

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR.JUSTICE V.G.ARUN

Tuesday, the 21st day of June 2022 / 31st Jyaishta, 1944
WP(C) NO. 19184 OF 2022

PETITIONERS:

1. RAKHI BOSE, AGED 42 YEARS, W/O BOSE C.M, CHEMPAKASSERY POIKATTIL HOUSE, IRINGOLE P.O, PERUMBAVOOR-683548.
2. C.M.BOSE,AGED 46 YEARS, S/O C.I.MATHAI, CHEMPAKASSERY POIKATTIL HOUSE, IRINGOLE P.O, PERUMBAVOOR-683548.

RESPONDENTS:

1. UNION OF INDIA, REPRESENTED BY ITS PRINCIPAL SECRETARY, PRIME MINISTER'S OFFICE, SOUTH BLOCK, SECRETARIAT BUILDING, NEW DELHI-110001.
2. THE SECRETARY, MINISTRY OF HEALTH AND FAMILY WELFARE, GOVERNMENT OF INDIA, NEW DELHI 110001.
3. THE DIRECTOR, MEDICAL COUNCIL OF INDIA, POCKET- 14, SECTOR 8, DWARAKA PHASE-1, NEW DELHI-110077.
4. THE CHIEF SECRETARY, GOVERNMENT OF KERALA, SECRETARIAT, THIRUVANANTHAPURAM-695001.
5. THE SECRETARY, DEPARTMENT OF HEALTH AND FAMILY WELFARE, SECRETARIAT, THIRUVANANTHAPURAM-695001.
6. DIRECTOR, KERALA STATE MEDICAL COUNCIL, COMBINED COUNCIL BUILDING, RED CROSS ROAD, NEAR GENERAL HOSPITAL, THIRUVANANTHAPURAM-695035.
7. DIRECTOR, CRAFT HOSPITAL AND RESEARCH CENTRE/AR MEDICAL CENTRE, CRAFT CAMPUS, CHANDAPURA, KODUNGALLOOR-680664.
8. MANAGING DIRECTOR, SABINE HOSPITAL AND RESEARCH CENTRE PVT. LTD., PEZHAKKAPPALLY P. O. MUVATTUPUZHA- 686673.

Writ petition (civil) praying inter alia that in the circumstances stated in the affidavit filed along with the WP(C) the High Court be pleased to pass an interim order directing R7 to transfer embryo of the petitioners, kept at CRAFT Hospital and Research Centre/AR Medical Centre, Kodungalloor (R7) to Sabine Hospital and Research Centre Pvt. Ltd., Muvattupuzha (R8) for the petitioners' further treatment, pending disposal of the W.P.(C).

This petition coming on for admission upon perusing the petition and the affidavit filed in support of WP(C) and upon hearing the arguments of SRI.ABRAHAM VAKKANAL (SENIOR ADVOCATE) along with M/S.PAUL ABRAHAM VAKKANAL, VINEETHA SUSAN THOMAS & ROHITH C., Advocates for the petitioners, ASSISTANT SOLICITOR GENERAL for R1 & R2, GOVERNMENT PLEADER for R4 & R5 and of SMT.SHERIN VARTHESE, Advocate for R8, the court passed the following:

V.G.ARUN, J.

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W.P. (C) No.19184 of 2022

Dated this the 21st day of June, 2022

ORDER

Life inside a human embryo remains frozen, awaiting its opportunity to be born as a child to its parents; the petitioners. Meanwhile, the State brings out a well meaning legislation viz, the Assisted Reproductive Technology (Regulation) Act, 2021 ('the Act' for short). Will the new enactment have an impact on the Assisted Reproductive procedure, which the petitioners now want to continue, is the question. The essential facts are as under;

The marriage of the petitioners was solemnized on 10.7.2007. Even after 15 years of marriage, the first petitioner was not able to conceive. Hence, the couple opted for infertility treatment at the 7th respondent hospital. As part of the procedure, the first petitioner underwent an Oocytes Retrieval procedure on 02.09.2014.

