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SWARANA KANTA SHARMA, J.

INTRODUCTION

1. **The issue before this Court is to adjudicate a crucial question of law as to whether a convict has a right to procreation and parenthood or not. A prayer has been made before this Court that the convict herein whose request for grant of parole has been rejected, be released on parole on the premise that the right to procreation is not a mere desire but an essential aspect of human existence, carrying profound implications for the continuity of familial bonds and the preservation of one's legacy.**

2. **As the Court grapples with this intricate legal question, it is tasked with determining whether, in the face of a rejected parole application, the preservation of familial lineage through procreation constitutes a compelling enough ground to warrant intervention.**

3. Thus, by way of present writ petition under Article 226 of the Constitution of India, read with Section 482 of the Code of Criminal Procedure, 1973 (*'Cr.P.C.'*), the petitioner seeks issuance of writ in the nature of certiorari for quashing of order dated 08.08.2023, passed by learned Deputy Secretary (Home), Government of NCT of Delhi, and for issuance of writ of mandamus directing the respondent to release the petitioner on parole for a period of 12 weeks.

FACTUAL BACKGROUND

4. Brief facts of the case are that the petitioner is presently confined in Jail No. 8/9, Tihar, New Delhi and is serving life

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sentence. The petitioner was convicted in case FIR No. 592/2007, registered at Police Station Mehrauli, Delhi, under Sections 302/201/404 of the Indian Penal Code, 1860 (*'IPC'*), and was awarded rigorous imprisonment for life by the learned Trial Court.

5. As disclosed from the petition, the petitioner has already spent more than 14 years in prison, excluding the period of remission.

6. It is stated that the appeal filed by the petitioner, challenging the judgment of conviction and order on sentence, was dismissed by this Court on 14.11.2015. It is further stated that the wife of the petitioner, *vide* an application filed on 27.05.2023 had approached the competent authority for grant of parole on the following ground:

> ***"The Petitioner and his wife want to protect their lineage by way of procreating their child in order to secure their family tree."***

7. The above-mentioned application was forwarded to the Deputy Secretary, Home Department. The Deputy Secretary, Home Department had dismissed the parole application, on the following grounds:

> "1. The convict is not entitled for parole in view of Rule 1210 sub rule (II) of Deihi Prison Rules 2018, which states that:- Rule 1210 sub rule (II):- *"The conduct of the Prisoner who has been awarded major punishment for any prison offence should have been uniformly good for last two years from the date of application and the conduct of Prisoner who has been awarded minor punishment or no punishment for any prison offence in prison should have been uniformly good for last one year from the date of application"*. In this case, as per nominal roll, said convict has been awarded punishment dated 31.12.2021, 03.01.2022 & 05.01.2022, which are the major punishment in view of Rule 1271 of Delhi Prison Rules, 2018.

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> 2. Further, as per nominal Roll, the overall jail conduct of the above said convict is reported to be unsatisfactory being multiple punishments. The superintendent has also not recommended grant of parole to the above said convict."

ARGUMENTS ADDRESSED BEFORE THIS COURT

8. Learned counsel for the petitioner argues that the petitioner is married for last three years and he and his wife Ms. 'X' do not have a child so far. Since the petitioner is aged about 41 years and his wife is aged about 38 years, they want to protect the lineage by way of procreating a child to secure their family tree. It is now stated that petitioner wants to undergo certain medical tests, and it is argued that they want to have a child through In-Vitro Fertilization (IVF). It is argued that petitioner has already undergone more than 14 years of incarceration, without remission and that he has been rendering his services as *Langar Sahayak* in the jail. It is argued that the competent authority has not appreciated the contents of the parole application, and has not taken note of the fact that petitioner and his wife want to protect their lineage by procreating a child to secure their family tree, and has rejected the application due to previous punishments dated 31.12.2021, 03.01.2022, 05.01.2022, awarded to the petitioner. It is, therefore, prayed that the petitioner be granted parole.

