taking care of child, if such taking care is indispensable for her. It is made clear that it is only in compelling circumstances, such right can be claimed and protected. In the enforcement of fundamental right, the employer cannot raise a plea to defend themselves by referring to financial implication or organisational interest. Whatever be the inconvenience that the employer may suffer, that is no excuse against claim of protection of fundamental rights. Our culture, tradition and practice venerate motherhood; our Constitution proclaim and protect status, dignity and self-respect of motherhood; let our deeds, action and decision not be allowed to become profane on motherhood of a woman.

**37.** The issue has another dimension in the context of Articles 14, 15 and 16 of the Constitution. Our Constitution proclaims through Preamble, the equality of status and opportunity. When a dignity is denied, that would amount to denial of status. That denial is a discrimination and amounts to violation of equality before law and equal protection before law as enshrined under Article 14. The fundamental rights are considered as part of a common thread of liberty, therefore, fundamental rights enumerated under different articles may overlap. A woman employee cannot be discriminated on account of compelling family responsibility. Nor can she be thrown out from employment on account of compelling family responsibility. The Constitution makers foresaw woman can be deprived from opportunity in public employment on account of her position in the traditional Society. Constitutional provisions, therefore, want to ensure that woman shall not be discriminated on account of her sex. Right to equal opportunity for a woman, for office or position is not possible, if her shackles of chain to confine her to household, is not removed. Their familial obligation cannot hamper her prospects of obtaining employment or continuing in employment. Our constitutional scheme under Articles 14 to 16 is well designed to insulate any discrimination against woman likely to be suffered by her on account of her familial obligations. Her womanhood as mother flows from her moral personality and can be distinguished as a superior right in any social standards. Any denial of such status certainly would offend protection accorded to her under Articles 14 to 16.

**38.** The crux of determination is whether a woman employee is unjustly denied an opportunity to compete with men in public employment.

**39.** Fairness in the workplace is a facet of equal opportunity in employment. The organisation should have policies in place to prevent discrimination. In the absence of any Regulations protecting her, the constitutional court has to adopt an approach reconciling service Regulations with Fundamental Rights to protect from any impending discrimination. Therefore, the service Regulations have to be read in harmony with the constitutional principles and those Regulations cannot be understood having an operational domain to invalidate such Fundamental Rights conferred on woman under the Constitution. Thus, any action of the employer denying an opportunity to woman to compete with men in public employment on account of her obligation as a woman, as a mother would amount to discrimination.

**40.** Convention on rights of child, cast an obligation on the State to respect the responsibility, rights and duties of parents. ICESCR Convention also obligates the State to take special measures for protection of children without any discrimination. UDHR also mandates that motherhood and child are entitled for special care. A woman as a mother, in fact, discharges those obligations cast on her which the State had been mandated to protect under the International conventions and laws. The modern State is having a pervasive control over the family. The State declared right of children upto elementary school as a Fundamental Right. The State also under Juvenile Justice (Care and Protection of Children) Act, 2015 protects the best interest of the child. Any neglect in the welfare of child or failure to secure best interest in child would entail in taking over custody of the child by the State through its agencies. State invested its resources on children. It is in that background the care giving to a child by a mother has to be addressed. A woman cannot therefore be discriminated on account of her compelling family responsibility of care giving to a child.

**41.** There is no right for an employee to get leave. Right to obtain leave would depend upon service Regulations. However, in the context of a claim based on fundamental right, the right to claim for leave has to be understood from the perspective of Fundamental Right. The fact that a woman discharges her duties as a mother, cannot be a reason to claim leave or to remain absent from employment in the absence of enabling provisions. She will have to show that she was deprived of attending duties on account of child care. There must be a correlation between absence and reasons for such absence. If on account of compelling familial obligation, a woman employee is unable to attend duty, that cannot be a reason to initiate any disciplinary proceedings against her. A compelling circumstance alone can be considered for such absence.

