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IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

W.P.A. No. 12573 of 2024

Mr. Bipul Kumar Sarkar & Ors.

Vs.

Union of India & Ors.

Mr. Ayan Banerjee,

Mr. Proshit Deb,

Ms. Sanchalita Sarkar

... for the petitioners

Mr. Uday Shankar Bhattacharya,

Ms. Sayani Roy Choudhury

...for the Union of India

Ms. Noelle Banerjee,

Mr. Shayak Chakraborty

...for the State

1. Although the *vires* of section 21(g) of the Assisted Reproductive Technology (Regulation) Act, 2021 has been challenged in the present writ petition, at the time of arguments learned counsel for the Union of India does not press such prayer.

2. Learned counsel for the petitioners contends that both the petitioners (spouses of each other) are Bangladeshi citizens. The petitioners sought the benefit of assisted reproductive technology in a clinic in India under the Assisted Reproductive Technology (Regulation) Act, 2021. Learned counsel appearing for the petitioners places reliance on the definition of assisted reproductive technology as

provided in Section 2(1)(a) of the said Act which defines the said technology with its grammatical variations and cognate expressions to mean all techniques that attempt to obtain a pregnancy by handling the sperm or the oocyte outside the human body and transferring the gamete or the embryo into the reproductive system of a woman.

3. Learned counsel further points out that under Section 21(g) of the 2021 Act, there is a restriction for a woman above fifty years and for a man above fifty five years from availing such technology. It is argued that in the present case, although the petitioner no. 1/husband has crossed the age of fifty-five years now, when the sperm of the petitioner no. 1 was collected, he was under fifty-five years of age. The petitioner no. 2, the wife, is still below the age of fifty years. It is argued that the date of collection of sperm should be the relevant date for the purpose of considering the age bar under the statute.

4. Learned counsel appearing for the Union of India contends that it is doubtful as to whether the petitioners, who are Bangladeshi citizens, can take advantage of the 2021 Act, since by obvious implication, the Act operates within the territorial jurisdiction of India and applies to Indian citizens.

5. Learned counsel appearing for the State points out that a relevant question here would be whether the petitioners, not being Indian citizens, are entitled to enforce their right to have a medical treatment within the territories of India.

6. It is argued that in the event no such right can be attributed to the petitioners, there would not arise any question of infringement of the same and, as such, invocation of writ jurisdiction by this Court.

7. In order to decide first as to whether foreign nationals are entitled to take the benefit of the 2021 Act, a glance at the preamble and the relevant portions of the statement of objects and reasons behind enacting the said Act is necessary.

8. The preamble of the Act reads as follows.

“An Act for the regulation and supervision of the assisted reproductive technology clinics and the assisted reproductive technology banks, prevention of misuse, safe and ethical practice of assisted reproductive technology services for addressing the issues of reproductive health where assisted technology is required for becoming a parent or for freezing gametes, embryos, embryonic tissues for further use due to infertility, disease or social or medical concerns and for regulation and supervision of research and development and for matters connected herewith or incidental thereto.”

9. Insofar as the Statement of objects and reasons is concerned, the same begins with the sentence that Assisted Reproductive Technology (ART) has grown by leaps and bounds in the last few years.

India has the highest growth in the ART centers and the number of ART cycles performed every year. It further goes on to observe that Assisted Reproductive Technology including in-vitro-fertilization has given hope to a multitude of persons suffering from infertility, but it has also introduced a plethora of legal, ethical and social issues. Conspicuously, Serial No. 2 of the statement of objects and reasons, in no uncertain terms, states that India has over the years become one of the major centers of this global fertility industry, with reproductive medical tourism becoming a significant activity.

10. Later on in the said statement, it is also stated that in spite of so much activity in India, there is yet no standardization of protocols and reporting is still very inadequate.

11. Serial No. 3 of the statement of objects and reasons states that the need to regulate ART services is mainly to protect the affected women and children from exploitation.

12. Thus, a bare perusal of the statement of objects and reasons and the preamble shows that India has been recognized therein to have become one of the major centers of this global fertility industry with reproductive medical tourism becoming a significant activity.

13. What the petitioners, who are foreign nationals, seek in the present case is not any right to reside in India but merely to seek the advantage of the legal system of India, which a major center of the global fertility industry. One of the purposes of the Act is, as per the statement of objects and reasons, to facilitate and govern as well as regulate the reproductive medical tourism, which has been recognized therein to be a global fertility industry of which India is a major centre.

14. Thus, I do not find anything in the statute to indicate that the same ought to be restricted to Indian nationals only. Rather, it is obvious from the narrative of the statement of objects and reasons and the preamble that the said technology is meant to be disseminated among the global community, since India has been recognized to be a major centre of the fertility industry.

15. Seen in such context, a composite reading of the relevant provisions of the statute discloses no bar to any foreign national taking advantage of the same. Section 1 of the Act merely provides the name of the Act and that it shall come into force on the date as the Central Government may, by notification in the Official Gazette, appoint, but does not restrict the operation of the Act to Indian nationals.

