2024:DHC:7662

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

Reserved on: 16th May, 2024
Pronounced on: 4th October, 2024

\+ **W.P.(C) 15159/2021**

..... Petitioners

Through: Ms. Suruchi Aggarwal, Sr. Adv along with Mr. Gurmeet Singh, Adv. (M:9650954007)

versus

GOVERNMENT OF NCT OF DELHI AND ORS. ..... Respondents

Through: Mr. Kirtiman Singh, CGSC with Ms. Vidhi Jain and Mr. Taha Yasin, Advs. for UOI. (M: 9999359235)
Mr. Subhash Kumar & Mr. Anurag Bindal, Advs. for Respondent No.3 (Sir Ganga Ram Hospital). (M:9999955947)

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. This hearing has been held through hybrid mode.

Introduction and Background Facts

2. In ***M. v. HFEA*** the Court of Appeal noted the anguish of a woman 'A', who was diagnosed with cancer at the age of 21, and wished to conceive children[1]:

"In other words, the Committee simply did not

[1] [2015] EWCA Civ 1289; See also, T Beider and Y Ben-Baruch, *Something from me* (Hebrew, 2014).

> *consider the possibility that this is a case where A said something along these lines (if I may be bold as to attribute words to A that A never used and to which she is not capable of answering):* ***"This is what I want to do. I want to do it whatever you want to tell me about what it involves. I trust my Mum and Dad to make the right decisions about all this when I am gone because they brought me up so well. It is my only chance." That possibility might explain why there was no detailed discussion involving A and her mother of the details of what would need to happen if A's eggs were to be used between January 2010 and her death****. In fact there was some discussion very shortly before her death, to which the Committee failed to refer. The Committee did not consider whether the inherent probabilities of the case might lead to this sort of conclusion"*

3. The sentiments of profound loss and the yearning to preserve a connection with the deceased, as expressed by the mother in the above passage, finds its parallel in the present case. The Petitioners, grieving the untimely demise of their son, seek to continue his legacy by obtaining his preserved semen sample from the Respondent No. 3—Sir Ganga Ram Hospital.

4. The brief background is that the present petition has been filed under Article 226 of the Constitution of India by the Petitioners *i.e.*, Petitioner No. 1-Gurvinder Singh, and Petitioner No. 2-Harbir Kaur, seeking release of their deceased son's-Late Preet Inder Singh's frozen semen sample stored in the fertility lab of the Respondent No. 3-Sir Ganga Ram Hospital.

5. The Petitioners' son was diagnosed with Non-Hodgkin's Lymphoma on 22nd June, 2020, which is a form of cancer and was admitted in the Ganga Ram Hospital (*hereinafter, 'Hospital'*). He was to be administered

chemotherapy and at that stage, he was advised for storage of his semen in order to deal with any infertility issues that may occur due to chemotherapy. The deceased had then given consent for freezing of his semen sample, and his semen sample was preserved in IVF lab of the Respondent No.3 on 27th June, 2020 vide registration no. 2726372. Unfortunately, he passed away at the age of 30 years on 1st September, 2020. As per the Petitioners, the advice of doctors was that chemotherapy could result in infertility, which led to this step being taken by the deceased son. The frozen semen sample has been preserved at the Hospital as has been confirmed by Mr. Subhash Kumar, ld. Counsel for the Ganga Ram Hospital.

6. The Petitioners are the parents of the deceased. Petitioner No. 1 is the father, and Petitioner No. 2 is the mother of the deceased. The Petitioners' son passed away at a young age of 30 years on 1st September, 2020. Prior to his death, when he was diagnosed with Non-Hodgkin's Lymphoma, which is a form of cancer. In June, 2020, upon the advice of doctors, he is stated to have availed of the services of the fertility lab for semen cryopreservation at the Hospital for storing his semen sample. They approached the Hospital on 21st December, 2020, for release of the frozen sperm stored in the fertility lab of the Hospital. The case of the Petitioners is that they wish to carry on the legacy of their deceased son, and hence they approached the Hospital for release of the semen sample. The Hospital however took the position that the same could not be released without appropriate orders from the Court. The relief prayed for in this writ petition is as under:

> *"Issue a Writ in the nature of Mandamus or such appropriate Writ, upon the Respondent No.2 for issuance of appropriate directions upon the Respondent No.3* ***for releasing the frozen Semen***

Sample bearing Regno.2726372 dated 27.06.2020 stored in the IVF lab of Respondent No.3 into the custody of the Petitioners"

7. The Petitioners state that they had been regularly paying for the preservation of their deceased son's semen sample. However, after the payment period expired on 27th June, 2020, the Hospital refused to accept further payments. The Petitioners feared that the Hospital may stop preserving the frozen semen due to non-payment. As per the Petitioners, they along with their daughters, are prepared to take full responsibility for any child born via surrogacy using the frozen semen sample.

Procedural History

8. Notice in the present petition was issued on 24th December, 2021. On 4th February, 2022, statement was made by the ld. Counsel for the Hospital that the semen sample had been preserved. The said statement was taken on record.

9. On 13th May, 2022, ld. Counsel for the Hospital stated that one of the reasons the semen sample of the deceased was not released was that no codified policy had been formulated by the Hospital to deal with the present situation. A competent officer from the Hospital was then directed to place an affidavit explaining the Hospital's position in respect of the prayers made in the present petition. From the affidavit tendered to the Court on 30th May, 2022, it was pointed out that the deceased had submitted a request for Semen cryopreservation before the start of his chemotherapy sessions from 27th June 2020. It was, however, submitted that in terms of the Assisted Reproductive Technology (Regulation) Act 2021, no statutory guidelines were placed in respect of disposal/utilization of semen samples of unmarried

person.

10. Considering the important questions raised in respect of the interpretation of the Assisted Reproductive Technology (Regulation) Act 2021 *(hereinafter, 'ART Act')*, the Court on 23rd November, 2022, directed the impleadment of the Ministry in the present petition. Thus, the Ministry of Health and Family Welfare *(hereinafter, 'MoHFW')* was impleaded as Respondent No. 4 in the present petition.

11. Vide order dated 12th April, 2023, Mr. Subhash Kumar, ld. Counsel appearing for the Hospital was directed to produce the relevant hospital records relating to the taking of semen sample of the deceased, notings made by the doctors, if any, and the manner in which the same was preserved by the Hospital. The record of the Hospital, including one sheet relating to semen freezing requisition was produced on 2nd May, 2023.

Counter-affidavit on behalf of the Hospital

12. On 3rd February, 2022, the Hospital filed its counter-affidavit. The said counter-affidavit challenged the maintainability of the present petition, on the ground that the said Hospital was not *'State'* in terms of Article 12 of the Constitution of India.

13. Further, according to the Hospital, there were no laws, including the ART Act, that governed the release of a frozen semen sample of an unmarried deceased male to his parents or legal heirs. Without any guidelines or regulations, the Hospital was unable to release the semen sample despite it being cryopreserved since June, 2020. Additionally, the judgment of the High Court of Calcutta in the case of ***Asok Kumar***

Chatterjee vs. Union of India[2] held that the father-son relationship did not grant the father any right over the progeny of his son. In this context, the Petitioners (parents of the deceased) had no legal standing or right to the frozen semen sample of their unmarried deceased son. According to the Hospital, the judgment emphasizes that such a right would only belong to the wife, if any.

Rejoinder on behalf of the Petitioners

14. Rejoinder affidavit to the above counter-affidavit was filed on 12th March, 2021. The Petitioners placed reliance on the decision of this Court in ***Sanjeev Gulati v. Sri Ganga Ram Hospital***[3]**,** to argue that even private hospitals performing public duties fall under Article 12 of the Constitution of India, and are subject to writ petitions. It was argued that since the Hospital was performing a public function, it could not escape its responsibilities by claiming that the present writ was not maintainable. Reliance was placed on ***Jasmine Ebenzer Arthur v. HDFC Ergo General Insurance Company Ltd.***[4] wherein it was held that writ petitions were maintainable against a private body, if a public duty was imposed on it.

15. According to the Petitioners, in the absence of any legislative guidance, the frozen semen sample should be provided to the Class I legal heirs of the deceased, and there was no legal embargo against the Petitioners claiming the genetic material of their deceased son. Furthermore, the Petitioners seek to distinguish the decision in ***Asok Kumar Chatterjee (supra)*** on the ground that the said decision differs from the facts of the

[2] W.P.A. No. 4553 of 2020, order dated 19th January, 2021
[3] 2005 SCC OnLine Del 1334
[4] AIR 2019 Mad 220

present case, as therein the deceased was married and had a wife, while in the present case, the deceased was unmarried.

16. Further, the Petitioners placed reliance on the judgment passed by the Supreme Court of the State of New York, County of Westchester, in ***'In the Matter of the Application of Monica Zhu & Yongmin Zhu' (dated 16th May, 2019, Index No. 53327/2019).*** The said decision would be considered later in detail.

17. Thereafter, vide ***CM 44521/2022*** dated 10th October, 2022, certain documents such as the ART Act, Surrogacy (Regulation) Act, 2021, Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India were placed on record. Further, certain newspaper articles relating to passing of possession and custody of frozen semen of the deceased son were also placed on record.

Response on behalf of the MoHFW to the present petition

18. MoHFW filed its short affidavit on 3rd February, 2023. In the said affidavit, the stand of the MoHFW is as under:

- The SRA applies only to intending couples or women with medical needs for surrogacy and does not cover grandparents as 'intending grandparents', which disqualifies the Petitioners from seeking relief under this Act.
- The ART Act is to assist infertile couples or women and does not extend to cases like the Petitioners', who wish to have a grandchild through surrogacy.
- The Petitioners lack the necessary documentation, specifically Forms 10 and 11 as required by the ART Rules, 2022, making their request for the release of the semen sample impermissible.

Submissions on behalf of the Petitioners

19. Ld. Senior Counsel Ms. Suruchi Aggarwal, appearing for the Petitioners, relies upon the provisions of the ART Act and the ART Rules, 2022. She specifically refers to Form 10 of the ART Rules, 2022, which, after the ART Act came into force, permits the donor to sign a consent form for freezing, as well as for handing over the said sample to his wife or to any other individual whose name and details can be specified. It is her submission that, although at the time of the Petitioners' son's death, this Act had not come into force, and the question of signing the declaration did not arise, the form indicates the intent of the legislation, and the benefit under the Act should not be limited to married individuals.

20. Ld. counsel further relies upon the preamble of the ART Act to argue that the same contemplates use due to infertility, disease or social or medical concerns, which would include the circumstances in which the Petitioners have been placed today. She further submits that the purpose of the ART Act and SRA need to be highlighted inasmuch as the same were only meant for stopping/regulating any commercial use of genetic material. In the present case, the Petitioners are the real parents of their predeceased son, and in terms of Section 2(1)(h) and Section 2(1)(u) of the ART Act, there was no bar on the Petitioners receiving the same.

21. Reliance is further placed upon the decision of the Supreme Court of New York in ***Monica Zhu (supra),*** where the Supreme Court of New York was dealing with a similar situation, where the son of the couple, *i.e.*, Peter Zhu was predeceased. The son's genetic material was permitted to be handed over by the Court in the said case to the parents, subject to various safeguards.

Submissions on behalf of the Union of India

22. Mr. Kirtiman Singh, ld. CGSC, firstly, places reliance on the two Acts i.e., ART Act and the SRA. He refers to the following provisions of ART Act:

- Section 2(1)(g) defining 'gamate',
- Section 2(1)(h) defining 'gamete donor',
- Section 2(1)(j) defining 'infertility',
- Section 2(1)(u) defining 'woman'
- Section 21(1)(g),
- and Section 29 which restricts the sale transfer etc of gametes.

23. He further refers to the following provisions of SRA:

- Section 2(1)(h) defining couple, which prescribed the age as being a man of more than 21 years of age and a woman of 18 years of age,
- Section 2(1)(r) defining 'intending couple',
- Section 2(1)(zd) defining 'surrogacy',
- Section 4(ii) and especially Section 4(ii)(c) which prescribes conditions for surrogacy.

24. As per his submission, on a joint reading of both the enactments, it can be seen that the Petitioners herein would not qualify for either of the benefits under the ART Act or under the SRA, as they have crossed the age limit.

25. In addition, they would also not constitute a *'intending couple'* under the SRA. Ld. CGSC tries to draw a parallel from the Adoption Regulations, 2022 of the Central Adoption Resource Authority, which prescribed the maximum composite age of prospective adoptive parent as a couple in order to argue that if the Petitioners cannot even adopt a child, then in law they

cannot be permitted to use their son's semen for the continuation of their son's legacy. Reliance is placed upon paragraph 9 of the writ petition and paragraphs B and E of the grounds of the petition to argue that clearly, the purpose for seeking release of the semen sample is for utilization for future surrogacy. Since the SRA does not permit the Petitioners for the same, the present writ petition would not be liable to be entertained. Reliance is also placed upon the following judgments:

- ***Nandini K v. Union of India***[5]
- ***Stuti Rakesh Painter v. State of Gujarat***[6]
- ***Rakhi Bose v. Union of India***[7]
- ***Arun Muthuvel v. Union of India***[8]

Rejoinder Submissions on behalf of the Petitioners

26. Ms. Aggarwal, ld. Senior Counsel, in response to the submission of ld. CGSC regarding the age of the parents, submits that the Petitioners would obviously not be the commissioning couple. If the genetic material is released to the Petitioners, they would avail of surrogacy only in accordance with law. The Petitioners undertake before this Court that they would not violate any provisions of law, if the material is released to them and if they choose to have a child through surrogacy. The question of whether the Petitioners wish to avail surrogacy or not would be considered after the release has taken place, although she does not dispute that the purpose is to continue the legacy of their son.