W.P.(C) No.19184 of 2022

-2-

Out of the six eggs injected after retrieval, four fertilised. The embryos were then preserved at the 7th respondent hospital. The petitioners continued treatment at the 7th respondent hospital and later, at the hospital's branch in Dubai, where they are employed. The treatment was stopped in 2016 on the advice of the Chief Consultant, since the required wall thickness of the uterus could not be obtained. Some time later, the first petitioner's sister, who had undergone the same process, conceived after ten years of marriage and gave birth to twins. This rekindled the petitioners' hope of having a child. The couple therefore re-commenced their treatment at the 8th respondent hospital. As advised by the Doctors at the 8th respondent, the petitioners requested for the 7th respondent's permission to transfer the frozen embryos to the 8th respondent. During the interregnum, the Act came into force on 20.01.2022, bringing in restrictions with respect to matters connected to

W.P.(C) No.19184 of 2022

-3-

the Assisted Reproductive Technology. The 7th respondent therefore sent a reply stating that, transfer of the embryos is not permissible after the introduction of the Act. The writ petition is hence filed seeking the following reliefs;

"i. Issue a writ of mandamus or other appropriate writ, order or direction, commanding the respondents 1 to 3 to constitute National Board as contemplated in Sec. 29 of the ART Act, 2021 and Surrogacy Act, 2021 or adhoc National Board to enable it to grant permission for petitioners to transfer their own frozen embryo kept in R7 Hospital to R8 Hospital, for their own use and to grant urgently such permission as applied for;

ii. If the statutory mechanism provided for such transfer under the Act is not in place even now, this Hon'ble Court may be pleased to direct R7 to transfer the frozen embryo of petitioners kept in their hospital to R8 Hospital, where all facilities are provided for further processing of embryo, as is made clear in Exhibit P6 and as requested by Petitioners in Exhibit P 7 and P7(a), forthwith;

iii. To declare that the petitioners are entitled to get their frozen embryo, kept in R7 Hospital, transferred to R8 Hospital,

W.P.(C) No.19184 of 2022

-4-

forthwith, where all facilities for continued treatment are available, as the statutory mechanism under the Act to grant such permission, is not provided yet;

iv. Direct R1 to R6 to grant permission to transfer the frozen embryo of the Petitioners kept in 7th Respondent Hospital to 8th Respondent Hospital forthwith in the special circumstances, in this case;

v. Issue a writ of certiorari or other appropriate writ or direction quashing Ext.P8 decision of 7th respondent being arbitrary and illegal."

2. Learned Senior Counsel appearing for the petitioners, submitted that the petitioners' hope of having a child is trampled upon by the 7th respondent by its refusal to transfer the embryo to the 8th respondent hospital. It is submitted that, since the National and State Boards envisaged under the Act are not constituted, the petitioners or the 8th respondent cannot approach the Board seeking permission for effecting the transfer. The maximum period for which embryos can be preserved is ten years and eight years having elapsed already, the petitioners will be

W.P.(C) No.19184 of 2022

-5-

put to undue prejudice and misery if the transfer is not permitted.

3. In spite of service of notice, the 7th respondent has not appeared.

4. Adv.Sherin Varghese appearing for the 8th respondent submitted that the hospital has all necessary technological facilities for storing the embryos and the service of specialist Doctors for continuing the assisted reproductive process. Reference is made to Ext.P6, wherein, while addressing the Embryologist at the 7th respondent hospital, the Chief Embryologist of the 8th respondent has stated that the hospital has all the facilities to receive the embryos for further processing.

5. Learned CGC submitted that the National Board under the Act was constituted on 04.05.2022 and the Assisted Reproductive Technology (Regulation) Rules, 2022 notified on 09.06.2022.