16. Nothing in the definition clauses also restricts the service being advanced to foreign nationals, subject, of course, to the said foreign nationals coming within the territory of India and seeking such technology.

17. Hence, the objections taken by the Union of India regarding Bangladeshi nationals not being entitled to seek the advantage of the Act is overruled.

18. An interesting question has been raised by the State as to whether any legal or fundamental right of the petitioners is infringed.

19. Article 21 of the Constitution of India, which recognizes the right to life and personal liberty, conspicuously, is not restricted to Indian citizens unlike certain other Articles, such as, Article 19 of the Constitution of India. Article 21 of the Constitution of India reads as follows:

“No person shall be deprived of his life and personal liberty except according to procedure established in law.”

20. Thus, in the present case, what the petitioners seek is a part of their right to life which, by necessary implication, includes the right to propagate one's species. It would be an absurd interpretation of Article 21 of the Constitution of India if the right to give birth to a life or to bring a life on the face of earth is not included within the

right to life, which would be a contradiction in terms.

21. Hence, there is no restriction for even foreign nationals to seek a vindication of their right to life, as canalized in the present case through the 2021 Act, which does not restrict its application to Indian citizens.

22. Seen from such perspective, a perusal of Section 21 of the 2021 Act indicates that the intention of the statute is definitely to ensure that the assisted reproductive technology is undertaken with health gametes/oocytes. To such end, Section 21(g) of the 2021 Act restricts the upper age limit of a woman to fifty years and a man to fifty-five years.

23. It is rather obvious that the point of time when the sperm of the donor was collected is the relevant consideration, since the biological age of the sperm corresponds to the point of time when the same was donated/collected.

24. In modern cryogenic technologies, gametes and embryos are preserved properly for several years. Hence, in the present case, the current biological age of the proposed father, that is, the petitioner no 1, at present is of utterly no relevance in the context of the 2021 statute.

25. Hence, the obvious intention of Section 21(g) of the 2021 Act has to be read to restrict the upper

age limit to the age of the sperm/oocyte which is contributed by the proposed father/mother.

26. Considering from such perspective, the sperm of the petitioner no. 1 was collected when he was under fifty-five years of age and the petitioner no. 2/proposed mother is still within the upper age limit as stipulated in Section 21(g) of the 2021 Act.

27. As such, there is no restriction whatsoever in the petitioners going for assisted reproductive technology from an Indian clinic of the petitioners' choice. Thus, the refusal on the part of the respondent-clinic to extend such services to the petitioners merely on the ground that the petitioner no. 1/husband is at present fifty-seven years of age, cannot be of any relevance whatsoever.

28. However, it should be left to the concerned clinic to ascertain finally before going for such technology, to assess whether the sperm, which was collected from the petitioner no. 1, is still fit to be used for such reproductive technology.

29. Even in the event such gamete is found not to be fit, in view of a previous similar attempt of the petitioners having ended in abortion, it would be open to the petitioners then to seek the benefits of the 2021 Act, keeping in view that the petitioner no. 2 is still underage and as a woman under the 2021 Act, can take the advantage of the statute. There is

no distinction in the statute, insofar as the definition of the woman is concerned, between a married and an unmarried woman.

30. Section 2(1)(u) of the 2021 Act defines ‘woman’ to mean “any woman” above the age of twenty-one years who approaches an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the authorized services of the clinic or bank.

31. Thus, there is no reason why, as the statute itself does not discriminate between a married and an unmarried woman, the Court should read such discrimination into the purview of the statute.

32. Seen from such perspective, the petitioner no. 2, in any event, is entitled to go for assisted reproductive technology. As a “commissioning couple” under Section 2(1)(e) of the 2021 Act means an infertile married couple who approach an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the services authorized of the said clinic or bank, the petitioner no. 2, as a woman, along with her spouse, comprise a commissioning couple, being thus entitled to approach any clinic for the services under the 2021 Act as well.

33. However, in such circumstances, if the preserved sperm/gamete of the petitioner no. 1

does not serve the purpose as per the assessment of the clinic, the petitioners would be at liberty to go for assisted reproductive technology services, however, with the oocyte of the petitioner no. 2 but with a third-party donor's sperm/gamete.

34. In the light of the above observations, W.P.A. No. 12573 of 2024 is disposed of by directing the respondent-clinic to permit the petitioners to have the facilities of assisted reproductive technology services under the 2021 Act with the sperm/gamete of the petitioner no. 1 and the oocyte of the petitioner no. 2 as the first choice.

35. If, for any reason, to be medically ascertained by the clinic, it is found that none of the sperms/gametes donated by the petitioner no. 1, while he was under the age of fifty-five years, serve the purpose, it would then be open to the petitioners to approach the same clinic for assisted reproductive technology services with the oocyte of the petitioner no. 2, however, with the sperm/gamete of a different donor.

36. The parties shall act on the server copy of this order without insisting upon prior production of a certified copy thereof, for the purpose of immediate compliance.

37. There will be no order as to costs.

38. Urgent certified copy of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)