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[5] High Court of Kerala, W.P.(C) 24058 of 2022, judgment dated 19th December, 2022.
[6] High Court of Gujarat, R/Special Civil Application No. 10400 of 2021, judgment dated 29th July, 2021.
[7] High Court of Kerala, WP(C) NO. 19184 OF 2022, judgment dated 21st June, 2022.
[8] Supreme Court of India, W.P.(C) No. 756/2022, order dated 7th February, 2023.

27. Reliance is placed upon ***Rakhi Bose (supra)*** to argue that in paragraph 7 of the said judgment, the Court recognizes that the power to transfer exists. This observation is relied upon to argue that the potential of a child to be born cannot be stultified by relying on the provisions of the ART Act which have no application in the present case. She highlights the reliefs that have been sought in the present petition *i.e.*, for release of the frozen semen sample which is stored in IVF Lab of the Hospital.

28. At the time when the Petitioners' son was admitted, the semen sample was given prior to commencement of chemotherapy and as per Petitioners' information, no consent was obtained as to the use of the same. In conclusion, she relies upon the judgment New York Supreme Court in ***Monica Zhu (supra),*** where under similar circumstances, the material was released to the parents.

29. It is submitted that if posthumous surrogacy is not barred under any law, the same ought not to be prevented by the Court. The Petitioners also have two daughters and their families, who are willing to give their undertaking that if surrogacy is opted for, they would also take care of the child.

30. On the issue of the application of the said two Acts, *i.e.*, ART Act and the SRA, it is argued that in the present case, the death of the son took place in 2020 and the application for release of the semen sample was also filed in 2020. However, both the statutes cited came into operation only in 2022, and hence the provisions of the said statutes cannot be relied upon to decide the present petition.

31. She relies on Section 22(2) of the ART Act to argue that the death of the person whose semen sample has been stored is accounted for in the

provision itself, indicating that there is no bar or prohibition on the release of the semen sample or gametes. The parents may be required to apply to the surrogacy board to obtain approvals, but the release cannot be prevented. Lastly, she refers to the form filled out by the deceased son at the time the decision to store the semen sample was made in the Hospital, wherein it was clearly specified that the purpose was for IVF. Both his and his father's mobile numbers were mentioned, which shows that the son intended to preserve his semen sample for procreation. Ultimately, it reflects the will of the deceased.

32. On the issue of whether semen sample constituted 'property', which can be passed on to the parents, ld. Sr. Counsel for the Petitioners places reliance on the judgment passed by the Supreme Court of British Columbia in ***K.L.W. v. Genesis Fertility Centre***[9], wherein issues framed for adjudication before the Court were as under:

> *" [7] This application raises the following issues:*
> *(a) Is the Reproductive Material property?*
> ***(b) If so, did property in the Reproductive Material pass to the petitioner as the sole beneficiary of [A.B.]'s intestate estate?***
> ***(c) In the circumstances of this case, may the Court order the release of the Reproductive Material to the petitioner, notwithstanding the lack of the donor's written consent to the petitioner's use of the Reproductive Material for the purpose of creating an embryo****?"*

33. The above decision considered various other decisions from different jurisdictions, wherein the first question was whether reproductive material could be held to be property. In the above decision, after considering the

[9] (2016 BCSC 1621)

decisions in ***Yearworth v. North Bristol NHS Trust***[10]***, Doodeward v. Spence***[11]***, Kate Jane Bazley v. Wesley Monash IVF Pty. Ltd.***[12]**,** and ***Jocelyn Edwards; Re the Estate of the late Mark Edwards***[13], the Supreme Court of British Columbia came to the conclusion that the deceased person's reproductive material has to be construed as property.

34. In the case of ***K.L.W. v. Genesis Fertility Centre (supra)***, three issues arose. The first was whether semen constitutes property, and this was affirmed in paragraph 95 of the decision. The second issue was whether property passes intestate to the parents. The Supreme Court of British Columbia held that the wife was the sole beneficiary of the deceased's intestate estate. The third issue concerned whether semen should be released and whether written consent was required. The Court analyzed various case laws from different jurisdictions, including ***Elizabeth Warren v. Care Fertility (supra)***, which held that no consent was required. The Court also discussed cases where the husband's wishes were recorded, even partially, including decisions from the United Kingdom, where consent can be vague. Finally, in paragraph 134 of the decision, the Court held that not allowing the Petitioner to use the reproductive material of the deceased would be an affront to her dignity. The Court declared the reproductive material to be the sole property of the Petitioner, to be released for the purpose of creating embryos for her reproductive use, while prohibiting any commercial use.

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[10] [2009] EWCA Civ 37
[11] (1908) 6 C.L.R. 406
[12] [2010] QSC 118
[13] [2011] NSWSC 478

35. In ***Hecht v. Superior Court***[14]**,** two issues were discussed by the Court of Appeal of California, Second Appellate District, Division Seven. One issue was whether there was ownership, which was answered in the affirmative and second issue was whether a moralistic approach is to be adopted or not. On the second issue, the Court held that the argument that the State would in effect to be allowing orphan children to be born is a value judgment which the Court cannot take inasmuch as the State cannot interfere in the decision of parties. In this case, the semen sample of the deceased had been stored and the claimant was his girlfriend, and two other children from a previous marriage were objecting to the release of the semen sample.

36. In ***Roblin v. The Public Trustee for the Australian Capital Territory***[15] , the question before the Supreme Court of the Australian Capital Territory was whether semen would form part of the estate of the deceased, which was answered in the affirmative, and the ova & sperm were held to be human tissues. The Court directed that the same would be property, and the ownership, which was originally with the deceased person, upon death would flow to the legal representatives and form part of the estate.

37. In ***Re Application by VERNON***[16]**,** the Supreme Court of New South Wales dealt with the posthumous retrieval of reproductive material. The Court held that reproductive material may be retrieved even after death. It also established a hierarchy of legal representatives, where the spouse is ranked first, children second, and the parents of the deceased third. The Court further recognized that the transplantation of reproductive material

[14] Decision dated 17th June, 1993, Cal.App.4th 836 (Cal. Ct. App. 1993)
[15] [2015] ACTSC 100
[16] [2020] NSWSC 608 BC202004365.

could be used either in the body of a living person or for research, development, and therapeutic purposes, but for no other purposes. Additionally, the Court held that once semen is removed from the body of a person awaiting burial, it constitutes property.

38. Ms. Aggarwal, ld. Sr. Counsel distinguished the decisions cited by the Respondent.

(i) In respect of ***Nandini K. (supra)***, she submits that the position of the Kerala High Court recognises that the right to procreate is part of Article 21 of the Constitution, and refers to the decision to say that prior to the enactment of the ART, 2021 any process that has already been commenced cannot be prevented.

(ii) Secondly, in ***Stuti Rakesh Painter (supra),*** the deceased person's semen could be used for the purposes of undertaking IVF/ART procedures by the spouse of the deceased and the Court would not injunct the same.

(iii) In ***Rakhi Bose (supra)*** as well, the Kerala High Court has again recognised that there is prohibition against sale, transfer and use of gametes, and the purpose of the said Act is to regulate and supervise Assisted Reproductive Technology clinics. The same is not meant to impinge upon personal freedoms of individuals.

39. Finally, she relies upon the decision in ***Saswati Mohury v. Union of India***[17] to argue that there are various gaps in ART Act, which are recognised in paragraph 13 of this decision. One of the gaps includes the fact that age limit is not matching — in the sense that an anomalous

[17] MANU/WB/0625/2023

situation might arise where one of the individuals of the commissioning couple may be within the permissible age-limit but would nonetheless not be entitled to ART, if his/her partner crosses the age-limit. Finally, reliance is placed upon ***Suchita Srivastava v. Chandigarh Administration***[18] to argue that the reproductive choice of a person is a part of right under Article 21 of the Constitution.

40. Ld. Sr. Counsel also highlights the case of Ms. Rajashree Patil where the mother was impregnated with the son's semen who has passed away due to cancer in Germany and she had given birth to two twins[19]. The said news article is reproduced below:

> *"In a heart-touching story, Rajashree Patil has been blessed with twins from a surrogate mother in Pune after her 27-year-old son, Prathamesh died of brain cancer two years back. Rajashree, instead of mourning of her son 's death used cryopreserved sperms for a surrogate pregnancy. The twins were born on February 12. They were named as Prathmesh and Preesha (God's gift).*
> *Rajashree, who is 48-years-old, said that she was very attached to her son who excelled in academics and was pursuing engineering in Germany when he was diagnosed with a stage IV cancer in the brain. She added that the doctors had asked her son to preserve his sperm before starting the chemotherapy and radiation. Prathamesh, who was unmarried, had authorized his mother and sister, to use his semen sample after his death.*
> *Rajashree rebuked anyone who referred to her as the*

[18] MANU/SC/ 1580/ 2009

[19] India Today, 'Pune woman who lost son to cancer becomes grandmother to twins born from dead son's preserved semen' (15 Feb 2018) https://www.indiatoday.in/fyi/story/pune-woman-becomes-grandmother-with-dead-sons-preserved-semen-1170040-2018-02-15 (accessed on 28 Sept 2024)

grandmother saying that she is their mother. Rajashree is a teacher at a private school in Mukundnagar. The cryopreserved sperm was used to fertilize a surrogate who was not from the family.

After his graduation from Sihbad College of Engineering, the 27-year-old had moved to Germany in 2010 to pursue his Master's. Back in 2013, he was diagnosed with brain tumor and lost his vision. Prathamesh died of cancer on September 3, 2016. Rajashree said that Prathamesh's sister had stopped talking while she herself walked around the house with her son' s photo. It is then that it occured to her that she could bring him back with some part of him which is still 'alive'.

Rajashree had completed all the formalities at the semen bank in Germany and approached Sahyadri Hospitals for an IVF procedure. IVF specialist Dr Supriya Puranik at the hospital said that the IVF procedure was quite common but the case was unique as a grief-stricken mother wanted her son back."

Further submissions on behalf of the Union of India

41. Mr. Kirtiman Singh, ld. CGSC reiterated his submission that the entire purpose of seeking the release of the semen sample of the deceased son is for the purposes of procreation through surrogacy. The mother and father of the deceased are 66 and 61 years old, respectively. Under such circumstances, surrogacy would not be possible in terms of the provisions of the SRA.

42. In relation to the judgment in ***Monica Zhu (supra)***, ld. CGSC relies upon various decisions in order to highlight the fact that posthumous conception has not been recognised in any jurisdiction. What the Petitioners seek in the present case would be a posthumous right to procreation after the death of her son, which is not recognised, although the right to procreation is

clearly recognised by various judicial decisions.

43. The grounds on which the Petitioners seek the release of the semen sample are as follows;

i) one, as the property of the son

ii) secondly, as recognition of the right to posthumous reproduction.

According to the ld. CGSC, both grounds are unavailable under the prevalent law. The claim to property in genetic material, according to Mr Singh, ld. CGSC cannot be treated as ordinary succession.

44. Finally, reliance is placed upon a recent decision of the Karnataka High Court in ***Sri H. Siddaraju & Anr. v. Union of India***[20] where various tests have been laid down by the Court in order to relax the upper age bar under the SRA. In the said decision, the Karnataka High Court allowed surrogacy, however, after satisfaction of the three tests which were genetic, physical and economic test. In this case, the female was within the age limit and the husband is one year over age. The said tests are pressed into service to argue that none of these tests would also be satisfied in the facts of the present case.

45. In response, Ms. Aggarwal, ld. Sr. Counsel submits that in the said decision, the Court clearly recognises that it is beyond the realm of the Court, in any manner, to inhibit the use of reproductive technology. In that case, directions to destroy the semen sample had been set aside.

Written Submissions on behalf of the Union of India

46. Three compilations were placed on record by the Union of

[20] 2023 SCC OnLine Kar 16

India/MoHFW on 24th May, 2023, 24th July, 2023 and 6th September, 2023. In addition to the above material, additional material was relied upon, which is provided below:

Statutes and Legislations

- *German Embryo Protection Act s 1, ss 1 EschG, 31-40.*
- *French Loi n° 2011-814, 41-46.*
- *Swiss Federal Act on Medically Assisted Reproduction, 1988*
- *Uruguay Regulation on Techniques for Human Assisted Reproduction*
- *Australian Assisted Reproductive Treatment Act 2008*
- *European Parliament and Council, DIRECTIVE 2004/23/EC dated 31st March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells*
- *European Commission, DIRECTIVE 2006/17/EC dated 8th February 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards certain technical requirements for the donation, procurement and testing of human tissues and cells*

Case Laws

Indian Decisions

- *Nandini K v. Union of India*, High Court of Kerala, Judgment dated 19 December 2022, 1-26, paras 10-11, 13-14.
- *Stuti Rakesh Painter v. State of Gujarat*, High Court of Gujarat, Judgment/Order dated 29 July 2021, 27-30, paras 4-5.
- *Rakhi Bose v. Union of India*, High Court of Kerala, Judgment/Order dated 21 June 2022, 31-42, paras 6-7.