9. On the other hand, learned ASC appearing on behalf of the State argues that the ground on which parole had been sought is not recognized in law to be a valid ground for grant of parole, and that additionally, as per the nominal roll, the overall jail conduct of the convict is 'unsatisfactory' due to multiple punishments awarded to

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him. It is also stated that the convict is not entitled to parole, in view of Rule 1210 sub rule (II) of Delhi Prison Rules, 2018. It is further argued that two years have not elapsed from meting out major punishment to the convict, which is mandatory for being released on parole. It is, however, stated that as per the verification report, an inquiry was conducted by SHO, P.S. Mehrauli, and it was found that the petitioner is a permanent resident of Heeragarh, Nainital, Uttrakhand, who had got married in the year 2020 and that there is no child born from the wedlock.

10. This Court has heard arguments addressed by learned counsel for the petitioner as well as learned ASC for the State, and has gone through the case file and material on record.

ANALYSIS AND FINDINGS

11. The present case reveals that the convict i.e. the petitioner herein has been convicted and has been incarcerated for last about 14 years. He is about 41 years of age, whereas his wife is 38 years of age.

12. During the course of arguments, learned counsel for the petitioner had pointed out that the accused and his wife need to undergo certain medical examinations and diagnostic tests conducted by a specialized hospital and may also require IVF treatment.

i. Right to Procreate Covered Within the Ambit of Article 21 of Indian Constitution

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13. This Court is of the opinion that Article 21 of the Constitution of India, which guarantees the fundamental right to life and personal liberty is not completely obliterated by a person's incarceration. Though, the human right of personal liberty of convict has to be surrendered in favour of the safety of the State and for the purpose of establishing rule of law, the convict cannot be denied the protection of fundamental right to life, which is expansive, and in this Court's opinion, will also include right to have a child, in peculiar facts and circumstances of a case. **While a constitutional Court has to ensure rule of law, it also has to ensure social justice**.

14. The Delhi Prison Rules, 2018, do not find mention of procreation of children and parenthood as a ground for grant of parole. However, **in this Court's opinion, if the rules do not provide for a particular specific ground, it cannot bar a Constitutional Court to go beyond the specific mention of a ground and can, in the facts and circumstances of a case, interpret and adjudicate a prayer before it by referring to the intent and content of the Rules and the practical context in which they need to be interpreted**.

15. In this regard, in the factual context of the present case and cases of similar nature, this Court holds that where the age of the convict and the biological clock of the convict and his marital partner has the potential of becoming a barrier for them to conceive and procreation of a child in future as a result of long incarceration of a convict, their prayer will need to be attended and adjudicated with empathy, though within the parameters of law.

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16. **Though parole can be granted to maintain social ties, which is a larger concept, the ground for grant of parole for the reason as in the present case cannot be considered less important**. The accused is aged about 41 years, whereas his wife is about 38 years of age, who have been married for last three years. The accused has been in judicial custody for the last 15 years, and was married while he was granted parole/furlough. The concern of the convict and his wife seems to be genuine that their age and the biological clock cannot wait for the period of incarceration to be over. The convict and his wife need medical assistance to have a child and for the same the convict also needs to undergo certain diagnostic tests.

17. This Court is of the opinion that a constitutional Court is duty bound to ensure that fundamental right of every citizen is upheld and is not violated. The definition of a citizen will include even a convict. **A convict does not become a lesser citizen only due to his incarceration** and his fundamental rights are of equal importance and have to be given equal weightage as any other free citizen.

18. **This Court is also of the opinion that it is human tendency and a natural desire for an individual to have biological children which can be for the purpose of adding value or meaning to their lives.** It also can be for the purpose of ensuring a family lineage and saving their family tree. Therefore, seeking parole for the purpose of having children, when the biological clock of the convict and his wife are moving in the opposite direction, so as to become a barrier after a few years for the purpose of having a child, should not be

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considered as if it is for the purpose of conjugal relations or for any other fulfilment, but to ensure the right to procreation.