**42.** How does a compelling circumstance arise for consideration in a given context? It has to be ascertained whether a woman employee was prevented on account of the responsibility attached with the family and a woman employee has no other option in those circumstances. In the absence of protective legislation, the court can consider only 'compelling circumstance' in the sense protecting a woman employee under negative conception of liberty. In negative concept of liberty, the State is expected to protect its citizen from interference of others. In all other circumstances, a woman employee can claim only through positive liberty which requires a legislation. In a famous article, Two Concepts of Liberty, published in the year 1958, Isaiah Berlin refers to the concept of negative and positive liberty. The author introduced this concept beautifully in narratives in a prelude to the article...

**43.** It is not possible for the court to determine the area that falls for positive liberty. The court can very well determine existence of negative liberty, if the liberty is allowed to be encroached that might cause harm to her. 'Harm' means to refer, injury to her own individual value as protected 'interest'. This is the criteria to find out compelling circumstances. Consideration of the issues involved in this case:

**44.** In this case, there are two charges levelled against the petitioner; one is for remaining absent and the other for going abroad without permission.

**45.** In respect of the first charge, it is to be noted that the petitioner never wanted to be absent from employment. She requested the Corporation to transfer her to Chennai so as to enable her to provide better treatment to her child. This was not acceded. When the petitioner moved to Bahrain, she also sought a transfer to Bahrain. According to her, in Bahrain she found out better facilities to take care of her child. This was also not considered. Autism impacts communication, language and social skill. The study in *Embodying Motherhood* supra, the author refers to the position of the mother in such a situation as follows:...

**46.** The mother in such a situation has to give all her care to the child in precedence to any other affairs. That priority cannot be a reason for initiating disciplinary proceedings against her. If there is any causal connection between her absence and child care, the Corporation is bound to inquire and to make necessary adjustments for her. The Corporation could have considered her request, to transfer her to any other place where they can accommodate her to continue with the treatment of her child. The Corporation remained insensitive to the cry and love of a mother for her child, who suffered mild autism. Perhaps, it is for the reason that the Corporation have no regulation in its place to consider such request. It is to be noted that the Central Government incorporated a rule in the Central Civil Services (Leave) Rules, 1972 by inserting Rule 43C to grant leave to a woman Government servant as 'child care leave' for a maximum period of two years for taking care of upto two children. It shows that the State is sensitive about the issue of child care. The petitioner applied for extra ordinary leave. As per the Regulation of the Corporation, extra ordinary leave can be granted to an employee when no leave is due, not exceeding three months on any one occasion and 12 months during the entire period of service (see Regulation 65). Therefore, the Corporation did not accede to the request of the petitioner. But that does not fail the Corporation in recognising the petitioner's fundamental rights. The communication between the petitioner and the Corporation would clearly go to show that the petitioner does not want to remain absent

from employment but only wanted to work at a place where she can provide better treatment to her child. All her communication would go to show that she was absent as she was compelled to remain at a place where she could give the best treatment to her child. As already noted, it is the insensitiveness of the organisation that led to the conclusion that the petitioner was unauthorisedly absent.

**47.** The next serious charge against the petitioner is going abroad without permission. It is to be noted that the petitioner made a request as per Ext.P1 to go abroad. The Corporation did not reject her request. On the other hand, the Corporation issued a no objection certificate for obtaining passport. The Corporation never raised any objection to her going abroad. On the other hand, the Corporation knowing well that she was at abroad, directed her to report for duty as seen from Ext.P6. That itself would show that Corporation had no intention to take action against her for going abroad without getting permission. It may be true that in terms of Regulation 31, no employee shall remain absent from station without permission of the Corporation. However, the Corporation had never raised any objection. Further, there is no specific Regulation that written permission shall be obtained before going abroad. Ext.P1 request and Ext.P2 no objection certificate issued by the Corporation would clearly establish that the Corporation had no objection in allowing the petitioner to go abroad. Therefore, the charge on this misconduct is legally unsustainable.