- *Arun Muthuvel v. Union of India & Ors,* Supreme Court Order dated 7 February 2023, Writ Petition No 756/2022, 43-44.
- *Sri H Siddaraju & Anr v. Union of India*[21]

Foreign Decisions

- *Louisville & Nashville Railroad v. Wilson*[22]
- *Williams v. Williams*[23]
- *Doodeward v. Spence*[24]
- *Yearworth v. North Bristol NHS Trust*[25]
- *Davis v. Davis*[26]
- *Hecht v. Superior Court*[27]
- *JCM v. ANA*[28]
- *SH v. DH*[29]
- *Ex Parte C*[30]
- *Robertson v. Saadat et al, Court of Appeal of the State of California, Second Appellate District, Division One*[31],

[21] 2023 SCC OnLine Kar 16
[22] 123 Ga 62 (1905)
[23] (1882) 20 Ch D 659
[24] 6 CLR 406
[25] [2009] EWCA Civ 37
[26] 842 SW 2d 588 (1992)
[27] [1993] 16 Cal App 4th 836
[28] 2012 BCSC 584
[29] [2018] OJ No 3961
[30] [2013] WASC 3
[31] (2020) B292448; 24 ITELR 17

Articles/Papers and Reports

- Antony Moses and Palada Dharma Teja, 'The Grave Issue of Privacy of the Deceased' (2018) 5(1) IJLPP 1, 1-17
- Robert PS Jansen, 'Sperm and Ova as Property' (1985) 11(3) Journal of Medical Ethics 123-16
- Iryna Chekovska et al, 'Postmortal and Posthumous Reproduction: Ethical and Legal Approaches to the Problem' (2021) 1 Journal of Legal Ethical & Regulatory Issues 1, 1-8
- Hashiloni-Dolev Y and Schicktanz S, 'A Cross-Cultural Analysis of Posthumous Reproduction: The Significance of Gender and Margins of Life Perspectives' (2017) Reproductive Biomedicine and Society Online 4:21-32, 9-30
- Asitik Sikary and Rajeshv Bardale, 'Postmortem Sperm Retrieval in the Context of Developing Countries of the Indian Subcontinent' (2016) 9 Journal of Human Reproductive Sciences 82, 47-50
- Pennings G, 'Belgian law on medically assisted reproduction and the disposition of supernumerary embryos and gametes' European Journal of Health Law 81-160
- ESHRE Task Force, 'Ethics and Law 11: Posthumous Assisted Reproduction' (2020) 388-391.
- Posthumous Collection and Use of Reproductive Tissue: A Committee Opinion (2020) 328-331.

International Legal Materials

- *WHO Guiding Principles on Human Cell, Tissue and Organ Transplantation*, 332-340.

47. The additional grounds raised by the Union of India in their written submissions[32] are as follows:

- Petitioners' reliance on the ***Monica Zhu (supra)*** judgment by the Supreme Court of the State of New York is misplaced. The Court of Appeal of California, in ***Robertson v. Saadat (supra)***, dismissed a similar appeal and disagreed with ***Monica Zhu (supra)***. The Californian Court held that neither the State's intestacy law nor the Uniform Anatomical Gift Act applied to a spouse's use of reproductive material for posthumous conception. The Court also ruled that signing an organ donor card or expressing a desire to have children did not indicate consent for the use of one's reproductive material for posthumous conception.
- Posthumous reproduction rights involve complex ethical, legal, moral, religious, and cultural questions, and that answers to these issues vary across jurisdictions. The Respondent argues that such questions should be addressed in specific cases rather than hypothetical scenarios
- Following the unfortunate death of the Petitioners' son on 1st September, 2020, the present writ petition was filed on 23rd December, 2021 seeking the release of his frozen semen samples for surrogacy through a recognized Hospital. However, the ART Act and the SRA, were enacted by Parliament on 18th December, 2021 and 25th December, 2021 respectively, with the latter coming into force

[32] Written Submissions dated 24th July, 2023, titled 'Note of Arguments-Part I on behalf of Respondent No. 1'; Supplementary Written Submissions dated 20th August, 2023, titled 'Supplementary Written Submissions on behalf of Respondent No. 1'

on 25th January, 2022. Petitioners are not entitled to surrogacy under these enactments, and the fact that the semen sample was collected before their enactment does not exempt the Petitioners from compliance with these two Acts. All individuals seeking the benefits of assisted reproductive technology, including surrogacy, ought to follow the said two enactments.

48. In relation to posthumous reproduction, the Union of India, has in its written submissions dated 24th July, 2023, has argued *inter alia* as follows:

- Posthumous Reproduction or ***'PR'*** refers to the process of conceiving a child using Assisted Reproductive Technology *('ART')* after the death of one or both genetic parents. This involves techniques such as Stimulated Ejaculation, Micro Epididymal Sperm Aspiration *('MESA')*, or Testicular Sperm Extraction *('TSA')*, using either preserved or newly collected sperm or eggs from a deceased or brain-dead individual.
- Broadly, PR can be divided into four categories: Planned PR[33], Unplanned PR[34], Brain-Dead PR[35], and Stem Cell PR[36]. In the context of the present petition, Planned PR is the focus, wherein explicit consent for the use of stored gametes for reproduction is a quintessential requirement. The present case does not meet this

[33] Occurs when death is anticipated due to war, dangerous activity, or illness, and the future parents provide explicit consent through an advance directive to use their stored gametes or pre-embryos for reproduction after their death.

[34] Involves the sudden death of one partner, with gametes retrieved within 36 hours of death, or the use of stored gametes, without explicit consent from the deceased.

[35] In cases where a female partner is declared brain dead while carrying an embryo, the embryo is brought to term through artificial support, again without consent from the deceased.

[36] A recent development where ova derived from embryonic or pluripotent stem cells are used to create a child, with no living biological mother and no possibility of consent.

requirement, as there is no explicit consent for the use of the deceased's frozen sperm for posthumous reproduction. This is a fundamental condition in jurisdictions where PR is permitted, alongside other mandatory requirements.

- PR is a controversial issue with different legal approaches worldwide. According to the Union of India, the most important requirement across jurisdictions permitting PR is explicit consent from the deceased, often in written form. Countries like Germany, France, Pakistan, and Switzerland prohibit PR, either outrightly or due to cultural or religious considerations. However, countries like Uruguay, Belgium, Australia (Victoria), Canada, and the United Kingdom allow PR under strict conditions, primarily depending on the deceased providing clear, written consent for the use of their gametes after death. Additionally, in many jurisdictions, other factors such as the approval of regulatory bodies and consideration of the potential child's well-being are taken into account before proceeding with PR.
- The Respondents argue that the Petitioners' request for the release of the sample for PR does not meet the requirements for posthumous reproduction. According to the Union of India, the deceased did not provide any written or oral consent for the use of his frozen sperm for PR, which is an important requirement in countries where PR is permitted. Secondly, the deceased was unmarried, and many jurisdictions only allow PR for married couples. Without consent, the Petitioners' case does not meet the conditions for PR in any of the jurisdictions. Deceased's parents have no automatic right to the use

of gametes for reproduction. Further, it is submitted that although international law recognizes reproductive rights as human rights, none of the jurisdiction across the world recognize that such a right enables PR.

49. In relation to the treatment of semen as property, the stand of the Union of India is that traditionally, human body parts, including sperm, were not considered property under the 'no-property' rule established in England, where such materials were treated as *res nullius*. Courts, including the Supreme Court of Georgia in ***Louisville & Nashville Railroad (supra)***, stressed on the ethical and sentimental value of human remains, distinguishing them from ordinary property. However, over time, legal perspective has changed. Cases like ***Doodeward v. Spence (supra)*** marked a significant shift, recognizing that body parts, once removed, could be subject to property rights. The concept laid down in that case was further expanded in ***Yearworth (supra)***, where the UK Court of Appeal held that sperm constituted property owned by the men who provided it, even after it left their bodies. Subsequent rulings have increasingly treated sperm and other reproductive materials as property.

Written Submissions on behalf of the Petitioners

50. The Petitioners have placed on record their written submissions dated 11th September, 2023. In addition to the above material, additional material was relied upon, provided below:

Case Laws

Indian Decisions

- *M/s. Shanti Conductors v. Assam State Electricity Board (2016) (15 SCC 13)*

- *Sri H. Siddaraju (supra)*

Foreign Decisions

- *Elizabeth Warren v. Care Fertility (Northampton) Limited*[37]
- *M v. HFEA*[38]
- *SB v The University of Atherlinn*[39]
- *Jennings v. Human Fertilisation and Embryology Authority*[40]
- *Yearworth (supra)*
- *K.L.W. v Genesis Fertility Centre (supra)*
- *Hecht v. Superior Court (supra)*
- *Re Zuch, Supreme Court of New York, Westchester County*[41]
- *Re HAE*[42]
- *Re HAE AO*[43]
- *Roblin v. The Public Trustee for the Australian Capital Territory & Anor*[44]
- *In Noone v. Ginea Ltd.*[45]
- *Application by Vernon*[46]
- *Re Estate of Edwards*[47]

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[37] [2014] EWFC 40 (Fam), 61-84.
[38] [2015] EWCA Civ 1289 (Court of Appeal), 85-108.
[39] [2020] CSIH 42, 109-118
[40] [2022] EWHC 1619 (Fam), 119-123.
[41] Index No. 53327/2019, 192-204.
[42] [2021] SASC 146, BC202102613.
[43] [2019] SASC 196, BC201315737.
[44] [2015] ACTSC 100.
[45] [2020] NSWSC 1860.
[46] [2020] NSWSC 068.
[47] [2011] NSWSC 198.

- *Chapman v. South Eastern Sydney Local Health District*[48]
- *Bazley v Wesley Monash IVF Pty Ltd*[49]
- *Re Cresswell*[50]

Articles/Papers and Reports

- Nofar Yakovi Gan-Or, 'Becoming Posterity: The Right to Posthumous Grandparenthood and the Problem for Law' (2019) Columbia Journal of Gender and Law 1.

51. In their written submissions, the Petitioners submitted that the present writ was filed on 21st December, 2021, prior to the ART Act coming into force. Placing reliance on ***Shanti Conductor (P) Ltd (supra)***, it is argued that the ART Act, applies prospectively, unless explicitly stated otherwise. Therefore, the ART Act does not apply to these facts of the present petition, where the deceased's semen sample was frozen on 27th June 2020, and the request for its release was made on 21st December, 2020.

52. Further, the concept of Postmortem Grandparenthood *(hereinafter, 'PMG')* as an emerging phenomenon is discussed within the broader practice of Posthumous Reproduction *(hereinafter, 'PMR')*, where the gametes of a deceased person are used for reproduction. In PMG, bereaved parents use their deceased child's semen sample to create a genetically related grandchild, fulfilling the desire for continuity and maintaining a bond with the deceased. According to the Petitioners, this is often viewed

[48] [2018] NSWSC 1231, BC20180757.
[49] [2011] 2 Qd R 207, [2010] QSC 118.
[50] [2019] QD R 403; [2018] QSC 178.

as a commemorative act, fulfilling the deceased's perceived wish to father a child. Parents pursuing PMG believe they have the authority to act on their knowledge of their child's reproductive preferences. Several instances are relied upon to show the prevalence of the practice of PMG and PMR[51].

53. On the aspect of consent, the Petitioners stated that in several jurisdictions however, the Courts have held in favour of posthumous reproduction on the basis of implied or inferred consent or due to lack of opportunity to the decedent to offer explicit consent. By placing reliance on the above cases cited above, it is argued that various UK cases have granted posthumous usage of gametes for reproduction with ambiguous or no written consent.

MAINTABILITY OF THE PRESENT WRIT

54. The Hospital has challenged the maintainability of the present writ petition on the ground the Hospital is not 'State', within the meaning of Article 12 of the Constitution of India, and thus, a writ of mandamus cannot be issued against it. The Petitioners, place reliance on ***Sanjeev Gulati (supra),*** to argue that even private hospitals performing public duties fall under Article 12 of the Constitution of India, and are subject to writ jurisdiction. It was argued that since the Hospital was performing a public function, it could not escape its responsibilities by claiming that the present writ was not maintainable.

55. The decision of this Court in ***Sanjeev Gulati (supra)*** requires consideration. The facts of the said case were that two Petitioners, both employees of Sir Gangaram Trust Society, approached this Court, alleging

[51] Nofar Yakovi Gan-Or, 'Becoming Posterity: The Right to Posthumous Grandparenthood and the Problem for Law' (2019) *Columbia Journal of Gender and Law* 1

violations of natural justice. The first Petitioner, facing charges of misconduct, contested the Hospital's inquiry process, claiming it was conducted unfairly without legal representation. The second Petitioner, terminated from service after eight years, challenged the termination as arbitrary, without inquiry or a hearing, and motivated by malice. In relation to Article 12 of the Constitution of India, a ld. Single Judge of this Court observed that such an institution must perform a function which is public in character — such an action need not necessarily be spelt out in law; the obligation should be apparent from its very nature. The words 'any person or authority' used in Article 226 of the Constitution of India are not restricted to statutory authorities and instrumentalities of the State; it includes any person/body performing ***'public duty'***. The nomenclature of the institution is irrelevant; of relevance is the nature of the duty imposed on the body. The duty is vis-a-vis positive obligation owed by the concerned person or authority to the affected party, irrespective of the means by which such a duty is imposed.

56. The ld. Single Judge of this Court held that the writ was not maintainable, as the issue raised in the writ petition concerned a private law element, *i.e.*, an employment dispute arising out of a contract, which did not involve any public function. Thus, the writ was dismissed. The relevant portion of the said decision is as follows:

> *"12. Further debate on the issue would not be necessary, in view of the judgment of the Division Bench of this court, reported as Sanjay Gupta v. Dr. Shroff's Charily Eye Hospital, 2002 (62) DRJ 368. An order of termination of an employee, working in a private charitable hospital was challenged in writ proceedings.* ***The court held that in such cases, the***

terms and conditions of the contract are private in character, and do not involve public law functions. The court rejected the contention that writ proceedings were maintainable, on account of functions of the hospital being of public importance. *Here too, whatever be the other obligations cast on the hospital, which may partake of a public nature, contracts of employment, disciplinary action, and termination orders do not answer the description of activities that are of an intrinsically public nature. Therefore, in the light of the judgments cited above, particularly Binny Ltd's case; Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733 and Sanjay Gupta v. Dr. Shroff's Charily Eye Hospital, 2002 (62) DRJ 368,* ***it has to be held that the petitions are not maintainable, since the dispute does not fall within the domain of public law***.