19. In the present case, the prayer for parole for the purpose of procreation, with medical assistance, due to the age of the convict, who has been in jail when he was about 25 years of age, and is now about 41 years of age and the standpoint of the convict and his wife in this regard needs to be taken note of. This Court is of the view that it is a personal choice and fundamental right of an individual, though a convict, and his wife who is a free citizen to have a child together for protecting and saving their lineage which must be respected by a Court of law. **People make different choices in different situations and not everyone may feel the same way about they being incomplete without giving birth to a child and even that point of view is respected by the Courts.**

20. **The majesty of the law lies in its capacity to understand, respect and embrace within the parameters of law, different point of views and through the prism of rule of law, pass orders which will grant relief to anyone who approaches the Court without being judgmental. Further, in this Court's opinion, the definition of fundamental rights and its expansion cannot be caged in narrow formulas of black and white letters and its duty and beauty lies in interpreting it with broader point of view as the faith of the common man in the judicial system is on the broad shoulders of Courts of law of Bharat**.

21. In backdrop of this observation, **this Court has no hesitation to hold that right to life under Article 21 of the Constitution of**

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India will include right of a convict to have a child when he is not blessed with a biological child by being extended the relief of grant of parole for this purpose where he needs medical assistance and the biological clock due to his age may weaken and make prospects of having a child bleak.

22. The Courts have to be sensitive while dealing with cases of such nature and about prayers, made by this age group of the convicts and ensure that severe breach of human rights and their intrinsic value is not committed by denying them the right to parenthood by passing mechanical orders and denying them parole on this ground by taking a narrow approach and holding that the statute in black and white does not specifically provide for this ground for grant of parole.

23. Further, delay in having a biological child would mean curtailing this fundamental right to parenthood, due to incarceration of a convict. **The right to procreate, in this Court's opinion survives despite incarceration, in certain set of facts and circumstances of a given case, as the present one**.

24. While**, Judiciary in Bharat, has always stubbornly refused to hold that prisoners have no fundamental rights, this Court following the same tradition as handed over by judges of the Hon'ble Apex Court and this Court respectfully takes the intent to interpret the constitutional rights in favour of upholding and including new situations and challenges holds that right to parenthood and procreation is fundamental right of a convict in peculiar circumstances of a case. Needless to say, the same have**

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to be adjudged on the basis of facts and circumstances of each case.

25. **Furthermore, the judicial decisions have to be a fine and delicate combination of upholding the fundamental right of the convict in a given circumstance without loosing sight of realities of life and legitimate human desires and thus, in the process upholding the view that prisoners are humans too.**

26. In this Court's opinion, the fundamental right to have a child in the present circumstances, where the convict and his wife need medical assistance due to their age and the same being considered as human right of the convict, cannot be deemed to be surrendered in favour of the State as right of freedom and liberty which have to be surrendered in favour of the State, once a person is convicted.

27. When the other parameters for grant of parole as per law are available to the convict, this Court would be duty bound to exercise its extraordinary jurisdiction and ensure that the incarceration of the convict would not act as a barrier between the fundamental right to procreate a child with assistance of medical procedures, due to the advancing age of the convict, while the Court ensures the right of the State to confine the convict to the jail, for the purpose of maintaining rule of law and security of the State and its citizens.

28. To conclude, while passing orders such as for grant of parole, for procreation purpose, where medical assistance is required due to advanced age of convict, when they do not have a biological child and the accused is in custody for a long period, the Courts have to note that the facts represented pass the test regarding prisoners'

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fundamental right to parenthood and procreation and his reasonable expectation as a social being.

29. While this Court recognizes that while being convicted and being imprisoned, it would certainly limit many aspects of a married life and grant of parole has to be subjected to reasonable restrictions and compelling State interest, the same will have to be balanced as per law.