**48.** Thus, the disciplinary proceedings were initiated against the petitioner as the Corporation had no measures to deal with the situation encountered by the petitioner. Incapacity of the organisation to deal with woes of a woman employee cannot be capitalised to penalise her. The inevitable conclusion thus has to be drawn is that the impugned orders have to be set aside and the petitioner has to be reinstated in service forthwith. However, taking note of the fact that the petitioner was requesting for extra ordinary leave without pay, this court is not ordering back wages. The petitioner will be entitled to reckon the broken period of service for all other service benefits. Thus, the petitioner is ordered to be reinstated forthwith.

**49.** Before parting with this judgment, this court has to remind the State the requirement of a legislation to protect an employee from discrimination based on family responsibility. Family responsibility may be equally applicable to male and woman employees. The State has to pursue family as an important unit for its own sustenance. The employers both in private and public remain oblivious as to the right of the employees on account of family responsibility and they are equally insensitive to such rights. Family responsibility discrimination arises when an employee suffers an adverse employment action owing to family care giving responsibility. Family responsibility may occur in different circumstances like, taking care of elderly parents, accidents, child care, diseases etc. It may not be possible for this court to enumerate all the circumstances. If an employee is able to demonstrate that on account of family responsibility, she/he requires adjustments in workplace, the employer or organisation must be in a position to accommodate such claim of the employee. The importance given to the family in the tradition and culture of this great Country must survive. It is for the State to come out with a legislation protecting employees against family responsibility discrimination. Therefore, the Registry shall forward a copy of this judgment to the Law Commission of India, Department of Labour and Social Welfare of the State and the Union and also to the Law Department of the Union and the State. The writ petition is disposed of as above. No orders as to costs.”

## IN THE SUPREME COURT OF INDIA

**Navtej Singh Johar & Ors. v. Union of India**  
(2018) 10 SCC 1

**Dipak Misra C.J., and R.F. Nariman, A.M. Khanwilkar, D.Y. Chandrachud and Indu Malhotra, JJ.**

***A five-judge bench of the Supreme Court read down Section 377 of the Indian Penal Code, 1860 in so far as it criminalised consensual sexual intercourse between adults of the same sex. In his concurring opinion, Chandrachud J., questioned the correctness of the Court's decision in Air India v. Nergesh Meerza ((1981) 4 SCC 335), on grounds of perpetuating sex and gender stereotypes by placing the entire burden of family planning and raising children on women.***

**Chandrachud, J.:** “...

**430.** One of the earliest cases decided in 1951 was by the Calcutta High Court in *Mahadev Jiew v. B.B. Sen* [*Mahadev Jiew v. B.B. Sen*, 1951 SCC OnLine Cal 182 : AIR 1951 Cal 563] . Under Order 25 Rule 1 of the Code of Civil Procedure, men could be made liable for paying a security cost if they did not possess sufficient movable property in India only if

they were residing outside India. However, women were responsible for paying such security, regardless of whether or not they were residing in India. In other words, the law drew a distinction between resident males who did not have sufficient immovable property, and resident females who did not have sufficient immovable property. Upholding the provision, the Calcutta High Court held: (SCC p. 460, para 31)

*“31. Article 15(1) of the Constitution provides, inter alia, — The State shall not discriminate against any citizen on grounds only of sex. The word “only” in this article is of great importance and significance which should not be missed. The impugned law must be shown to discriminate because of sex alone. If other factors in addition to sex come into play in making the discriminatory law, then such discrimination does not, in my judgment, come within the provision of Article 15(1) of the Constitution.”*

(emphasis supplied)

