ABORTION AS A GROUND FOR DIVORCE UNDER HINDU LAW

IN AN important pronouncement in *Sushil Kumar Verma* v. *Usha*,[1] Justice Mahinder Narain of the Delhi High Court has held that aborting the foetus in the very first pregnancy by a deliberate act without the consent of the husband amounts to cruelty within the meaning of section 13(1)(*ia*) of the Hindu Marriage Act 1955 (HM Act).

In this case the wife, who became pregnant within one month of her marriage, aborted the foetus the following month in a government approved pregnancy termination centre with the help of a registered medical practitioner without consulting her husband. The husband was kept completely in the dark about the fact of pregnancy as also of its abortion. His petition for the grant of a decree of divorce on the ground of cruelty was dismissed by the district court, but the High Court granted it on appeal. In effect, the High Court's decision makes the husband's consent mandatory in matter of termination of pregnancy. Further, in the court's opinion, if one of the parties to marriage deliberately avoids progeny or procreation of children, without the consent of the other spouse, the very purpose of marriage is frustrated.[2]

The decision is no less significant as it raises two crucial issues :

(1) Does a woman have a right to decide about her own physical health, which includes a right to limit and space pregnancies?

(2) How far can the ambit of the concept of cruelty be stretched or liberalised for the purpose of granting divorce? In other words, will an isolated act of an induced abortion by the wife without her husband's consent amount to cruelty under HM Act?

The court in this regard chose to base its opinion on an old English decision,[3] but failed to take note of the present English law concerning termination of pregnancy. Under English law, the husband does not have a right to be consulted in matters of termination of pregnancy.[4] In the United States also, the law in this respect is the same.[5] Above all, the court seems to have disregarded the legal position in India itself, pertaining

---

1. A.I.R. 1987 Del. 86.

2. *Id.* at 89.

3. *White* v. *White*, [1948] 2 All E.R. 151.

4. *Margaret, Duchess of Agryll* v. *Duke of Agryll*, [1965] 1 All E.R. 611; English Abortion Act 1967. See also, *Paton* v. *Trustees* of *B.P.A.S.*, [1978] 2 All E.R. 987; D.C. Bradley, "A Woman's Right to Choose," 41 *Mod. L. Rev.* 365 at 370 (1978).

5. See *Planned Parenthood of Central Missouri* v. *John C. Danforth*, 428 U.S. 52 at 67-68 (1976).

to this matter. The Medical Termination of Pregnancy Act 1971 (MTP Act) has liberalised the law relating to abortion to a great extent.

The purpose envisaged under this Act was to boost and effectuate the government's family planning schemes, a motive which was cautiously denied by the government only to satisfy opposition from the conservatives.[6]

The MTP rules[7] as revised by the Government of India in 1975[8] have made it competent for a woman to have her unwanted pregnancy terminated under the Act,[9] without the consent of her husband. She can avail herself of this legal protection in any government hospital or a government approved medical termination of pregnancy centre[10] by filling a form under her signature. Under the rules, only the consent of pregnant woman is mandatory. The consent of her guardian is required only in those cases where she is a minor or a lunatic.[11] The rules also enjoin a duty upon the doctor performing the operation, of observing complete secrecy and confidentiality to his patient;[12] even the husband of the patient is not to be informed of the fact of abortion.[13]

The MTP Act, along with the revised rules was, therefore, envisaged as a milestone in the modernisation of the Indian society through the instrumentality of law. Little did the framers of these rules know that if a woman did resort to these enabling legislations, the foundations of her matrimonial home will be uprooted by the judiciary.

Regarding the right of a woman to take decisions affecting her health, espousing such conservative and orthodox attitudes, authorising a husband to take such decisions, is anachronistic and reactionary. Autonomy and independence of a woman is related directly to her ability to take for herself decisions relating to the procreation and rearing of children. The lack of woman's right to take free decisions in these matters has deprived many a woman of their health, education, employment and their role in family, public and cultural lives, on an equal footing with men.

