

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN
&
THE HONOURABLE MR. JUSTICE HARISANKAR V. MENON

Tuesday, the 6th day of August 2024 / 15th Sravana, 1946
WA NO. 696 OF 2024

AGAINST JUDGMENT DATED 19.12.2022 IN WP(C) 24058/2022 OF THIS COURT
APPELLANT(S)/RESPONDENT NO.1:

UNION OF INDIA, REPRESENTED BY ITS SECRETARY, MINISTRY OF HEALTH AND
FAMILY WELFARE, SASTHRI BHAVAN, NEW DELHI, PIN - 110001

BY ADV. K.ARJUN VENUGOPAL

RESPONDENT(S)/PETITIONERS & RESPONDENTS 2 TO 6:

1.

AND 6 OTHERS.

BY ADV AKASH S FOR R1 & R2

SRI K.S.PRENJITH KUMAR, STANDING COUNSEL FOR R3.

SENIOR GOVERNMENT PLEADER FOR R4 & R6

STANDING COUNSEL FOR R5



Prayer for interim relief in the Writ Appeal stating that in the circumstances stated in the appeal memorandum, the High Court be pleased to stay Judgment dated 19.12.2022 in W.P.(C)No. 24058 of 2022 to the extent of the directions issued therein, pending disposal of the above Writ Appeal.

This Writ Appeal again coming on for orders along with connected cases on 06.08.2024, upon perusing the appeal memorandum and this Court's Order dated 30.07.2024, the court on the same day passed the following:

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ANIL K. NARENDRAN & HARISANKAR V. MENON, JJ.

W.A. Nos.574, 575, 689, 696, 701, 768 and 827 of 2024

Dated this the 6th day of August, 2024

ORDER

Harisankar V. Menon, J.

These connected writ appeals under Section 5 of the Kerala High Court Act, 1958 are filed by the 1st respondent – Union of India – in the writ petitions, challenging the final judgment rendered by a learned Single Judge disposing of two of the writ petitions and interim orders issued subsequently following the afore judgment, in the writ petitions filed later.

2. WA No. 696 of 2024 filed against the judgment dated 19.12.2022 in WP(C) No. 24058 of 2022, is taken as the lead case since the main judgment is rendered in the said writ petition.

3. WP(C) No.24058 of 2022 has been filed by respondents 1 and 2 in this writ appeal, under Article 226 of the Constitution of India, pointing out that they are wife and husband married for the last 27 years, undergoing infertility treatment and contemplating in vitro fertilization (IVF) option, challenging the provisions under Section 21(g) of the Assisted Reproductive Technology (Regulation) Act, 2021, (hereinafter referred to as the 'ART Act'), on account

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of which, they are barred from continuing the treatment. It is stated in the writ petition that though respondents 1 and 2 herein have registered for treatment at various Centers offering infertility treatment, they could not complete the same for various reasons. It is further stated that they commenced the treatment in the 7th respondent Hospital in November 2021, as evidenced by Ext. P4. It is then they came to know that the Assisted Reproductive Technology (Regulation) Bill was passed by the Lok Sabha and Rajya Sabha, receiving assent of the President on 18.12.2021 coming into effect from 25.01.2022. Section 21 of the ART Act, to the extent, challenged in the writ petition, reads as under:

"21. General duties of assisted reproductive technology clinics and banks. The clinics and banks shall perform the following duties, namely:

.....

g) the clinics shall apply the assisted reproductive technology services,-

- (i) to a woman above the age of twenty-one years and below the age of fifty years;
- (ii) to a man above the age of twenty-one years and below the age of fifty-five years".

