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

+ **W.P.(C) 7565/2024 & CM APPLs. 31490-31491/2024**

**MRS MAMTA KUMARI & ANR.**

..... Petitioners

Through: Ms. Aditi Gupta, DHCLSC with  
Mr. Akashdeep and Mr. Praveen,  
Advocates

versus

**UNION OF INDIA THROUGH SECRETARY  
& ORS.**

..... Respondents

Through: Ms. Monika Arora, CGSC for UOI  
with Ms. Rashi Mangal, GP and  
Mr. Subrodeep Saha, Advocate for  
UOI  
Ms. Hetu Arora Sethi, ASC for  
GNCTD with Ms. Kavita, Advocate

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Date of Decision: 24<sup>th</sup> May, 2024

**CORAM:**

**HON'BLE THE ACTING CHIEF JUSTICE**

**HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA**

**JUDGMENT**

**MANMOHAN, ACJ: (ORAL)**

**CM APPL. 31491/2024 (for exemption)**

1. Allowed, subject to all just exceptions.
2. Accordingly, the present application stands disposed of.

**W.P.(C) 7565/2024 & CM APPL. 31490/2024**

3. Present petition has been filed seeking a direction for relaxing the age criteria as provided under Section 21(g) of the Assisted Reproductive



Technology (Regulation) Act, 2021 ('ART Act') and directing the Respondents to permit the Petitioners to continue with their In Vitro Fertilization treatment ('IVF'). It is further prayed that Section 21(g) ('impugned provision') of the ART Act be declared as ultra vires and unconstitutional being violative of Articles 14 and 21 of the Constitution of India.

4. The Petitioners, who are a married couple are desirous of having a child through the process of IVF and find themselves, restrained due to the age bar introduced under Section 21(g) of the ART Act, despite having initiated the process in 2011, before the date of enforcement of the ART Act, i.e. 25<sup>th</sup> January, 2022.

5. Through this petition, the Petitioners seek a declaration that Section 21(g) of the ART Act, which imposes an age restriction in respect of intending parents, infringes their right to reproductive autonomy, protected by Article 21 of the Constitution of India, 1950.

6. It is stated that since 2011, the Petitioners, have had several procedures at various facilities around India. It is stated that the Petitioners had underwent IVF process at AIIMS in 2011 and 2012, but with negative results. It is stated that the Petitioners had also underwent Intracytoplasmic Sperm Injection treatment ('ICSI') at AIIMS in 2013, but with no success. It is stated that the Petitioners were also under the medical treatment at AIIMS till 2017.

7. It is stated that between the years 2018-2021, the Petitioners consulted with doctors at Lilawati Hospital, Mumbai and P.D. Hinduja National Hospital, Mumbai, where again they underwent ART process with no success.



8. It is stated that thereafter, the Petitioners consulted Birla Fertility and IVF Centre i.e., Respondent No. 3 herein in the year 2022 for the IVF process. It is stated that Petitioners, are presently under the care of Respondent No. 3 herein, and had their embryos frozen on 02<sup>nd</sup> December, 2022, at the ages of 44 years (wife) and 54 years (husband). The sperm of the husband was frozen on 4<sup>th</sup> October, 2022. The embryology record shows that blastocysts were frozen on 2<sup>nd</sup> December, 2022.

9. It is stated that subsequently, the Petitioners opted for Embryo Transfer on 18<sup>th</sup> March, 2023 and 09<sup>th</sup> June, 2023, however, both their attempts were unsuccessful.

10. It is stated that thereafter, Respondent No. 3 has refused the Petitioners' request to undergo Embryo Transfer, as Petitioner No. 2/husband has crossed the upper age limit of 55 years, fixed under Section 21 (g) of the ART Act on 28<sup>th</sup> June, 2023. Even though, Petitioner No. 1 is still eligible for ART, as she is below the age of 50.

11. It is stated that Petitioners have written to Respondent No. 2 *vide* representation dated 12<sup>th</sup> February, 2024 for granting permission to continue their treatment; however, the said representation has not been considered.

12. Aggrieved by Respondent No. 3's decision to discontinue the Petitioners treatment, the Petitioners have filed the present petition.

13. Learned counsel for the Petitioners, contends that the age bar fixed under the ART Act, is irrational, arbitrary and without any scientific backing and goes behind the whole objective of the ART Act, which intends to aid infertile couples desirous of parenthood. She further draws the attention of this Court to various judgements passed by this Court and



other High Courts whereby, the Courts considering the facts of each case and balancing the equities have provided interim relief to the couples desirous of parenthood and who have initiated the process of IVF before the provisions of ART Act, came into force.