This interpretation was upheld by this Court in *Air India v. Nergesh Meerza* [*Air India v. Nergesh Meerza*, (1981) 4 SCC 335 : 1981 SCC (L&S) 599] (“*Nergesh Meerza*”). Regulations 46 and 47 of the Air India Employees' Service Regulations were challenged for causing a disparity between the pay and promotional opportunities of men and women in-flight cabin crew. Under Regulation 46, while the retirement age for male Flight Pursers was fifty-eight, Air Hostesses were required to retire at thirty-five, or on marriage (if they married within four years of joining service), or on their first pregnancy, whichever occurred earlier. This period could be extended in the absolute discretion of the Managing Director. Even though the two cadres were constituted on the grounds of sex, the Court upheld the Regulations in part and opined: (SCC p. 362, para 68)

*“68. Even otherwise, what Articles 15(1) and 16(2) prohibit is that discrimination should not be made only and only on the ground of sex. These Articles of the Constitution do not prohibit the State from making discrimination on the ground of sex coupled with other considerations.”*

(emphasis supplied)

**431.** This formalistic interpretation of Article 15 would render the constitutional guarantee against discrimination meaningless. For it would allow the State to claim that the discrimination was based on sex and another ground (“Sex plus”) and hence outside the ambit of Article 15. Latent in the argument of the discrimination, are stereotypical notions of the differences between men and women which are then used to justify the discrimination. This narrow view of Article 15 strips the prohibition on discrimination of its essential content. This fails to take into account the intersectional nature of sex discrimination, which cannot be said to operate in isolation of other identities, especially from the socio-political and economic context. For example, a rule that people over six feet would not be employed in the army would be able to stand an attack on its disproportionate impact on women if it was maintained that the discrimination is on the basis of sex and height. Such a formalistic view of the prohibition in Article 15, rejects the true operation of discrimination, which intersects varied identities and characteristics.

**432.** A divergent note was struck by this Court in *Anuj Garg v. Hotel Assn. of India* [*Anuj Garg v. Hotel Assn. of India*, (2008) 3 SCC 11]. Section 30 of the Punjab Excise Act, 1914 prohibited the employment of women (and men under 25 years) in premises where liquor or other intoxicating drugs were consumed by the public. Striking down the law as suffering from “incurable fixations of stereotype morality and conception of sexual role”, the Court held: (SCC pp. 16-17, paras 42-43)

*“42. ... one issue of immediate relevance in such cases is the effect of the traditional cultural norms as also the state of general ambience in the society which women have to face while opting for an employment which is otherwise completely innocuous for the male counterpart. ...*

*“43. ... It is State's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow. Any other [Ed.: The matter between two asterisks has been emphasised in original.] policy inference [Ed.: The matter between two asterisks has been emphasised in original.] (such as the one embodied under Section 30) from societal conditions would be oppressive on the women and against the [Ed.: The matter between two asterisks has been emphasised in original.] privacy rights [Ed.: The matter between two asterisks has been emphasised in original.] .”*

(emphasis supplied)

The Court recognised that traditional cultural norms stereotype gender roles. These stereotypes are premised on assumptions about socially ascribed roles of gender which discriminate against women. The Court held that:

“insofar as governmental policy is based on the aforesaid cultural norms, it is constitutionally invalid”.

In the same line, the Court also cited with approval, the judgments of the US Supreme Court in *Frontiero v. Richardson* [*Frontiero v. Richardson*, 1973 SCC OnLine US SC 101 : 36 L Ed 2d 583 : 411 US 677 (1973)]. The case concerned a statute that allowed service-members to claim additional benefits if their spouse was dependent on them. A male claimant would automatically be entitled to such benefits while a female claimant would have to prove that her spouse was dependent on her for more than half his support. The Court struck down this statute stating that the legislation violated the equal protection clause of the American Constitution.] and *United States v. Virginia* [*United States v. Virginia*, 1996 SCC OnLine US SC 74 : 135 L Ed 2d 735 : 518 US 515 (1996)]. The case concerned the Virginia Military Institute (VMI), which had a stated object of producing “citizen-soldiers”. However, it did not admit women. The Court held that such a provision was unconstitutional and that there were no “fixed notions concerning the roles and abilities of males and females”.], and Marshall, J.’s dissent in *Dothard v. Rawlinson* [*Dothard v. Rawlinson*, 1977 SCC OnLine US SC 148 : 53 L Ed 2d 786 : 433 US 321 (1977)]. The case concerned an effective bar on females for the position of guards or correctional counsellors in the Alabama State Penitentiary system. Justice Marshall’s dissent held that prohibition of women in “contact positions” violated the Title VII guarantee.]. The Court grounded the anti-stereotyping principle as firmly rooted in the prohibition under Article 15.