Reliance was also placed on the decisions in Institute of Technology v. Union of India, 1991 Supp (2) SCC 12 : C.L. Subramaniam v. Collector of Customs, (1972) 3 SCC 542 : AIR 1972 SC 2178, by the petitioners, to say that failure to provide a legal practitioner vitiated the conduct of the proceedings, and rendered it arbitrary, and thus, amenable to writ jurisdiction. ***I am of the opinion that such alleged wrongful action can be questioned in civil proceedings; or remedies available under the Industrial Disputes Act, as the case may be; a petition under Article 226 of the Constitution of India would neither appropriate nor maintainable.***

14. For the foregoing the petitions and applications are dismissed with no order as to costs. All interim orders stand discharged. The petitioners are entitled to initiate such legal proceedings as they may choose, and as is available in law. All rights and contentions of parties are kept open.*"*

57. The above decision is clearly inapplicable to the facts of the present writ. Firstly, this decision was rendered solely on the consideration that private disputes, such as employment disputes, cannot be litigated through a writ petition, as alternative remedies are available. Secondly, the Court did not consider contract disputes to be part of functions that were important to the public. The ld. Single Judge dismissed the contention that writ proceedings were maintainable on the grounds that the Hospital's functions were of public importance. Clearly, employment disputes did not constitute a part of the Hospital's public functions.

58. However, in the present writ, the facts are completely distinguishable. Here is a situation where the semen sample is stored with the IVF lab of the Hospital. There exists no alternative remedy for the Petitioner to secure the release of the semen sample. There is an imminent threat that the said sample would be destroyed, rendering the Petitioners' rights, whatsoever they may be in law, infructuous. No document has been placed on record by the Hospital to demonstrate as to how the transfer of the semen sample would take place after the death of the donor. As per the Hospital's own stand[52], in the absence of any guidelines or regulations, the Hospital was unable to take any decision in relation to the disposal of the frozen semen sample of the deceased.

59. Considering the above position, it is clear that the Petitioners cannot be left without a remedy in this unique situation and cannot also be relegated to a civil court. In the opinion of this Court, questions relating to the freezing of semen samples and their release to legal heirs of individuals who provided such samples undoubtedly constitute a public function, thereby bringing the

[52] Paragraphs 12-15 of the Counter-Affidavit dated 3rd February, 2022.

Hospital's actions or inactions within the scope of Article 12 of the Constitution of India.

60. In this context, the decision of the Supreme Court in ***Binny Ltd. & Anr. v. V. Sadasivan***[53] is relevant. The Supreme Court observed that a *'writ'* was a public law remedy, and that it was difficult to draw a line between the public functions and private functions when it is being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. The relevant portion of the said judgment reads as follows:

> *"10. The Writ of Mandamus lies to secure the performance of a public or a statutory duty. The prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities. Originally, the writ of mandamus was merely an administrative order from the sovereign to subordinates. In England, in early times, it was made generally available through the Court of King's Bench, when the Central Government had little administrative machinery of its own. Early decisions show that there was free use of the writ for the enforcement of public duties of all kinds, for instance against inferior tribunals which refused to exercise their jurisdiction or against municipal corporation which did not duly hold elections, meetings, and so forth. In modern times, the mandamus is used to enforce statutory duties of public authorities. The courts always retained the discretion to withhold the remedy where it would not be in the interest of*

[53] 2005 INSC 343

justice to grant it. It is also to be noticed that the statutory duty imposed on the public authorities may not be of discretionary character. A distinction had always been drawn between the public duties enforceable by mandamus that are statutory and duties arising merely from contract. Contractual duties are enforceable as matters of private law by ordinary contractual remedies such as damages, injunction, specific performance and declaration. In the Administrative Law (Ninth Edition) by Sir William Wade and Christopher Forsyth, (Oxford University Press) at page 621, the following opinion is expressed:

...

29. Thus, it can be seen that ***a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs.*** *It is used for enforcement of various rights of the public or to compel the public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties.* ***This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish***

between public law and private law remedies.

30. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. But nevertheless it may be noticed that the Government or Government authorities at all levels is increasingly employing contractual techniques to achieve its regulatory aims. It cannot be said that the exercise of those powers are free from the zone of judicial review and that there would be no limits to the exercise of such powers, but in normal circumstances, judicial review principles cannot be used to enforce the contractual obligations. When that contractual power is being used for public purpose, it is certainly amenable to judicial review. The power must be used for lawful purposes and not unreasonably.

32. Applying these principles, it can very well be said that a writ of mandamus can be issued against a private body which is not a State within the meaning of Article 12 of the Constitution and such body is amenable to the jurisdiction under Article 226 of the Constitution and the High Court under Article 226 of the Constitution can exercise judicial review of the action challenged by a party. But there must be a public law element and it cannot be exercised to enforce purely private contracts entered into between the parties."

61. In the fact of the present case, control over human reproductive material, for example, semen sample, ova samples, and use of human reproductive material constitute an important public function. Handling, preservation, and potential release of human reproductive material involves significant ethical, social, and legal considerations that extend beyond the

realm of private contractual relationships. Such control over human reproductive material, given its important implications on family lineage, reproductive rights, and potential future generations, constitutes an important public function. Merely because contracts are entered into between donors and IVF clinics in respect use and disposal of human reproductive material, it cannot be said that there is no public law element. Thus, in the opinion of this Court, the present writ is maintainable.

ANALYSIS AND FINDINGS

62. The present petition raises several important issues, including legal and ethical issues relating to giving birth to progeny. The Petitioners are the parents of the deceased who intend to use the semen sample admittedly for the purposes of continuing the legacy of their son. The son died intestate. He was unmarried at the time of his death and did not also admittedly have any partner or spouse. Thus, his primary legal heirs are his parents.

63. The Court is faced with a diabolical situation in which its order could have the impact of permitting the parents of the deceased to in effect give birth to a grand-child in the absence of their son. Apart from the legal issues, there are moral, ethical and spiritual issues that confront the Court in such a situation. However, the issues raised ought to be merely decided on the basis of the existing legal and statutory framework and not on the basis of any other extrinsic material.

64. The legal regime itself which is prevalent is only in the form of two enactments, namely, ART Act, 2021, and the Surrogacy Act. Both these statutes do not deal with the fact situation that the Court is currently confronted with. The statutes do not even contemplate the scenario as has

arisen in the present case and thus there is clearly a legal vacuum.

65. The powers of Courts to hand even a death sentence or bring an end to life for example in cases of euthanasia, etc. have been pronounced upon in the past either under criminal jurisprudence or under Article 21 of the Constitution of India. However, hitherto, the Court has not come across a case in India where its order could in fact lead to the birth of a life or a child. It is this scenario that the Court struggles to deal with in the present case.

66. The ld. Counsels for the parties in this case deserve special credit for the volume of legal precedents and material they have placed from various jurisdictions. A perusal of these decisions and material would reveal that Courts across the world have dealt with similar situations and have rendered decisions based upon the legal position prevalent in the said countries. But the common thread in all these decisions is the dilemma that the Courts have faced, especially when the prayer for release of a semen sample is made by the proposed grand-parents of a yet to be born child. Before going further, therefore, the first step would be to analyse the various judicial decisions from other countries which have been placed before the Court.

A. <u>Analysis of the decisions relied upon by the parties.</u>

67. In ***Hecht (supra) (1993)***, the Court of Appeal of California was dealing with a case where the claimant was the girlfriend of the deceased and she was opposed by the deceased's adult children. The deceased had stored his sperm in a sperm bank to whom he had given instructions that the claimant was entitled to the sperm if she wishes to become impregnated. The County Court had ordered destruction of the deceased's sperm which was in control of the sperm bank. The same was appealed by the claimant. The two adult children of the deceased were from the previous marriage.

68. The Court of Appeal of California considered the two main issues. Firstly, whether the claimant had an interest in the preserved sperm and secondly, whether there was any public policy issue, which prohibited artificial insemination of a girlfriend, who was not a married woman, especially at the instance of the deceased's children, who felt that there were other means by which she could have impregnated after the death of the deceased.

69. The Court of Appeal of California held that the deceased, at the time of his death, had an interest, which was in the nature of ownership over sperm. He also had the decision-making authority as to the manner in which the same ought to be used for reproduction. Considering the nature of the substance, the same would constitute property. The Court considered that at the relevant point in time, the legal position regarding property rights in the human body was unsettled, as Common Law historically refused to recognize a property right in human bodies, or only recognized a quasi-property right.

70. Relying on ***Davis (supra)***, the Court of Appeal of California observed that sperm which is stored by its provider, with the intent that it be used for artificial insemination is thus ***unlike*** other human tissue because it is "gametic material", which can be used for reproduction. For the Court of Appeal of California, the value of the sperm lies in its potential to create a child after fertilization, growth, and birth. Thus, it was concluded that at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had **decision making authority as to the use of his sperm for reproduction**. Such interest was sufficient to constitute "property" within the meaning of Probate Code. The relevant portion of the decision

reads as follows:

> *"The Davis court also notes that The American Fertility Society suggests that "'Within the limits set by institutional policies, decision-making authority regarding preembryos should reside with the persons who have provided the gametes. . . . As a matter of law, it is reasonable to assume that the gamete providers have primary decision-making authority regarding preembryos in the absence of specific legislation on the subject. A person's liberty to procreate or to avoid procreation is directly involved in most decisions involving preembryos.'" (842 S.W.2d at p. 597.)*
>
> ***(4b) Sperm which is stored by its provider with the intent that it be used for artificial insemination is thus unlike other human tissue because it is "gametic material" (Davis v. Davis, supra, 842 S.W.2d 588, 597) that can be used for reproduction. Although it has not yet been joined with an egg to form a preembryo, as in Davis, the value of sperm lies in its potential to create a child after fertilization, growth, and birth. We conclude that at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decisionmaking authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute "property" within the meaning of Probate Code section 62****. Accordingly, the probate court had jurisdiction with respect to the vials of sperm. In concluding that the sperm is properly part of decedent's estate, we do not address the issue of the validity or enforceability of any contract or will purporting to express decedent's intent with respect to the stored sperm. In view of the nature of sperm as reproductive material which is a unique type of "property," we also decline petitioner's invitation to apply to this case the general law relating to gifts of personal property or the statutory provisions for gifts in view of impending death. (See Prob. Code, § 5700 et seq.)"*

71. The Court of Appeal of California then considered the question of artificial insemination in case of unmarried women, and also aspects relating to post-mortem artificial insemination. The Court held that there was nothing in the public policy of California that prescribed artificial insemination of the claimant, merely because she was an unmarried woman. On the question of posthumous conception or post mortem artificial insemination, the Court of Appeal of California observed as under:

> *"[*858] Echoing some of the concerns expressed by Shapiro and Sonnenblick, real parties argue that "this court should adopt a state policy against posthumous conception," because it is "in truth, the creation of a orphaned children by artificial means with state authorization," a result which they characterize as "tragic." However, real parties do not cite any authority establishing the propriety of this court, or any **[**289]** court, to make the value judgment as to whether it is better for such a potential child not to be born, assuming that both gamete providers wish to conceive the child. **In other words, assuming that both Hecht and decedent desired to conceive a child using decedent's sperm, real parties fail to establish a state interest sufficient to justify interference with that decision**. As in Tennessee, we are aware of no statutes in California which contain a "Statement of public policy which reveals an interest that could justify infringing on gamete-providers' decisional authority **[***47]....** "(Davis v. Davis, supra, 842 S.W2d 588. 622)*
>
> *We also disagree with real parties' claim that any order other than destruction of the sperm is tantamount to "state authorization" of **posthumous** conception of children, i.e., the creation of a public*

> *policy in favor of such conception.* ***In such a case, the state is simply acknowledging that "no other person or entity has an interest sufficient to permit interference with the gamete- providers' decision …. because no one else bears the consequences of these decisions in the way that the gamete- providers do." (Davis v. Davis, supra, 842 S.W.2d at p. 602.)***"

72. Finally, the Court rejected the argument, and held that the Probate Court ought to first treat the matter as a surrogacy arrangement or adoption and appoint guardian *ad litem*, at this stage, prior to the conception itself. The said observation is relevant and is set out below:

> "*At this point, it is also* ***entirely speculative as to whether any child born to Hecht using decedent's sperm will be a burden on society****. Real parties also offer no authority for* ***[***53]*** *their suggestion that if the sperm is to be distributed to Hecht, the probate court should first treat of the matter as a surrogacy arrangement or adoption and appoint a guardian ad litem for the unborn child(ren) and conduct a fitness hearing as to Hecht's fitness to bear a child. We know of no authority which would authorize the probate court to proceed in the foregoing manner, much less provide it authority to address the issue of Hecht's fitness to bear a child.*"

73. In ***Elizabeth Warren (supra) (2014)***, an application was filed before the High Court of Justice (Family Division), UK, seeking a declaration to allow the sperm of Warren Brewer, who died on 7th February, 2012, to be stored beyond 18th April 2015, for up to 55 years until 18 April 2060. This would permit his widow, Elizabeth Warren, to use it for conceiving a child. Mr. Brewer, was diagnosed with a brain tumour in 2005, and stored his sperm before starting radiotherapy due to the risk of infertility. Initially, he

consented to a three-year storage period, but later extended it, naming Elizabeth Warren, his partner, as the intended recipient for posthumous use in fertility treatment. In the said decision, the High Court of Justice (Family Division) allowed the application, and observed that there was no conflict of individual rights, as both Mr. Brewer and his wife, Mrs. Warren, were in agreement that she should have the opportunity to conceive a child using his sperm after his death. However, the challenge arises from the fact that Mr. Brewer's written consent did not specifically extend the storage of his sperm beyond the statutory period required by regulations, even though he had provided consent for his wife to use his gametes posthumously. Mrs. Warren relied upon Article 8 of the European Convention on Human Rights, to argue that she had the right to become a parent by her deceased husband, which aligned with his wishes. The Court recognized Mrs. Warren's right under Article 8 of the European Convention on Human Rights, and acknowledged that Mr. Brewer was not given the necessary information or opportunity to provide consent for extended storage beyond the statutory period.