14. She relies upon the order dated 10<sup>th</sup> October, 2023 passed by a Coordinate Bench of this Court in W.P.(C) 12395/2023 titled as ***Mrs. D & Anr. vs. Union of India***, the order dated 24<sup>th</sup> March, 2023 passed by High Court of Calcutta in WPA 1592/2023 titled as ***Saswati Mohury & Anr. vs. Union of India & Ors.*** and the judgment dated 19<sup>th</sup> December, 2022 passed by High Court of Kerala in W.P.(C) 24058/2022 titled as ***Nandini K & Anr. vs. Union of India & Ors.***

15. She states that Petitioner No. 1, who is presently aged 46 years and 5 months is eligible to undergo the IVF process under the impugned provision and had she been a single mother, the said law would have not imposed any embargo on the process. She states that only because Petitioner No. 1 is married and Petitioner No. 2 has crossed the age of 55 years, Petitioner No. 1 is being deprived of her rights. She states that time is of the essence and if the interim relief prayed for is not granted, the final prayers sought in the present petition will be rendered infructuous.

16. We have considered the submissions of the Petitioners and find that the Petitioners are similarly placed as the parties in the judgments relied upon by the learned counsel for the Petitioner. The judgment of the High Court of Kerala in ***Nandini K.*** (Supra) was duly considered and followed by the Coordinate Bench of this Court in the case of ***Mrs. D & Anr. vs. Union of India*** (Supra), wherein the Coordinate Bench granted permission by interim order to the petitioners therein, to continue with



their surrogacy process pending the challenge to the *pari materia* age restrictions on intending parents brought in force under the Surrogacy (Regulation) Act, 2021. The relevant paras read as under: -

*“13. At this juncture, we must reference a judgment passed by the High Court of Kerala in **Nandini K (Supra)**, as it bears significant relevance to the issue at hand. In that case, the Court was dealing with Section 21(g) of the ART Act, which prescribes the age limit for couples desirous of availing ART. It was held that if the prohibition under Section 21(g) is understood to be preventing continuance of ART services that had already commenced, it would amount to unreasonable and unjustified restriction on the reproductive choice of the commissioning couple, and would militate against the liberty guaranteed under Article 21 of the Constitution. As a result, the Court determined that couples who had initiated IVF treatment prior to 25th January, 2022 (the date of the enforcement of the ART Act) should not be adversely affected by the age prescription outlined in the ART Act. This precedent, set by the High Court of Kerala, sheds significant light on the prospective applicability of standing provisions, and reinforces the argument in favour of the Petitioners.*

*14. Thus, while the Court deliberates on the challenge to the validity of Section 4(iii)(c)(I) of the SR Act, considering the Petitioners' situation and the peculiar facts and circumstances of this case, we are inclined to grant an interim relief. It is imperative to acknowledge the profound emotional and psychological distress endured by the Petitioners as a consequence of their present predicament. Their inability to proceed with the surrogacy procedure has placed them in a state of anguish and uncertainty, deeply affecting their mental and emotional well-being. Such circumstances underscore the pressing need for interim relief and compassionate consideration. The Court recognizes the paramount importance of relieving the Petitioners from this agonizing wait, and granting them the opportunity to pursue their aspiration of parenthood, especially when the embryos in question were created during a time when these legal constraints were not in effect. As discussed above, Petitioner No. 1's egg retrieval and freezing were done in 2016-17, and Petitioner No. 2's sperm were frozen on 29th November, 2021, before the enforcement of SR Act and ART Act. Furthermore, Petitioners intend to commission surrogacy through a woman who fulfils the eligibility criteria prescribed under Section 4(iii)(b) of SR Act.*

*15. Therefore, we are inclined to allow the Petitioners to continue with*



*their treatment through gestational surrogacy. Accordingly, we direct that, subject to fulfilment of all other conditions under the SR Act and other applicable laws, an eligibility certificate be issued to the Petitioners, enabling them to avail the surrogacy procedure from the embryos already created through their IVF treatment.”*

(Emphasis Supplied)

17. In this case as well, the Petitioners commenced their IVF treatment before the coming into force of the impugned provision of the ART Act, and embryos were created, when Petitioner No. 2's age was below the age limit introduced under the ART Act. Petitioner No. 1 as noted above, continues to remain eligible even today under the ART Act.

18. Therefore, we are inclined to allow the Petitioners to continue with their IVF process as the time taken in deciding the petition finally may cause irreparable loss to them. Accordingly, we direct that, subject to fulfilment of all other conditions under the ART Act and other applicable laws, an eligibility certificate be issued to the Petitioners, enabling them to continue with their IVF process from the embryo already created.

19. Respondents are granted four weeks' time to file a counter affidavit. Rejoinder affidavit, if any, be filed within two weeks thereafter.

20. List on 30<sup>th</sup> July, 2024.

**ACTING CHIEF JUSTICE**

**MANMEET PRITAM SINGH ARORA, J**

**MAY 24, 2024/hp/MG/AKT**