6. The preamble of the Act shows that the objective of the Act is the regulation and

W.P.(C) No.19184 of 2022

-6-

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 reproductive technology is required 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 therewith or incidental thereto. As per Section 2(a), Assisted Reproductive Technology means all technologies that attempt to obtain a pregnancy by handling the sperm or the oocytes outside the human body and transferring the gamete or the embryo into the reproductive system of a woman. The terms 'Assisted Reproductive Technology Bank' and 'Assisted Technology Reproductive Clinic' are defined under Section 2(1)(b) and (c). As per Section 2(f), an 'embryo' means a developing or developed organism after

W.P.(C) No.19184 of 2022

-7-

fertilization till the end of fifty-six days from the date of fertilization. An infertile married couple is termed as 'commissioning couple' under Section 2(1)(e) and 'infertility' is the inability to conceive after one year of unprotected coitus or other proven medical condition preventing a couple from conception [Section 2(1)(j)]. The Act provides for constitution of a National Board under Section 3 and a National Registry under Section 9. The procedure for registration of the assisted reproductive technology clinics and banks is provided under Sections 15 and 16. The duties of assisted reproductive technology clinics and banks are provided in Chapter IV (Sections 21 to 24). Under Section 29, there is prohibition against the sale, transfer or use of gametes, zygotes and embryos, or any part thereof or information related thereto, directly or indirectly to any party within or outside India, except in the case of transfer of own gametes and

W.P.(C) No.19184 of 2022

-8-

embryos for personal use with the permission of the National Board.

7. Presumably, the 7th respondent has refused to transfer the embryos to the 8th respondent, relying on Section 29. In my considered opinion, Section 29 does not interdict such transfer. A close scrutiny of the provision shows that the intention is to prevent/restrict sale etc of human gametes, zygotes and embryos. In the case at hand, there is no such transfer, since no donor or third party is involved and the embryos are that of the commissioning couple. Apart from the aspirations of the first petitioner to conceive and the second petitioner, to beget a child, the right of the life inside the embryo, which is kept frozen for the past 8 years, to develop into a fetus and be born, cannot be stultified by relying on a provision which has no application. The primary objective of the Act is the regulation and supervision of the assisted reproductive technology clinics and

W.P.(C) No.19184 of 2022

-9-

banks, by preventing misuse and ensuring safe and ethical practice of assisted reproductive technology services. The Act is not intended to create difficulties for persons opting assisted reproductive procedure.

For the aforementioned reasons, I deem it appropriate to issue the following interim directions;

(i) Petitioners shall pay the amounts due to the 7th respondent hospital for preserving the embryos from 02.09.2014 onwards.

(ii) On such payment being effected and a copy of this order being produced, the 7th respondent shall forthwith permit transfer of the embryos to the 8th respondent hospital.

(iii) The 8th respondent shall collect the embryos and transfer it to its Assisted Reproductive Technology Bank and preserve the embryos with due care and

W.P.(C) No.19184 of 2022

-10-

protection.

(iv) The 8th respondent shall, within 5 days, file an affidavit before this Court affirming that it has all the requisite facilities envisaged under the Act.

Post after a week.

Sc1/21.06.2022



Sd/-
V.G.ARUN
JUDGE

APPENDIX OF WP(C) 19184/2022

- Exhibit P6** TRUE COPY OF THE LETTER DATED 03-06-2022 ISSUED FROM SABINE HOSPITAL AND RESEARCH CENTRE PVT. LTD. TO CRAFT HOSPITAL.
- Exhibit P7** TRUE COPY OF THE APPLICATION DATED 03-06-2022 SUBMITTED BY THE 1ST PETITIONER TO THE ICSI LAB OF CRAFT HOSPITAL WHERE PETITIONERS' EMBRYO IS PRESERVED.
- Exhibit P7 (a)** TRUE COPY OF THE CLEAR TYPED COPY OF EXT.P7.
- Exhibit P8** TRUE COPY OF THE LETTER DATED 03-06-2022 ISSUED BY AR MEDICAL CENTRE, REJECTING PETITIONERS APPLICATION.