74. The case of ***M. v. HFEA (2016) (supra)*** came before the Court of Appeal. A, the Appellants' daughter, was diagnosed with cancer at 21 and passed away six years later in 2011. Despite her illness, A wanted to have children, even underwent the process of egg retrieval and storage during a period of remission in 2008. Although A did not have a partner at the time, her mother had offered to carry A's children, and A accepted this. Ms. A signed forms consenting to the storage and posthumous use of her eggs, although she did not complete the necessary forms for the use of donor sperm. According to her mother, Ms. A was clear in her wishes for her

mother to carry and raise her children after her death, expressing this desire repeatedly in her final years. Following her death, A's parents have sought to fulfil her wish to have children, and planned to use an anonymous sperm donor from a New York sperm bank, but they encountered obstacles due to the incomplete consent forms.

75. The Court of Appeal allowed the appeal, and reversed the decision of the High Court, which had refused the Appellants' application to export to the United States, the eggs of their late daughter. The eggs were stored at a hospital in London. The Appellants had made their application as they wanted that a centre in the United States to use A's eggs to create an embryo with anonymous donor sperm, and to implant the embryo in the second appellant, A's mother, with a view to any child who may be born being brought up as the Appellants' grandchild. The relevant portions of the decision of the Court of Appeal are as follows:

> *"64. The second revealing point is the suggestion that the appellants are raising a new case on this appeal, that is, that A was donating her eggs to her mother rather than asking her mother to be a surrogate - a contention which the appellants deny. This suggestion indicates that the HFEA would adopt a different approach where a person is donating eggs to another person so that the other can have a child from the situation from the case where a donor of gametes asks someone to be a surrogate because of the donor's childlessness.* ***This suggestion also reinforces the view that the Committee, in treating the arrangement between A and her mother as simply a surrogacy arrangement, failed to consider the possibility that A consented to her mother's use of the eggs for the purpose of bearing her child on the basis that her parents or her mother took all the detailed steps and***

brought up the child themselves.

> *65. In other words, the Committee simply did not consider the possibility that this is a case where A said something along these lines (if I may be bold as to attribute words to A that A never used and to which she is not capable of answering):* ***"This is what I want to do. I want to do it whatever you want to tell me about what it involves. I trust my Mum and Dad to make the right decisions about all this when I am gone because they brought me up so well. It is my only chance." That possibility might explain why there was no detailed discussion involving A and her mother of the details of what would need to happen if A's eggs were to be used between January 2010 and her death****. In fact there was some discussion very shortly before her death, to which the Committee failed to refer. The Committee did not consider whether the inherent probabilities of the case might lead to this sort of conclusion."*

76. In relation to the question whether gametes are property, the Court of Appeal followed the decision in ***Yearworth (supra).***

77. In ***K.L.W. v. Genesis Fertility Centre (2016) (supra)***, the Supreme Court of British Columbia was dealing with a case where the wife sought release of her husband's semen sample after his death. The husband had suffered medical ailments and had passed away, but prior to the same, his sperm was extracted, frozen and stored. The following issues were considered by the Court:

> *"(a) Is the Reproductive Material property?*
>
> *(b) lf so, did property in the Reproductive Material pass to the petitioner as the sole beneficiary of [A.B.]'s intestate estate?*

> *(c) In the circumstances of this case, may the Court order the release of the Reproductive Material to the petitioner, notwithstanding the lack of the donor's written consent to the petitioner's use of the Reproductive Material for the purpose of creating an embryo?*"

78. The Supreme Court of British Columbia noted the following factors:

- Husband had died intestate, and his only heir was the spouse.
- Spouse was the sole beneficiary — no one had claimed any interest.
- Husband had not given any written consent for use of reproductive material. But the Court felt that if the requirement had been brought to his notice, he would have given consent.

79. On the first issue as to whether the reproductive material constitutes property, the Supreme Court of British Columbia considered an earlier judgment in ***Yearworth (supra)***, wherein six persons, who were having cancer, had stored their gametes. In the said decision, the UK Court of Appeal had held that sperm did amount to property that could be legally owned by persons. Since the sperm had been damaged, they were entitled to maintain their claim damages under the law of contract, rather than the law of tort. In ***K.L.W. v. Genesis Fertility Centre (supra)***, the Supreme Court of British Columbia came to the conclusion that the sperm constituted reproductive material and therefore, it constituted property of the deceased. Reasoning given by the Court is set out below:

> *"[93] Here, [A.B.] generated the sperm that was surgically retrieved from him, frozen and stored at Genesis.*
> ***[94] The sole purpose for extracting and storing the***

> ***sperm was to preserve it for later use by [A.B.] and the petitioner to attempt to conceive a child. While [A.B.] was alive, Genesis stored the frozen sperm on his behalf and treated it as [A.B.]'s property. Only [A.B.] could consent to the use of the stored sperm for reproductive purposes permitted under the AHRA.***
> ***[95] While [A.B.] could not sell the stored sperm, only he could authorize its reproductive use by his spouse following his death, or donate it for the reproductive use of a third party.***
> ***[96] I find that [A.B.] had rights of use and ownership in the Reproductive Material sufficient to make it property****."*

80. On the second issue, the Supreme Court of British Columbia held unequivocally that, as the spouse was the only heir, she was the sole beneficiary of his intestate estate. Thirdly, on the question of whether written consent was required for the release of the sperm to the wife, the Supreme Court of British Columbia held that the primary purpose of its storage was for use as reproductive material. As long as the sperm was not to be sold, it could be released to the spouse. The use was limited by the condition imposed by the Supreme Court of British Columbia, specifying that the reproductive material would be used solely for the creation of embryos for the reproductive use of the spouse, and for no other purpose. The relevant portions of the decision are set out below:

> *"[101] Since [A.B.]'s death, Genesis has stored the Reproductive Material for the petitioner and she has paid the annual storage fees. In the event that the petitioner were to decide to discard the stored sperm, Genesis would require her written consent to its disposal.*
>
> *[102] No one other than the petitioner claims any right*

to the Reproductive Material.

[103] [A.B.] intended that the petitioner would use the stored sperm for reproductive purposes following his death.

[104] The claimant has paid the storage fees in order to store, preserve and maintain the stored sperm for her own reproductive use.

[105] In these circumstances, I find that following [A.B.]'s death, property in the Reproductive Material vested in the petitioner as [A.B.]'s spouse and sole beneficiary of his intestate estate.

…

[131] The circumstances of this case are extraordinary. [A.B.] freely and repeatedly expressed his consent to the petitioner's use, following his death, of the Reproductive Material. He communicated his agreement to the petitioner's use of his stored sperm to the petitioner, to his social worker, to a nurse at the [content redacted] hospital where his [content redacted] was performed, to his family doctor, and to Genesis.

[132] [A.B.] fully understood that the Reproductive Material would be used in accordance with his wishes to create an embryo, and would be used, following his death, by the petitioner to attempt to conceive a child.

[133] One of the guiding principles of the AHRA is the promotion and application of free and informed consent as a fundamental condition for the use of human reproductive technologies. Another guiding principle, set out in s. 2(b), is that the benefits of the technology for individuals, families and society can be most effectively secured by appropriate measures for

the protection and promotion of human health, safety and dignity. Here, [A.B.] and the petitioner sought to use the technology in order to have a child of their own. They took appropriate steps to ensure that the [content redacted] would not be passed on to any child they conceived through in-vitro fertilization. They consulted with medical specialists about the safe use of the technology.

[134] To deny the petitioner the use of the Reproductive Material intended by [A.B.] would be both unfair and an affront to her dignity.

[135] [A.B.] expressed his consent to the petitioner's use of the Reproductive Material after he had the benefit of professional counseling from his [content redacted].

[136] I conclude that in the circumstances of this case, [A.B.]'s consent, although not in writing, specifically contemplated the petitioner's reproductive use of his stored sperm after his death, and was sufficient to satisfy the fundamental objective of the AHRA that the donor's consent must be both free and informed. Accordingly, the Court may order the release of the Reproductive Material to the petitioner to enable her use of that material for the purpose of creating an embryo.

…

Relief

[137] This Court declares that the Reproductive Material of [A.B.] stored at Genesis is the sole property of the petitioner.

[138] The Reproductive Material shall be released by Genesis Fertility Centre to the petitioner, K.L.W., for her use to create embryos for the reproductive use of the petitioner, and for no other purpose.

[139] The sealing order made in this proceeding on August 5, 2016, by the Honourable Justice Griffin remains in force and effect."

81. Recently, the Supreme Court of New York in the matter of ***Monica Zhu (supra)*** was considering a case where the parents of one Mr. Peter Zhu, who had predeceased, had approached the Court for retrieval of the sperm of their son. The son was a cadet at the Military Academy and due to a ski accident had suffered several injuries and was declared brain dead. He had remained alive through life support pending organ donation as he had signed an organ donor card. On the day, when the organ donation surgery was to take place, the parents approached the Supreme Court of New York seeking retrieval of the sperm and storage of the same in a sperm bank and for permission to allow his sperm to be used for reproduction through a third party. Interim relief was initially granted prior to organ donation surgery directing release of the sperm to a sperm bank for storage, subject to further orders of the Supreme Court of New York. Various issues were raised in this case in relation to the organ donor card and as to who should be given the decision regarding the disposition of the deceased's genetic material. The Supreme Court of New York observed that the deceased was primarily a family man and his closet kin were his parents as he was unmarried. He also did not have any domestic partner relationship and nor he had made any Will. The Supreme Court of New York noted that irrespective of whether the deceased had signed the organ donation card or not, the parents would have been his heirs in terms of the law applicable in New York. The Supreme Court of New York also concluded that the deceased's parents are the proper parties to make the decision of disposition of his genetic material.

Accordingly, the Supreme Court of New York directed as under:

> *"[*781] At this time, the court will place no restrictions on the use to which Peter's parents may ultimately put their son's sperm, including its potential use for procreative purposes. As far as the court can discern, no such restrictions are mandated by either New York or federal law. That is not to say, however, that petitioners may not need to surmount certain obstacles, or confront important residual issues should they choose to seek to use Peter's sperm for reproductive purposes. A specific use, once chosen, may run afoul, or at least merit consideration, of certain legal, practical and ethical concerns, including the potential reluctance of medical professionals to assist in such a procedure. (See e.g. Jean Benward et at., Posthumous Retrieval and Use of Gametes or Embryos: An Ethics Committee Opinion, Ethics Committee of the American Society for Reproductive Medicine, Apr. 2, 2018 at 3-5 [Discussion of ethical concerns of doctors asked to participate in posthumous reproduction, particularly at the [***16] behest of parents rather than a surviving spouse].*
>
> *In addition, the recognition of a posthumously conceived child as the son or daughter of the deceased may prove problematic, in some states, a child born after a certain period of time following the father's death may not be deemed such father's offspring for certain purposes. (See Astrue v Capato, 566 US 541, 132 S Ct 2021, 182 L Ed 2d 887 [2012] [Children conceived by in vitro fertilization using late husband's frozen sperm and born 18 months after husband's death held not entitled to social security survivor benefits since such children were deemed not to be his offspring under the relevant state (here, Florida) intestacy law] **[289]** Cal Prob Code $ 249.5 [a] [c] [A posthumously conceived child is deemed a child of the decedent "(f)or purposes of determining rights to property to be distributed upon the death of a decedent*

only if the decedent, in writing, "specifies that his or her genetic material shall be used for the posthumous conception of a child of the decedent" and the child was "in utero within two years of the date of issuance of a certificate of the decedent's death"], of. Matter of Martin B., 17 Misc 3d 198, 841 NYS2d 207 (Sur Ct, NY County 2007) [The court interpreted trust agreements to include children conceived posthumously using a decedent's cryopreserved semen ***[***17]*** *as his "issue" and "descendants"].) And this is not to mention the challenges and responsibilities necessarily entailed in caring for and raising a child. The aforementioned considerations may well weigh into any decision petitioners may make regarding the ultimate disposition of Peter's sperm.*

The court is constrained from addressing the range of other potential considerations at this juncture. Any evaluation must perforce await not only the expressed intent of the Zhus, but the presentation to the pertinent medical professionals, medical ethicists and, perhaps ultimately, a court of a concrete plan for that intent's actualization.

In any event, for the reasons set forth herein, the court concludes that Peter's parents are the proper parties to make decisions regarding the disposition of Peter's genetic material. Accordingly, petitioners' application is granted to the extent that they shall possess and control the disposition and potential use of their son Peter's genetic material*.''*

Thus, the Supreme Court of New York directed release of the sperm samples to the parents of the deceased.

