

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C)6332/2013**

AMY ANTOINETTE MCGREGOR & ANR Petitioners
Through: Mr. Karan S. Thakur, Advocate with
Mr. Vikrant Goyal, Advocate.
Versus

DIRECTORATE OF FAMILY WELFARE
GOVT OF NCT OF DELHI & ANR Respondents
Through: Ms.Nidhi Raman, Advocate for
Respondent No.1.
Ms.Shipra Shukla, Advocate for
Respondent No.2.

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Judgment Reserved on: October 04, 2013
Judgment Pronounced on: October 24, 2013

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

JUDGMENT

: **CHIEF JUSTICE**

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. After medical examination by best doctors and taking medical advice, they found that the cause is some 'Lupus' and it is an Immuno-Suppressive Stipulation which does not physically and practically allow the embryos of the mother to thrive and properly flourish in her body. The doctors therefore advised her to proceed with a Gestational Surrogacy. It is a procedure by which one woman, the surrogate mother, carries a

fertilized donor egg or embryo for the petitioner No.1. It basically involves In-Vitro Fertilization (IVF), which involves mixing of eggs and sperms outside the uterus, followed by implanting the fertilized eggs into the uterus, where the embryo will grow and develop into a baby. This is available, apart from India, in only two countries, i.e., Thailand and America, throughout the world, which offer an assured and medically secure IVF process. For a long time, the petitioners had a desire to have a child but because of the medical problem they could not conceive. Now they thought of using the above technique to get a child. However, for the sake of family balancing they intend to have one girl child and one boy child and for this purpose, in the surrogacy procedure for the petitioners, the prenatal techniques play an essential and important role. 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 Vs. Shri Justice S.R.Tendolkar & Ors.**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.

No costs.

(CHIEF JUSTICE)

**(MANMOHAN)
JUDGE**

OCTOBER 24, 2013
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