Despite references to the society's longing for a child,[14] the High Court overlooked the fact that the society comprises women also, and more

6. See K.D. Gaur, "Abortion and the Law in India," 28 *J.I.L.I.* 348 at 355 (1986).

7. The rules were framed in 1972 by the Government of India, exercising its powers under section 6 of the Medical Termination of Pregnancy Act 1971.

8. On the recommendation of a workshop on the implementation of the programme of medical termination of pregnancy at district hospitals and at block levels organised by the World Health Organisation in New Delhi.

9. The grounds on which an unwanted pregnancy can be terminated include, *inter alia*, a risk to the health of the pregnant woman by reason of her actual or reasonably forseeable environment. See MTP Act, s. 3.

10. *Id.* s. 4.

11. Medical Termination of Pregnancy Rules 1972, r. 11(1).

12. *Id.* rr. 16 and 17. Rule 16 requires that the name of patient is not to be entered anywhere except the admission register. As per rule 17, the admission register is to be destroyed after the expiry of five years from the date of the last entry therein.

13. *Id.* r. 19.

14. *Supra* note 1 at 89.

than men, it is women who crave and long for motherhood, even though it is not all fun and play. It means serious business, undergoing through physical and mental trauma of producing a child (indeed which may, at times, would be at the cost of her physical health). Only a woman has to undergo this entire process and, therefore, she must be prepared for it both physically and mentally.

Be that as it may, a deliberate act of causing an abortion with a view only to spite the husband can never be justified. But it appears doubtful as to whether such motive can be attributed in all cases where the husband is not consulted. Advanced medical technology has made abortion easier, though an incontrovertible fact remains that a number of women put themselves to grave physical risks by undergoing abortion—a fact which necessitates the pre-existence of good reasons for her to go to such length involving these risks.

The family planners' wide publicity not to have the first child too soon after the marriage also becomes meaningless if the judiciary chooses to rule differently.

It now remains to be seen whether the abortion in this case has frustrated the very puspose of marriage? One of the prime objectives of marriage, according to the court, is progeny. It said:

> In this country everyone wants to have at least one child, if not more and in fact one of the primary ends of marriage...is to have progeny.[15]

It impliedly concluded that by aborting the foetus in the very first pregnancy, the wife has vitiated the primary purpose of marriage. One wonders whether the court treats abortion as synonymous to sterlisation or tubectomy. Abortions are no hindrance to the conceivement of children and a conclusion, therefore, that this abortion will seal the conception altogether and the husband will be denied the right to have a child for all times to come seems preposterous.

The court said that is no more the requirement of law that cruelty must be of such kind that it should be a cause of danger to life and limb.[16] This observation is sound enough as the Act does not provide a precise definition of cruelty which, even if desirable, is not feasible. Even so the ambit of cruelty cannot be liberalised to such an extent that on the slightest provocation the matrimonial unit is dissolved. The court, while granting divorce, unfortunately forget the warning of Lord Denning, Master of the Rolls. He observed :

> If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatability of temperament ....The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperilled.[17]

---

15. *Ibid.*
16. *Ibid.*
17. *Kaslefsky* v. *Kaslefsky*, [1950] 2 All E.R. 398 at 403.

The question remains : Is an isolated act of induced abortion by the wife so grave as to shatter the entire foundation of her matrimonial home? The court's judgment is in the affirmative, but it is submitted with considerable amount of distress that it appears to be (and is in fact) incorrect. It is against the elements of human dignity and the right of a woman to take decision regarding her physical health. Above all, the court has disregarded Indian law pertaining to medical termination of pregnancy. Its ruling should have supported existing legislation instead of confronting it, as it has the effect of creating a non-existing conflict between the two, *viz.*, MTP Act and HM Act, inasmuch as the court has ruled here that an abortion would result in a divorce under the latter on the ground of cruelty.

*Poonam Pradhan Saxena**

* Lecturer, Campus Law Centre, Faculty of Law, University of Delhi, Delhi.