82. In ***H, AE, Re 2012 (supra)***, the wife had approached the Supreme Court of South Australia for removal and preservation of the sperm of his deceased husband. Interim relief was initially granted for removal and

preservation. The Supreme Court of South Australia first considered various issues that had arisen and the sperm was removed from the deceased or nearly deceased's person body. The deceased had died due to injuries sustained in a motor vehicle accident. The issues before the Supreme Court of South Australia ranged from ethical, legal, moral and various other issues. The wife wanted to have the possibility of conceiving children by him. The deceased had left a Will naming the wife as executor, and also making provision for children. The direction to retrieve the sperm and preservation was made by the Supreme Court of South Australia by exercising its inherent jurisdiction.

83. In ***Roblin (supra)***, similarly, the Supreme Court of the Australian Capital Territory, held that the stored semen would be the personal property of the deceased and would form part of his estate. The same would vest in the deceased while he was alive and thereafter in his personal representatives. ***Roblin (supra)*** also placed reliance on ***Yearworth (supra), Hecht (supra)*** and ***R v. H, AE (No. 2) (supra).***

Issues before the Court

84. In the opinion of this Court, the following issues would arise for consideration.

(i) Whether the ART Act and the Surrogacy Act are applicable to the facts of the present case?

(ii) Whether semen is to be treated as property of the deceased?

(iii) Whether the Petitioners are entitled to release of the said semen sample, which is preserved in the Hospital?

(iv) Whether there are any ethical or other legal considerations that need to be looked into while considering the relief sought in the

present petition?

85. In the present petition, submissions on behalf of the Respondents have primarily revolved around the possible use of the deceased's semen sample by the Petitioners for the purposes of reproduction/procreation. Various statutes including the ART Act have been relied upon to argue that under the prevalent laws, the Petitioners' demand cannot be allowed.

86. Having analysed the various decisions passed in other jurisdictions, the Court now considers the two statutes that deal with artificial insemination and reproduction.

Assistive Reproductive Technology (Regulation) Act, 2021 and the Surrogacy (Regulation) Act, 2021

87. One of the main objections raised by the Union of India against release of the semen sample of the deceased to the Petitioners is on the strength of the various provisions of the ART Act, 2021. The ld. CGSC has objected to the release on the ground that even if semen sample is released it cannot be put to any useful productive use in view of the provisions of the ART Act, 2021. It is his case that there are age limits fixed under the said Act within which a commissioning couple would be able to avail of ART services. It is his submission that under Section 21(g) of the ART Act, 2021, ART services can only be provided by clinics to a woman between the age of 21 and 50 years and to a man between the age of 21 years and 55 years (21 & 50) and (21 & 55) respectively. Since the mother of the deceased, who is seeking release of the semen sample, has already crossed the said age limit, even if the release is directed within the confines of law, there can be no use of the same.

88. Reliance is also placed upon the Surrogacy (Regulation) Act, 2021 *('SRA')*, which also defines 'intending woman' in Section 2(s) as under:

> "2*(s) "intending woman" means an Indian woman who is a widow or divorcee between the age of 35 to 45 years and who intends to avail the surrogacy;"*

89. The mother of the deceased would also not fall within this age bracket. Thus, she would not be even entitled to bear a child. The prescription of an upper age limit has been the subject matter of discussion in various judicial decisions. Various provisions of the ART Act are under challenge and the same is pending before the Supreme Court in ***Arun Muthuvel (supra)***.

90. The Court now considers whether the relief sought in this writ petition ought to be affected by the ART Act, 2021, and whether the said Act is even applicable in the present case. The ART Act, 2021 prescribes a detailed procedure as to the manner in which ART services are to be availed of.

91. Under the ART Act, 2021, a National Assisted Reproductive Technology and Surrogacy Board has been set up under Section 3 of the ART Act, 2021, for advising the Central Government on policy matters related to ART. It is also empowered to review and monitor the implementation of the ART Act, 2021, to lay down the code of conduct for ART clinics and banks, code of conduct for employees of such institutions to supervise the national registry etc.

92. Under the ART Act, the provisions of the SRA, 2021 in respect of State Assisted Reproductive Technology Surrogacy Board *('SARTSB')* under Section 26 of the Surrogacy Act, 2021, would apply to the ART Act[54].

[54] See, Section 6 and 7 of the ART Act, 2021

The ART Act also contemplates the setting up of a 'National Registry' called the ***'National Assisted Reproductive Technology and Surrogacy Registry'*** which shall act as the central database consisting of details of all clinics and banks, providing such services. Such clinics and banks enable the availing of ART procedures, subject to the fulfilment of all the criteria. Under Section 21 of the ART Act, 2021, the function of the clinics is also to obtain donor gametes from ART banks, after ensuring that the prescribed procedures are complied with. Under Section 21 of the ART Act, 2021, the ART clinics also provide professional counselling to commissioning couple as also the surrogate women in respect of:

- Implications of ART procedures.
- Chances of success in ART procedures.
- Advantages and Disadvantages of the procedures.
- Costs of the procedures.
- Medical side effects
- Risks
- Assistance to the couple and the surrogate in arriving at an informed decision.
- Sensitise them in respect of the rights of the child born through ART.
- Preserve information relating to the commissioning couple, the woman and the donor, which shall be kept confidential.

93. Under Section 21(g) of the ART Act, 2021, as stated earlier, the woman has to be above the age of 21 and below 50 years of age, and the man has to be above the age of 21 and below the age of 55 years. Clinics and banks have to update the National Registry in respect of the procedures

undertaken, the complications, etc.

94. Section 22 of the ART Act, 2021 is of significance, and is reproduced below:

> *"22. Written informed consent. —* ***(1) The clinic shall not perform any treatment or procedure without—***
> ***(a) the written informed consent of all the parties seeking assisted reproductive technology;***
> ***(b) an insurance coverage of such amount as may be prescribed for a period of twelve months in favour of the oocyte donor by the commissioning couple or woman from an insurance company or an agent recognised by the Insurance Regulatory and Development Authority established under the provisions of the Insurance Regulatory and Development Authority Act, 1999 (41 of 1999)****.*
>
> *(2) The clinics and banks shall not cryo-preserve any human embryos or gamete, without specific instructions and consent in writing from all the parties seeking assisted reproductive technology, in case of death or incapacity of any of the parties.*
>
> ***(3) The clinic shall not use any human reproductive material, except in accordance with the provisions of this Act to create a human embryo or use an in-vitro human embryo for any purpose without the specific consent in writing of all the concerned persons to whom the assisted reproductive technology relates****.*
>
> *(4) Any of the commissioning couple may withdraw his or her consent under sub-section (1), any time before the human embryos or the gametes are transferred to the concerned woman's uterus.*
>
> *Explanation. —For the purposes of this section, the expressions—*
> *(i) "cryo-preserve" means the freezing and storing of*

> *gametes, zygotes, embryos, ovarian and testicular tissues;*
> *(ii) "insurance" means an arrangement by which a company, individual or commissioning couple undertake to provide a guarantee of compensation for specified loss, damage, complication or death of oocyte donor during the process of oocyte retrieval; and*
> *(iii) "parties" includes the commissioning couple or woman and the donor."*

95. The above Section 22 of the ART Act, 2021, records the necessity of written informed consent, without which the ART procedure or treatment cannot be undertaken. Consent is required in writing from all parties for performing the procedure and consent in case of death or incapacity is also to be obtained. The human reproductive material cannot be used for any other purposes except for ART. The specific manner in which ART has to be performed is also prescribed in Section 24 of the ART Act, 2021.

96. Section 31 of the ART Act, 2021, titled 'Rights of child born through assisted reproductive technology', provides that a child born through ART procedures shall be considered as the biological child of the commissioning couple. The donor would have no parental rights over the child born. In fact, applying the principles of the ART Act, if the parents approach a donor for the egg and choose a Surrogate for the child to be born, then the donor and the surrogate would have no rights over the child born. There is no law prohibiting the Petitioners from doing so, except that the ART Act defines `commissioning couple' to be of a particular age. Illustratively, if the semen sample is released and the sister of the deceased and her spouse come forward to be the commissioning couple, they may satisfy the requirements under the Act. Thus, there can be myriad possibilities of the Petitioners

begetting a grandchild using their son's semen sample. The Transfer of Property Act, 1882, in fact gives recognition to transfers made to unborn persons subject to certain conditions.

97. The ART Act, 2021, specifically bars sex selection in terms of the Pre-Conception and Pre-Natal Diagnostic Techniques *('PCPNDT')* Act, 1994. Section 27 of the ART Act, 2021, also provides the manner in which sourcing of gamete can be done by ART banks. The said section is relevant and is set out below:

> *"27.* ***Sourcing of gametes by assisted reproductive technology banks.*** *— (1) The screening of gamete donors, the collection, screening and storage of semen; and provision of oocyte donor, shall be done only by a bank registered as an independent entity under the provisions of this Act.*
>
> *(2) The banks shall—*
>
> *(a) obtain semen from males between twenty-one years of age and fifty-five years of age, both inclusive;*
>
> *(b) obtain oocytes from females between twenty-three years of age and thirty-five years of age; and*
>
> *(c) examine the donors for such diseases, as may be prescribed.*
>
> *(3) A bank shall not supply the sperm or oocyte of a single donor to more than one commissioning couple*
>
> *(4) An oocyte donor shall donate oocytes only once in her life and not more than seven oocyte shall be retrieved from the oocyte donor.*
>
> ***(5) All unused oocytes shall be preserved by the banks for use on the same recipient, or given for research to an organisation registered under this Act after seeking written consent from the commissioning couple.***
>
> ***(6) A bank shall obtain all necessary information in***

respect of a sperm or oocyte donor, including the name, Aadhaar number as defined in clause (a) of section 2 of the Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016, address and any other details of such donor, in such manner as may be prescribed, and shall undertake in writing from such donor about the confidentiality of such information.

Explanation. —For the purposes of this section, the expressions—
(i) "retrieval" means a procedure of removing oocytes from the ovaries of a woman;
(ii) "screening" means the genetic test performed on embryos produced through in-vitro fertilisation."

98. Under Section 27(2) of the ART Act, 2021, semen can be obtained from males between the age of 21 to 55, both inclusive. Under Section 24(f) of the ART Act, 2021, posthumous collection of gametes can be done only if the prior consent of commissioning couple is available. A reading of Section 24(f) of the ART Act, 2021, along with Sections 22(1) and (3) of the ART Act, 2021, would mean that prior consent of the deceased for use of the gametes would be required. Section 42(2)(r) of the ART Act, 2021, mandates that the Central Government may make rules to regulate the manner of collection of gametes posthumously under Section 24(f) of the ART Act, 2021. Pursuant thereto, the Assisted Reproductive Technology (Regulation) Rules, 2022, which came into force on 7th June 2022, do not specifically outline the procedure for obtaining consent from individuals who wish to opt for the posthumous collection of gametes. The only indication is provided in Form 10 titled 'Consent for Freezing of Gametes/Sperms/Oocytes'. The said Form also does not provide an option to handover the frozen/cryopreserved gametes to the parents, and the option is

limited to the partner only. The said form is extracted below for reference:

FORM 10

[See rule 13 (f) (v)]

Consent for Freezing of Gametes/Sperm/Oocytes

I/We, …….. and ……., consent to freezing of the my …….. (sperm/oocyte). We understand that the gametes would be normally kept frozen for ten years. In the exceptional circumstances If I/we wish to extend this period, we would let the ART clinic ……..(Name and address) know at least six months ahead of time. If you do not hear from us before that time, you will be free to (a) use them for research purposes; or (b) discard and destroy them off. We also understand that sometimes the quality of these …… sperm/occytes may decrease on subsequent thaw and that frozen gametes may have a lower pregnancy rate than when fresh gametes are transferred.

***Husband / Man**

In the unforeseen event of my death, I would like the gametes

To perish ☐

To be handed over to my wife/ ……,.(specify name and details) ☐

Used for research purposes ☐

Signed: Dated:

***Wife / Woman**

In the unforeseen event of my death, I would like the gametes

To perish ☐

To be handed over to my husband/ …… ☐

……..(specify name and details)

Used for research purposes ☐

Signed: Dated:

Name, Address and Signature of the couple/woman/man

But the Form itself is writ with ambiguities as it also recognises by using a blank line `……..' that the gamete could be handed over to the "**wife/……..**" OR **"husband/……"** which means that apart from the wife the owner of the gamete could give consent for it to be handed over to anyone else for e.g., a parent or a sibling. The form does not say "wife/none else". Thus such a terminology cannot be read into the Form. There is therefore no prohibition on release of the gamete to a person other than the spouse, even under the extant Form 10 under the ART Rules 2022.

99. Under the SRA, Section 2(zg) and Section 4(b) prescribes the

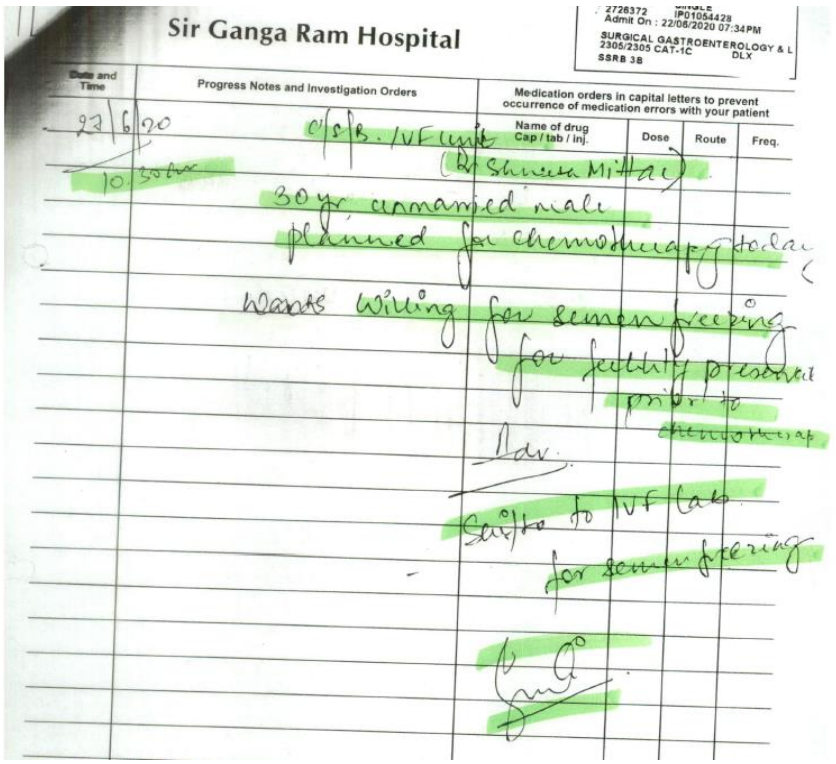
eligibility criteria for a surrogate mother, as a married woman, having a child of her own between the age of 25 to 35 on the date of implantation apart from other eligibility criteria.