**433.** In *National Legal Services Authority v. Union of India* [*National Legal Services Authority v. Union of India*, (2014) 5 SCC 438] (“NALSA”), while dealing with the rights of transgender persons under the Constitution, this Court opined: (SCC p. 488, para 66)

“66. Articles 15 and 16 sought to prohibit discrimination on the basis of sex, recognising that sex discrimination is a historical fact and needs to be addressed. The Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalisations of binary genders. Both gender and biological attributes constitute distinct components of sex. The biological characteristics, of course, include genitals, chromosomes and secondary sexual features, but gender attributes include one’s self-image, the deep psychological or emotional sense of sexual identity and character. The discrimination on the ground of “sex” under Articles 15 and 16, therefore, includes discrimination on the ground of gender identity.”

(emphasis supplied)

This approach, in my view, is correct.

**434.** In *Nergesh Meerza* [*Air India v. Nergesh Meerza*, (1981) 4 SCC 335 : 1981 SCC (L&S) 599], this Court held that where persons of a particular class, in view of the “special attributes, qualities” are treated differently in “public interest”, such a classification would not be discriminatory. The Court opined that since the modes of recruitment, promotional avenues and other matters were different for Air Hostesses, they constituted a class separate from male Flight Purser. This, despite noting that

“a perusal of the job functions which have been detailed in the affidavit, clearly shows that the functions of the two, though obviously different overlap on some points but the difference, if any, is one of degree rather than of kind” (SCC p. 359, para 60).

**435.** The Court did not embark on the preliminary enquiry as to whether the initial classification between the two cadres, being grounded in sex, was violative of the constitutional guarantee against discrimination. Referring specifically to the three significant disabilities that the Regulations imposed on Air Hostesses, the Court held that: (*Nergesh Meerza* case [*Air India v. Nergesh Meerza*, (1981) 4 SCC 335 : 1981 SCC (L&S) 599], SCC p. 360, para 62)

“62. ... There can be no doubt that these peculiar conditions do form part of the Regulations governing [Air Hostesses] but once we have held that [Air Hostesses] form a separate category with different and separate incidents the circumstances pointed out by the petitioners cannot amount to discrimination so as to violate Article 14 of the Constitution on this ground.”

**436.** The basis of the classification was that only men could become male Flight Pursers and only women could become Air Hostesses. The very constitution of the cadre was based on sex. What this meant was, that to pass the non-discrimination test found in Article 15, the State merely had to create two separate classes based on sex and constitute two separate cadres. That would not be discriminatory. The Court went a step ahead and opined: (*Nergesh Meerza case [Air India v. Nergesh Meerza, (1981) 4 SCC 335 : 1981 SCC (L&S) 599] , SCC p. 366, para 80*)

“80. ... Thus, the Regulation permits an AH to marry at the age of 23 if she has joined the service at the age of 19 which is by all standards a very sound and salutary provision. *Apart from improving the health of the employee, it helps a good deal in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal. Thirdly, it has been rightly pointed out to us by the Corporation that if the bar of marriage within four years of service is removed then the Corporation will have to incur huge expenditure in recruiting additional AHs either on a temporary or on ad hoc basis to replace the working AHs if they conceive and any period short of four years would be too little a time for the Corporation to phase out such an ambitious plan.*”

(emphasis supplied)