4. The said provisions were challenged before this Court on various grounds.

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5. By the impugned judgment dated 19.12.2022, a learned Single Judge of this Court found that it is difficult to hold that the prescription of upper age limit in Section 21(g) of ART Act is excessive and arbitrary so as to warrant judicial interference. However, after finding so, the learned Single Judge observed that the imposition of age restriction, without a transitional provision, would be irrational and arbitrary, especially when some of the parties were undergoing ART services when the ART Act was introduced on 25.01.2022. On the basis of the above, the learned Single Judge passed the following directions:

“Based on the above discussion, the following directions are issued;

- (i) Those among the petitioners who were undergoing ART services as on 25.01.2022 shall be permitted to continue their treatment.
- (ii) The National Board shall alert the Central Government about the need for having a re-look at the upper age limit prescribed in Section 21(g) of the Act.
- (iii) The National Board shall also bring to the notice of the Central Government the requirement of including a transitional provision in the ART Act.

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- (iv) The above directions shall be complied by the National Board within three months of receipt of a copy of this judgment.
- (v) Those among the petitioners who are yet to commence their ART treatment shall await the decision of the Central Government on the upper age limit and the transitional provision.
- (vi) The liberty of the petitioners to approach this Court at a later stage, if so necessitated, is reserved."

With the above observations, WP(C) No.24058 of 2022 is disposed of.

6. Following the above judgment, WP(C) No.315 of 2023 is disposed of by a judgment dated 12.01.2023, against which, WA No.689 of 2024 is filed by the Union of India.

7. In other cases, this Court granted interim orders during the pendency of the writ petitions directing the respondents to provide ART service to the petitioners in the writ petitions, if they were continuing the treatment as on 25.01.2022. In WP(C)No.34687 of 2023 against which WA No.701 of 2024 is filed, an interim order is granted by this Court noticing that the wife, in that case, is below 50 years of age, and therefore merely because the husband is above 55 years of age, ART services cannot be denied, further directing the ART services to be extended, however,

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for only one cycle.

8. We have heard the learned Central Government Counsel representing the Union of India and the learned counsel for party respondents 1 and 2 in WA No.574 of 2024, extensively with respect to the admission of these appeals and the interim relief sought for in these cases. After arguing the matter for a few days before us, on 30.07.2024, the learned counsel for respondents 1 and 2 in WA No.574 of 2024 informed that he is relinquishing the vakalath and notice may be issued to the concerned respondents.

9. The learned Central Government Counsel submits that the judgment of the learned Single Judge in WP(C) No.24058 of 2022, is illegal, arbitrary and unjustifiable for the following reasons:

- i. After finding that the impugned legislation cannot be said to be excessive and arbitrary so as to warrant judicial interference, this Court ought not to have issued further directions in the matter permitting the parties to continue the ART services even after 25.01.2022.
- ii. The directions at Serial Nos. (ii) and (iii) of the impugned judgment virtually amounts to directing

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the National Board to act in a particular manner, which is unjustified.

- iii. The directions issued in the judgment have worked themselves out, as is clear from Annexure A1 which evidences the minutes of the virtual meeting held on 18.01.2023 by the expert members of the National Assisted Reproductive Technology and Surrogacy Board (for short, the National Board).
- iv. On account of the directions issued at serial No.(i), the parties can continue to avail ART services for the rest of their lives, which is beyond the scope of the Act.

10. We have considered the submissions made as above, and the connected records.

11. The challenge before the learned Single Judge in the writ petition was with reference to the constitutionality of Section 21(g) of the ART Act, to the extent a maximum age for men and women was prescribed for availing of ART services. Though various contentions were raised in the writ petition, the learned Single Judge did not find any reason to exercise the writ jurisdiction as against 21(g) of the ART Act to declare the same as excessive,

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arbitrary and unconstitutional. The only argument that was found favourable by the learned Single Judge was with reference to the absence of transitional provisions. However, even then, the provisions of Article 21(g) of the Act was not declared as unconstitutional for that reason. Instead, certain directions were issued in the matter, mainly permitting the continuance of ART services even after 25.01.2022.

12. In **State of West Bengal v. Subhas Kumar Chatterjee [2010 11 SCC 694]**, the Apex Court held that the State is under an obligation to follow the statutory rules and neither the Government can act contrary to the rules nor the court can direct the Government to act contrary to rules. The court went on to further hold as follows:

“No court can issue Mandamus directing the authorities to act in contravention of the rules as it would amount to compelling the authorities to violate law. Such directions may result in destruction of rule of law.”