Applicability of the ART Act and SRA

100. In the present petition, submissions on behalf of the Respondents have primarily revolved around the possible use of the deceased's semen sample by the Petitioners for the purposes of reproduction/procreation. Various statutes including the ART Act have been relied upon to argue that under the prevalent laws, the Petitioners' demand cannot be allowed.

101. The deceased in this case was 29/30 years of age when he was diagnosed with Non-Hodgkin's Lymphoma and was admitted to the Hospital. At the time of his death, he was 30 years of age. His treatment in the Hospital commenced sometime in June, 2020. He was subjected to various tests including MRI, PET Scan, etc., between the period from 22nd June, 2020 to 27th June, 2020, all the required tests were carried out and chemo therapy was to start on 27th June, 2020. At that stage, he was advised by one Dr. Shweta Mittal for storing of the semen sample before starting chemotherapy. On the same day *i.e.*, on 27th June, 2020 at 10:30 am, he was sent to the IVF unit, where the record shows that he was planned for chemotherapy on the same day. The noting by the doctor in the medical records is very crucial and is set out below:

> ***"Willing for semen freezing for fertility preservation prior to the chemotherapy" adv. sent to IVF for semen freezing."***


Sir Ganga Ram Hospital

2726372 IP01054428
Admit On : 22/06/2020 07:34PM
SURGICAL GASTROENTEROLOGY & L
2305/2305 CAT-1C DLX
SSRB 3B

Date and Time	Progress Notes and Investigation Orders	Medication orders in capital letters to prevent occurrence of medication errors with your patient			
		Name of drug Cap / tab / inj.	Dose	Route	Freq.
22/6/20 10.30am	c/o P.B. /IVF unit (Dr Shweta Mittal) 30 yr unmarried male planned for chemotherapy today Wants willing for semen freezing for fertility preserved prior to chemotherapy Adv. Sent to IVF lab for semen freezing				

102. The same has been signed by Dr. Shweta Mittal. Thereafter, on 27th June, 2020, the semen sample was extracted and the doctor, who had administered chemotherapy, stated that he waited for Dr. Shweta Mittal's approval that semen analysis sample was good in order to enable the chemotherapy to begin. Chemotherapy was, thereafter, administered to the patient. The patient was then discharged. He took treatment in some other hospital thereafter. During this period the semen sample was continued to be preserved at the Gangaram hospital. Unfortunately, he passed away few months later on 1st September, 2020. The parents approached the Hospital for release of the semen sample in December, 2020, but upon the Hospital not releasing the same, have approached the Court.

103. The Petitioners contend that the ART Act is not applicable in this case as the consent was given by the deceased on 22nd June, 2020. The preservation also took place on the said date. The deceased passed away on

1st September, 2020 and the father of the deceased approached the hospital for release of the sperm on 21st December, 2020. All of these events occurred prior to the enactment of the ART Act, 2021. Thus, at first blush following the decision in ***Nandini (supra)***, the ART Act is not applicable to the facts of the present case as the semen sample was preserved when the Act had not come into force and also the provisions do not deal with the fact situation as contemplated in this case. Even if the provisions of the Act are considered for the principles that are recognised therein, there is no prohibition in release of the sample to a person who is not a spouse, as is clear from the discussion above.

Whether gametes/semen sample constitutes property?

104. The next question that arises is whether semen sample constitutes property. In order to decide this issue, the Court needs to consider as to what is the nature of the material.

105. Thus, helpful guidance ought to be taken from other jurisdictions to understand the scope of the phrase. For example, Canada has enacted the Assisted Human Reproduction Act, 2004, which is the fundamental legislation governing ART procedures in Canada. The said Act, 'human reproductive material' means *"a sperm, ovum or other human cell or a human gene, and includes a part of any of them"*.

106. Historically, a dead body of a human being was not deemed to be property. ***Williams (supra)*** is relevant where it holds that there is no property in the dead body of human being. The relevant portion of the judgment is herein below:

> *"there can be no property in the dead body of a human being ... after the death of a man, his executors have a*

right to the custody and possession of his body (although they have no property in it) until it is properly buried"

107. This position changed in the modern world and various decisions have held that reproductive material is property. On this issue, the decision in ***Yearworth (supra)*** followed the reasoning that the stored sperm of the deceased is ***'property',*** as the deceased could have exercised right of use and ownership over the same. It was, thus, held that sperm would constitute the estate of the deceased. Similar is the view taken in ***Hecht (supra)*** on this issue. In a case which is similar on facts to the case at hand, in ***Monica Zhu (supra)***, the New York Supreme Court held that the parents were the nearest of the kin as the deceased was unmarried. He did not have a partner and he died *intestate*. The parents were the legal heirs and, thus, had the right to decide on how the genetic material ought to be dealt with. Similarly, the Supreme Court of South Australia also exercised its inherent jurisdiction to allow preservation of the sperm. In ***Roblin (supra)*** it was held that sperm is the personal property of the deceased and would form part of the estate.

'Property' under Indian law

108. Under Indian law, ***'property'*** includes both tangible and intangible property. The estate of a deceased would also be included in the term `property'. The meaning and the ambit of the property has been discussed, and laid down in several judicial decisions under different statutes. The following are the various kinds of properties recognised in law:

i. Every species of valuable rights and interest is property.

ii. Ownership and exclusive right to a thing including a right to use, possess and dispose is a property.

iii. Anything which can be subject of ownership is property or has an exchangeable value.

iv. A chose in action is property.

v. A position in a religious endowment would constitute property, though, not inheritable.

vi. Right of recovery of money is also property.

vii. Any protected right or bundle of rights is a property.

viii. Property could be either abstract or concrete.

ix. Any proprietary rights over a particular thing would constitute property.

x. Rights of maintenance in property.

xi. Any interest in a commercial or industrial undertaking is a property.

xii. Property would include both corporeal and non-corporeal rights.

109. Black's Law Dictionary (9th edn) defines "property" as –

- *"The right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel)"*

OR

- *"Any external thing over which the rights of possession, use, and enjoyment are exercised".*

110. There are two types of property:

i. Corporeal property and

ii. Non-Corporeal property.

111. Corporeal property is a right of ownership in material things and is also known as ***'tangible property'***. Non-corporeal property has two classes:

i. Encumbrances.

ii. Rights over non-material things, such as intellectual property.

112. Corporeal property would also include tangible personal property that can be seen, weighed, measured, felt, touched or perceived in any manner.

'***Estate'***

113. The broadest definition of an estate is, that it includes all the properties of the deceased. The word estate is to be liberally construed[55]. Black's Law Dictionary (9th edn) defines estate as under:

> *"**Estate. 1.** The amount, degree, nature, and quality of a person's interest in land or other property. **2.** All that a person or entity owns, including both real and personal property. **3.** The property that one leaves after death; the collective assets and liabilities of a dead person. **4**. A tract of land, esp. one affected by an easement."*

114. Estate also includes personal property, which can be called as a ***'decedent estate'*** and is defined in Black's Law Dictionary (9th edn) as under:

> *"**decedent's estate**. The real and personal property that a person possesses at the time of death and that descends to the heirs subject to the payment of debts and claims"*

115. By applying the above authorities, the question in this case is whether semen sample is to be considered as a property or forming part of the estate of the deceased.

116. On a perusal of the above, there are three tests that are to be determined for deciding as to what is `Property' i.e., whether the same is -

i) capable of Possession,

[55] Ranjit Singh v. State of Punjab 1965 SCR (1) 82

ii) capable of being used and enjoyed,

iii) capable of being disposed of.

117. Applying these three tests to a semen sample, which also constitutes a gamete in terms of Section 2(g) of the ART Act, 2021, semen can be owned and possessed within the body and outside of it as well. Modern technology has made it possible for a sperm sample to be preserved, stored and used even at a later date. It can be used for the purposes of enabling procreation. It can be disposed of like any other biological material. In recent years, rapid advancements in digital and biotechnologies have significantly enhanced the practical applications of bodily materials, primarily by unlocking their genetic (informational and therapeutic) potential. These applications range from building genetic material databases to support research on individual identities and health, to the development of diagnostic tools, medicines, and various other technologies. While these innovations offer substantial social benefits, they also open vast opportunities for commercial profit[56].

118. Thus, sperm sample constitutes as 'property' or an 'estate' of an individual, as it can be used for the **purposes** of procreation, leading to the birth of a child. It can also be **used** for the purposes of providing fertility to infertile person. It can also be **donated** for the purposes of enabling a woman to conceive. Thus, sperm sample constitutes property or an estate. In the case of a person who is deceased, it is part of the individual's biological material just like the human corpse or its organs.

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[56] See, Justine Pila, 'Property in Human Body Parts: An Old Legal Question for a New Technological Age' in David Orentlicher and Tamara K Hervey (eds), *The Oxford Handbook of Comparative Health Law (Oxford Academic, 2021*; online edn, 8 June 2020) https://doi.org/10.1093/oxfordhb/9780190846756.013.33 accessed 29 September 2024.

119. Moreover, various decisions discussed above have also unequivocally held that since 'sperm' is reproductive material, it would constitute property.

120. In ***Doodeward (supra)***, the High Court of Australia ruled that a portion of the human body could be considered as property. In ***S.H. v. D.H. (supra)***, sperm was subjected to contractual settlement at the time of divorce between the spouses.

121. The decision in ***Yearworth (supra)*** is important in this regard. The Court of Appeal ruled that sperm could be considered property, and that the men who provided it retained ownership even after it had been removed from their bodies. The Court referenced the High Court of Australia's decision in ***Doodeward (supra)***, which suggested that a body part could become property if some work or skill was applied to it. The Court of Appeal also followed the decision in ***Hecht (supra),*** where the Court took a significant step towards recognizing that stored sperm could be considered property, particularly for determining its use after death. This recognition of ownership for certain purposes was viewed as a meaningful advancement in the legal treatment of body parts, like sperm, in the context of posthumous reproduction.

122. In ***Yearworth (supra)***, it was held that sperm would be property which was legally owned by man and since the arrangement was not a commercial arrangement but for the purpose of personal or family benefits, the same would be construed as property. Sperm had undergone a process of being frozen in tanks of liquid nitrogen, and this was seen as sufficient to establish it as property capable of being owned. The relevant portion of the judgment reads:-

*"28. We have no doubt that, in **deciding whether sperm is capable of being owned for the purpose which we have identified**, part of our enquiry must be into the existence or otherwise of a nexus between the incident of ownership most strongly demonstrated by the facts of the case (surely here, the right, albeit limited, of the men to use the sperm) and the nature of the damage consequent upon the breach of the duty of care (here, their inability to use it notwithstanding that this was the specific purpose for which it was generated).*

40…
*We nevertheless regard the decision in Hecht as of considerable interest; and the fact that under our law the cohabitant's use of the sperm with the written consent of the deceased would in principle be achievable under the Act (s.12(1)(c) and para. 5 of Schedule 3) irrespective of ownership does not derogate from the significance of the step taken **in Hecht towards recognition of ownership of parts or products of a living body – indeed, as it happens, of stored sperm – for certain purposes. Indeed it is hard to regard ownership of stored sperm for the purpose of directing its use following death as other than a step further than that which the men invite us to take in the present case**.*

45.We conclude:

***(a) In this jurisdiction developments in medical science now require a re-analysis of the common law's treatment of and approach to the issue of ownership of parts or products of a living human body, whether for present purposes (viz. an action in negligence) or otherwise**.*

(b) The present claims relate to products of a living human body intended for use by the persons whose

bodies have generated them. In these appeals we are not invited to consider whether there is any significant difference between such claims and those in which the products are intended for use by other persons, for example donated products in respect of which claims might be brought by the donors or even perhaps by any donees permissibly specified by the donors.

(c) For us the easiest course would be to uphold the claims of the men to have had ownership of the sperm for present purposes by reference to the principle first identified in Doodeward. We would have no difficulty in concluding that the unit's storage of the sperm in liquid nitrogen at minus 196°C was an application to the sperm of work and skill which conferred on it a substantially different attribute, namely the arrest of its swift perishability. We would regard Kelly as entirely consistent with such an analysis and Dobson as a claim which failed for a different reason, namely that the pathologist never undertook to the claimants, and was not otherwise obliged, to continue to preserve the brain*.*

(d) However, as foreshadowed by Rose LJ in Kelly, we are not content to see the common law in this area founded upon the principle in Doodeward, which was devised as an exception to a principle, itself of exceptional character, relating to the ownership of a human corpse. Such ancestry does not commend it as a solid foundation. Moreover, a distinction between the capacity to own body parts or products which have, and which have not, been subject to the exercise of work or skill is not entirely logical. Why, for example, should the surgeon presented with a part of the body, for example, a finger which has been amputated in a factory accident, with a view to re-attaching it to the injured hand, but who carelessly damages it before starting the necessary medical procedures, be able to

escape liability on the footing that the body part had not been subject to the exercise of work or skill which had changed its attributes?