30. The Courts also have to consider the impact of denying parole to the convict for the purpose as prayed for and as to how it will impact his future life in the light of the principle that punishment after conviction is not to punish but to reform.

31. The petitioner, in this case has demonstrated the reason which entitles him to grant of parole for the legitimate right of procreation and parenthood with medical assistance, due to advanced age of the petitioner and his wife.

32. This Court notes that no major punishment has been meted out to the present convict in the last about two years, i.e. the last punishment was meted out to him on 05.01.2022, which shows that the convict herein, is trying to reform himself after his marriage, which is a factor worth taking note of.

33. **This Court clarifies that this Court is not dealing with prayer for grant of parole for the purpose of maintaining conjugal relationship and conjugal rights while being imprisoned in the present order, or allowing conjugal visits. This Court is dealing with the fundamental right of a convict, to undergo treatment required, to have a child while being granted parole**

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on this ground itself, within the parameters of law and rules governing the grant of parole under the Delhi Prisons Rules, 2018.

34. **In this Court's opinion, justice cannot be artificial but real as reality of human life, and has to adjudicate cases keeping in mind the same**. This Court also notes that the right to procreation is generally taken for granted when one is a free citizen. However, it becomes valuable and cherished right while one is incarcerated and is dependent on a parole order for the purpose of procreation and parenthood. When this Court engages itself with this consideration in mind, this Court reaches only one decision, that the prayer to be released on parole for the purpose of medically-assisted procreation is an understandable reasonable desire and the convict is entitled to parole on this ground.

ii. The Right To Procreate While Being Incarcerated Is Not An Irrefutable Right

35. At the same time, it may be added that in all cases the desire to procreate may not amount to being basis of it becoming an irrefutable right, for example, considering that the prisoner already has children or is not in the advanced years of age.

36. **The right to procreation is not absolute and necessitates a contextual examination**. **By taking into account factors such as the prisoner's parental status and age, a fair and just approach can be adopted to preserve the delicate equilibrium between individual rights and broader societal considerations**. It is

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essential to recognize that the right to procreate is inherently linked to the notion that every individual has the right to extend their lineage. However, this right is not without its nuances, and its exercise is subject to various considerations. If the inmate already has children, this dynamic aspect of the right may be considered fulfilled.

CONCLUSION

37. In conclusion, this Court recognizes that the plea for parole to facilitate medically-assisted procreation, due to the advanced age of the convict and his wife, is grounded in a genuine desire to protect and preserve their lineage. In doing so, the Court affirms that even a convict does not forfeit their fundamental rights and remains entitled to equal consideration before the law.

38. Thus, in view of the foregoing discussion, this Court is inclined to grant parole to the petitioner for a period of four (04) weeks, subject to following conditions:

i. The petitioner shall furnish a personal bond in the sum of Rs.20,000/- with one surety of the like amount, to the satisfaction of the Jail Superintendent.

ii. The petitioner shall not leave District Nainital, Uttarakhand except to travel to and from Central Jail, Mandoli, Delhi, without permission of the court and shall ordinarily reside at the address mentioned in this application;

iii. The petitioner will report on every Wednesday to the SHO P.S. Kathgodam, District Nainital, Uttarakhand between 11 am

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and 11:30 am for marking his appearance. However the petitioner will not be kept waiting for longer than one hour at the police station during such visits;

iv. The petitioner shall furnish a telephone/mobile number to the Jail Superintendent as well as SHO of local police station, on which he can he contacted if required. The said telephone number shall be kept active and operational at all the times by the petitioner.

v. If the petitioner has a passport, he shall also surrender the same to the Jail Superintendent

vi. Immediately upon the expiry of period of parole, the petitioner shall surrender before the Jail Superintendent.

vii. The period of parole shall be counted from the day when the petitioner is released from jail.

39. Accordingly, the present petition stands disposed of in above terms.

40. A copy of this order be sent by the Registry to the concerned Jail Superintendent for information.

41. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

DECEMBER 22, 2023
Aanchal