13. The Apex Court in **Dhanraj v. Vikram Singh [(2023) SCC OnLine SC 724]** considered a similar situation where certain directions were issued by the High Court after upholding the statutory provisions, finding as under:

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“13. We fail to understand the propriety of the observation that the law departments of the State and the Union should have a dialogue to remove the discrepancy. Moreover, the High Court has not proceeded to strike down the relevant provisions which were held to be repugnant to PESA. It only directs that till the discrepancy is removed by the legislature, certain provisions of the 1961 Act and the rules framed thereunder shall be ignored. Such approach by the writ Court is not at all called for. Without holding that the statutory provisions are not constitutionally valid, the High Court could not have issued a direction not to implement the statutory provisions.”

14. Again in **State of Himachal Pradesh v. Yogendera Mohan Sengupta [2024 SCC OnLine SC 36]**, the Apex Court has laid down the extent of powers available to the Codes under the Constitution of India as under:

“81. It is a settled law that the Constitution of India does not permit the courts to direct or advise the Executive in the matters of policy or to sermonize qua any matter which under the Constitution lies within the sphere of Legislature or Executive. It is also settled that the courts cannot issue directions to the Legislature for enacting the laws in a particular manner or for amending the Acts or the Rules. It is for the Legislature to do so.”

Thus, it is noticed that in a writ petition filed, when the provisions of the statute are not held to be unconstitutional, the writ court is not expected to issue further directions in the matter, like the one

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issue in the case at hand.

15. Apart from the above, we notice that the judgment of the learned Single Judge was rendered as early as on 19.12.2022. Direction Nos.(ii) and (iii) were with reference to the directions given to the National Board, firstly to alert the Central Government about the need for having a re-look at the upper age limit and secondly to alert the Central Government about the requirement for including a transitional provision in the ART Act. We notice that the National Board had already acted upon the above directions, as is evidenced by Annexures A1 and A2 in WA No.696 of 2024.

16. By Annexure A1, the Expert Members of the National Board have convened a virtual meeting on 18.01.2023, to discuss about the various directions issued by the learned Single Judge. A perusal of the opinion given by the members of the committee, throws light on the reason for prescribing an upper age limit for ART services. It is to be noticed that the committee consists of experts in the field. The Committee has given valid reasons for prescribing an upper age limit. There is no challenge to the above opinion. We see no reason to doubt their wisdom. Annexure A2 is a letter addressed by the Ministry of Health and Family Welfare informing the gist of the meeting held by the National Board to

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the Deputy Solicitor General of India, Kerala. The said letter reads as under:

“This is in reference to your email dated 01.01.2023 on the above noted subject and to say that meeting of National Board was held on 31.01.2023 at 15.00 hrs. in hybrid mode (through VC/Physical) under the Chairpersonship of Hon’ble Minister of Health and Family Welfare at Nirman Bhawan, New Delhi. As desired by Hon’ble High Court of Kerala, the National Board considered the relevant issues and decision of National Board in the matter is summarised below:-

Directions of Hon'ble High Court of Kerala	Decision of National Board
<p>The National Board shall alert the Central Government about the need for having a re-look at the upper age limit prescribed in Section 21(g) of the Act</p> <p>The Section 21(g) of ART Act reads as under:-</p> <p>21 (g) the clinics shall apply the assisted reproductive technology services,-</p> <p>(i) to a woman above the age of twenty-one years and below the age of fifty years;</p> <p>(ii) to a man above the age of twenty-one years and below the age of fifty-five years;</p>	<p>The National Board agrees with the comments of the Expert Members of the National Board and accordingly is of the opinion that the upper age limit for male and female availing ART treatment is correct and no changes are required in the current law.</p>
<p>The National Board shall also bring to the notice of the Central Government the</p>	<p>The National Board is of the opinion that the extension time given to clinics/banks by the</p>

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requirement of including a transitional provision in the ART Act.	Central Government vide letter No.U.11019/133/2022-HR dated 24.01.2023 is sufficient and hence no further specific transitional provision in the ART Act is required
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2. A copy of instructions issued vide letter No. U.11019/133/2022-HR dated 24.01.2023 is enclosed.