**437.** A strong stereotype underlines the judgment. The Court did not recognise that men were not subject to the same standards with respect to marriage. It holds that the burdens of health and family planning rest solely on women. This perpetuates the notion that the obligations of raising family are those solely of the woman. In dealing with the provision for termination of service on the first pregnancy, the Court opined that a substituted provision for termination on the third pregnancy would be in the “larger interest of the health of the Air Hostesses concerned as also for the good upbringing of the children”. Here again, the Court's view rested on a stereotype. The patronising attitude towards the role of women compounds the difficulty in accepting the logic of *Nergesh Meerza [Air India v. Nergesh Meerza, (1981) 4 SCC 335 : 1981 SCC (L&S) 599]* . This approach, in my view, is patently incorrect.

**438.** A discriminatory act will be tested against constitutional values. A discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate. Such a discrimination will be in violation of the constitutional guarantee against discrimination in Article 15(1). That such a discrimination is a result of grounds rooted in sex and other considerations, can no longer be held to be a position supported by the intersectional understanding of how discrimination operates. This infuses Article 15 with true rigour to give it a complete constitutional dimension in prohibiting discrimination.

**439.** The approach adopted by the Court in *Nergesh Meerza [Air India v. Nergesh Meerza, (1981) 4 SCC 335 : 1981 SCC (L&S) 599]* , is incorrect.

**440.** A provision challenged as being ultra vires the prohibition of discrimination on the grounds only of sex under Article 15(1) is to be assessed not by the objects of the State in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights. Any ground of discrimination, direct or indirect, which is founded on a particular understanding of the role of the sex, would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex.

...”

## Endnotes

- 1 Article 19, Constitution of India.
- 2 Article 16 (1), Constitution of India.
- 3 Articles 15 (1) and 16 (2), Constitution of India.
- 4 See *Air India v. Nergesh Meerza*, (1981) 4 SCC 335; *Inspector (Mahila) Ravina v. Union of India*, MANU/DE/3946/2015.
- 5 *Municipal Corporation of Delhi v. Female Workers (Muster Roll)*, (2000) 3 SCC 224.
- 6 (1981) 4 SCC 335.
- 7 (2018) 10 SCC 1.
- 8 2016 SCC OnLine P&H 602.
- 9 1989 SCC OnLine Mad 234.
- 10 (1992) 1 SCC 286.
- 11 (2000) 3 SCC 224. See also *Rakhi P.V. v. State of Kerala*, 2018 SCC OnLine Ker 864 (where the High Court of Kerala extended the protection of the MB Act 1961 to contract employees engaged by the Government).
- 12 2006 SCC OnLine Del 1421.
- 13 2017 SCC OnLine Ker 41588.
- 14 (2013) 3 Mad LJ 493.
- 15 2015 SCC OnLine Bom 6127.
- 16 (2015) 1 KLJ 494.
- 17 (2015) 221 DLT 756.
- 18 Section 5 (4), Maternity Benefits Act, 1961.
- 19 Section 3 (ba), Maternity Benefits Act, 1961.
- 20 2016 SCC OnLine Mad 30096. See also *J. Sharmila v. The Secretary to Govt. Education Department, Govt. of Tamil Nadu W.P. (MD) No. 13555 of 2009* (Order dated Oct. 19, 2010) (High Court of Madras).
- 21 See also *Javed v. State of Haryana*, (2003) 8 SCC 369 (upholding a law that disqualified otherwise eligible persons from holding office in local government institutions on the basis of the number of children one has).
- 22 2013 SCC OnLine Del 2152.
- 23 MANU/DE/3946/2015.
- 24 U.N. Office of the High Commissioner for Human Rights, “Status of Ratification Interactive Dashboard—India,” <http://indicators.ohchr.org/>.
- 25 Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001 (Final Outcome) (International Law Commission [ILC]), contained in U.N. Doc. A/56/49(Vol. I)/Corr.4 (2001), Arts. 3-4.
- 26 *Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.







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