3. You are requested to apprise the Hon'ble High Court of Kerala in the matter accordingly.

4. This issues with the approval of Joint Secretary (DHR)."

Thus, from the above, it is clear that the directions issued by this Court on 19.12.2022 have already been carried out by the National Board.

17. In view of the above, we are of the opinion that the directions issued by the learned Single Judge in the judgment dated 19.12.2022 have worked themselves out.

18. Therefore, we see no reason to continue with the directions issued by the learned Single Judge in the impugned order.

19. We also notice that in Writ Appeal No.701 of 2024, arising out of W.P(C) No.34687 of 2023 the interim order was granted in the writ petition taking into account the fact that the wife is below 50 years of age and therefore, ART services can be permitted to be continued. However, as already found, insofar as the provisions of Section 21(g) of the Act have been upheld by this Court as

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constitutional, we see no reason to permit the continuance of ART services in that case also. We are not called upon to consider in the present case a situation where one of the parties is below the prescribed age and ART services are sought for from a donor who is within the age limit.

20. We also notice that the Apex Court is considering the very same issue and no interim orders have been issued in the matter. Though the High Courts of Karnataka, Calcutta and Delhi have issued orders permitting the continuance of treatment, we notice that, as regards orders issued by the Delhi and Karnataka High Courts, the issue was with respect to the amendments under the Surrogacy (Regulation) Act, 2021. As regards the orders issued by the Calcutta High Court, the constitutionality of the ART Act is being considered and only an interim arrangement has been made in the matter. However, for the reasons stated hereinbefore, we are clear that unless the provisions of the statute are declared as unconstitutional, no directions can be issued to the authorities to the act contrary to the provisions of the statute.

In view of the above, we are of the opinion that the appeals require to be admitted and an interim order as prayed for to be granted. Therefore, all the above appeals are admitted, ordering

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notice to the party respondents, since the learned counsel who represented the respondents in one of the writ appeals (WA No.574 of 2024) has relinquished the vakkalath. Pending final disposal of the writ appeals as above, we stay the operation of the following impugned judgments/orders:

- (i) Order dated 24.08.2023 in W.P(C) No.28296 of 2023, challenged in WA No.574 of 2024.
- (ii) Order dated 26.06.2023 in W.P(C) No. 20748 of 2023, challenged in WA No.575 of 2024.
- (iii) Judgment dated 12.01.2023 in W.P(C) No.315 of 2023, challenged in WA No.689 of 2024.
- (iv) Judgment dated 19.12.2022 in W.P(C) No.24058 of 2022, challenged in WA No.696 of 2024.
- (v) Order dated 19.12.2023 in W.P(C) No.34687 of 2023, challenged in WA No.701 of 2024.
- (vi) Order dated 18.08.2023 in W.P(C) No.27372 of 2023, challenged in WA No.768 of 2024.
- (vii) Order dated 25.07.2023 in W.P(C) No.24247 of 2023, challenged in WA No.827 of 2024.

Sd/-
ANIL K. NARENDRAN, JUDGE

Sd/-
HARISANKAR V. MENON, JUDGE

In

APPENDIX OF WA 696/2024

Annexure A1

TRUE COPY OF EMAIL DATED 19.01.2023 SHARING THE MINUTES OF VIRTUAL MEETING HELD ON 18.01.2023 OF EXPERT MEMBERS OF NATIONAL BOARD AND ACCEPTING THE SAME BY ITS MEMBERS VIDE THEIR DIFFERENT DATES EMAILS.

Annexure A2

TRUE COPY OF THE LETTER NO.U.11021/01/2023-HR DATED 09.03.2023 ISSUED TO THE LEARNED DSG.