(e) So we prefer to rest our conclusions on a broader basis.

(f) In our judgment, for the purposes of their claims in negligence, the men had ownership of the sperm which they ejaculated:

(i) By their bodies, they alone generated and ejaculated the sperm.

(ii) The sole object of their ejaculation of the sperm was that, in certain events, it might later be used for their benefit. Their rights to its use have been eroded to a limited extent by the Act but, even in the absence of the Act, the men would be likely to have needed medical assistance in using the sperm: so the interposition of medical judgment between any purported direction on their part that the sperm be used in a certain way and such use would be likely to have arisen in any event. It is true that, by confining all storage of sperm and all use of stored sperm to licence-holders, the Act has effected a compulsory interposition of professional judgment between the wishes of the men and the use of the sperm. So Mr Stallworthy can validly argue that the men cannot "direct" the use of their sperm. For two reasons, however, the absence of their ability to "direct" its use does not in our view derogate from their ownership. First, there are numerous statutes which limit a person's ability to use his property – for example a landowner's ability to build on his land or to evict his tenant at the end of the tenancy or a pharmacist's ability to sell his medicines – without eliminating his ownership of it. Second, by its provisions for consent,

the Act assiduously preserves the ability of the men to direct that the sperm be not used in a certain way: their negative control over its use remains absolute.

(iii) Ancillary to the object of later possible use of the sperm is the need for its storage in the interim. In that the Act confines storage to licence-holders, Mr Stallworthy stresses its erosion of the ability of the men to arrange for it to be stored by unlicensed persons or even to store it themselves; he also stresses their inability to direct its storage by licence-holders for longer than the maximum period provided by the Act. But the significance of these inroads into the normal consequences of ownership, driven by public policy, is, again, much diminished by the negative control of the men, reflected in the provisions that the sperm cannot be stored or continue to be stored without their subsisting consent. ***Thus the Act recognises in the men a fundamental feature of ownership, namely that at any time they can require the destruction of the sperm.***

(iv) The analysis of rights relating to use and storage in (ii) and (iii) above must be considered in context, namely that, while the licence-holder has duties which may conflict with the wishes of the men, for example in relation to destruction of the sperm upon expiry of the maximum storage period, no person, whether human or corporate, other than each man has any rightsin relation to the sperm which he has produced.

(v) In reaching our conclusion that the men had ownership of the sperm for the purposes of their present claims, we are fortified by the precise correlation between the primary, if circumscribed, rights of the men in relation to the sperm, namely in relation to its future use, and the consequence of the

Trust's breach of duty, namely preclusion of its future use.”

123. The case relied upon by the Respondent - Union of India, ***Robertson (supra)***, is a case where the sperm sample of the Petitioner's husband was preserved by the Respondent. However, the same was lost. The wife then sued for damages. The Court came to a conclusion that the consent of the Petitioner's husband for conception after his demise, was not visible in the facts. The Court observed that it would not wish to make a value judgment as to whether it is better for a potential child to be born or not. However, the Court held that the Petitioner was not legally entitled to conceive a child posthumously with her husband's sperm in first place and thus is not entitled to damages for an opportunity, she never had. The Californian Court of Appeal did not agree with the opinions in ***Hecht (supra)*** as also in ***Monica Zhu (supra)***. Clearly, the decision in ***Robertson (supra)*** is distinguishable on facts, as in the present case, the consent of the deceased clearly exists.

124. In view of the discussion above, this Court concludes that a semen sample or similarly an ovum sample constitutes `property'.

Whether the parents are entitled to release of the semen sample?

125. The important issue in deciding the above question is whether the Petitioners are entitled to release of the sample on the ground that they are the heirs to the deceased, and considering the fact that the sample itself constitutes property.

126. This issue is easily resolvable as there can be no doubt that any biological material belonging to the deceased who has passed away intestate would belong to his heirs. Under the Hindu Succession Act, 1956 which covers the Petitioners, in the absence of spouse or children, the parents are

the Class-1 legal heirs of the deceased. Thus, both the conditions *i.e.* semen sample being property and the Petitioners being heirs are satisfied. Thus, they are entitled to release of the semen sample.

Should the release be subject to any condition or should it be unconditional?

127. Clearly, in terms of paragraph 11 as also grounds D and E of the petition, the Petitioners intend to use the semen sample for the purpose of continuing his legacy *i.e.* to have their progeny. This raises the question of posthumous reproduction and its legality and validity. Ld. Counsel for Union of India has filed detailed written submissions on the issue of posthumous reproduction.

128. Posthumous Reproduction *('PR')* and Postmortem Sperm Retrieval *('PMSR')*, while related, mean different things within the context of reproductive technology. PR refers to the broader concept of conceiving a child after the death of one or both genetic parents, often using stored sperm, eggs, or embryos with prior consent from the deceased. PMSR, on the other hand, specifically refers to the immediate retrieval of sperm from a deceased or brain-dead individual, often in cases where no sperm had been previously stored. PMSR frequently occurs in unplanned situations where consent from the deceased is not explicit. The present petition is an instance of PR, and not PMSR.

129. Posthumous Reproduction or 'PR' refers to the process of conceiving a child using ART after the death of one or both biological parents. As already noted earlier, it involves techniques like Stimulated Ejaculation, Micro Epididymal Sperm Aspiration *('MESA')*, or Testicular Sperm Extraction *('TSA')* from a deceased or brain-dead individual. Alternatively,

preserved or frozen sperm or eggs collected before death can be used. PR can be categorized into four types:

- Planned PR, where future parents provide explicit consent in anticipation of death;
- Unplanned PR, where death occurs suddenly without consent;
- Brain-dead PR, involving the continued development of a foetus in a brain-dead female partner; and
- Stem Cell PR, a recent development where ova from stem cells are used to create embryos without the biological mother's presence or consent.

130. The international position in relation to PR, as succinctly captured in the UOI's written submissions, is as follows:

Legal Position on PR in Various Jurisdictions:

Jurisdiction	***Legal Position on PR***	***Key Requirement***
Germany	Strictly prohibited. Punishment up to 3 years or fines for performing PR.	N/A
France	Allowed only for married couples with medical fertility issues. PR for individuals is excluded.	Consent and medical necessity.
Pakistan	PR is prohibited under Islamic law, as death ends the marital bond.	N/A
Switzerland	PR is restricted under the Swiss Federal Act on Medical Assisted Reproduction.	N/A

Jurisdictions Requiring Explicit Consent for PR:

Jurisdiction	***Legal Position on PR***	***Consent Requirement***
Uruguay	PR is allowed with written consent, valid for 365 days.	Written consent valid for 1 year.
Belgium	PR is permitted after a 6-	Separate written

	month waiting period but must occur within 2 years.	agreement.
Australia (Victoria)	PR is regulated by the Human Tissue Act 1982 and Assisted Reproductive Treatment Act 2008.	Written or oral consent in presence of two witnesses, and approval by the Patient Review Panel.
Canada	PR is allowed with strict written consent.	Written consent required.
United Kingdom	PR is permissible only with a written, signed consent.	Written, signed consent (previously written only).

Additional Considerations for PR

Jurisdiction	***Additional Requirements/Considerations***
Australia (Victoria)	Approval by the Patient Review Panel, counseling for the woman, and consideration of the impact on the child.
United States (ASRM Guidelines)	Ethical guidelines suggest that parental desires do not give ethical claim to the deceased's gametes.
Israel	Only the deceased's female partner can use the sperm; parents are excluded.

131. As can be seen from the above tables, on the issue of posthumous reproduction, there is no international consensus. As per the material placed on record, some jurisdictions such as Germany, Switzerland and France prohibit the same. Some countries such as Russia and Cannada have strict regulations governing the same. Posthumous reproduction/postmortal reproduction is usually in the context of death of one of the parents. In a case where there is only one parent *i.e.*, the father who has frozen the sperm who is also unmarried and did not have partner, the issue becomes more complex.

132. In such a case, in the opinion of this Court, the question that ought to be considered is whether there was consent either express or implied for the purpose of use of the genetic material by the owner of the sperm for use of the same for the purposes of postmortal reproduction. There are various debates that arise in this context -

(i) First, the intention of the Petitioners, who would become the grand parents of the proposed child *i.e.*, for companionship of a grand-child during old age,

(ii) Whether their motivation is to feel a sense of continuation of their deceased son's existence or potentially to seek financial benefits.

(iii) The psychological effects on a child born through posthumous reproduction must be considered. Will the child suffer from the absence of their parents? How will they process their unique conception story and the reasons behind it?

(iv) Broader societal implications of posthumous reproduction. This includes debates on the commodification of human reproductive material, the commercialisation of genetic heritage, and concerns over whether the ability to reproduce posthumously could be misused.

133. Technology enables the use of semen samples for the purposes of giving birth to progeny. However, what is to be borne in mind is also the informed consent and the welfare of the future child in cases of posthumous reproduction or post-mortal reproduction. To that extent, before directing release of gametes especially in the case of a deceased individual without a spouse/partner, the Court exercises *parens patriae* jurisdiction over the unknown and unborn. Several factors would be required to be borne in mind

including the family circumstances, well-being of the unborn etc., Since the Court is to decide in respect of release of the sample, of a deceased person, enormous caution needs to be exercised. Merely because the semen sample constitutes `property' and there is no prohibition against such release, the same cannot be automatic. Each case needs to be adjudged on its own facts, without a general rule.

134. In one case arising in Israel, the parents of a 19-year-old soldier killed in 2002 in Gaza obtained legal permission to use their son's sperm post-mortem. The mother of the deceased soldier got permission to choose the future single mother and a daughter was born from the deceased son's sperm[57]. Even in Germany, which adopts a rather conservative approach, the case of the 'Erlanger baby' was hotly debated wherein a pregnant mother who became brain dead, was kept alive in an attempt to save her pregnancy. There have been documented cases in Germany where brain dead mothers were kept artificially alive to give birth to a healthy child[58]. Since 2009, however, it is stated that PHR is permissible in Germany with Cryopreservation of Gametes[59]. There are several cases where men have preserved semen samples due to cancer treatment who have thereafter used surrogate mothers for having children.

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[57] Y Hashiloni-Dolev and S Schicktanz, 'A Cross-Cultural Analysis of Posthumous Reproduction: The Significance of the Gender and Margins-of-Life Perspectives' (2017) 4 *Reproductive Biomedicine and Society Online* 21 https://doi.org/10.1016/j.rbms.2017.03.003 accessed 29 September 2024.

[58] *Id.*

[59] D Sternberg, 'Herausgabe von impregnierten Eizellen nach dem Tod des Mannes' (2010) 28 *Medizinrecht* 874.

135. In one review article[60] published in the Journal of Human Reproductive Sciences authored by Professors from the Department of Forensic Department in AIIMS, it is noticed that the lack of proper guidelines had led to the doctor not permitting sperms retrieval from deceased person on one case, where a request was made by the wife. This article records the international scenario as under:

Countries Prohibiting PMSR:

- **Hungary** and **Slovenia**: These countries explicitly prohibit postmortem sperm retrieval (PMSR).
- **Australia (Infertility Treatment Act 1995)**: Prohibits insemination with sperm from a deceased man. National Health and Medical Research Council *(NHMRC)* guidelines initially described this as 'unethical', although new guidelines in 2007 allow PMSR with proper consent and counselling.

Countries Allowing PMSR:

- **Czech Republic**: PMSR is allowed without restrictions.
- **Japan**: Permits PMSR if there is a confirmed blood relationship and if the husband's agreement has been secured.
- **United Kingdom (Human Fertilization and Embryology (Deceased Fathers) Act 2003)**: PMSR is permitted if the deceased provided written consent. The law recognizes the deceased as the father if the embryo was created using his sperm posthumously, and proper consent procedures were followed.

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[60] AK Sikary, OP Murty, and RV Bardale, 'Postmortem Sperm Retrieval in Context of Developing Countries of Indian Subcontinent' (2016) 9(2) *Journal of Human Reproductive Sciences* 82 https://doi.org/10.4103/0974-1208.183510 accessed 29 September 2024.

Countries with No Legislation or Guidelines:

- **Cyprus, Estonia, Latvia, Lithuania, Malta, Poland, and Slovakia**: These countries have no specific laws or guidelines regulating PMSR.

Specific Guidelines and Ethical Standards:

- **Australia (Updated NHMRC Guidelines 2007)**: PMSR is accepted with proper consent and counseling for the widow, after a mandatory waiting period.
- **European Society for Human Reproduction and Embryology (11th Task Force)**[61]: PMSR is deemed acceptable under these conditions:

- Written consent of the deceased.
- Extensive counseling of the partner.
- A minimum one-year waiting period before starting treatment.
- It also allows the use of gametes for third-party reproduction under donation conditions.

- **American Society of Reproductive Medicine (Ethics Committee)**: PMSR is allowed if the deceased provided consent, the partner is properly counseled, and the donor has been screened for infections.

Countries Prohibiting Research or Experimentation on Gametes:

- **Malaysia (Malaysian Medical Council guidelines 2006)**: Prohibits any research or experimentation involving human oocytes or sperm.

Gaps in Legislation:

[61] G Pennings and others, 'ESHRE Task Force on Ethics and Law 11: Posthumous Assisted Reproduction' (2006) 21(12) Human Reproduction 3050 https://doi.org/10.1093/humrep/del287 accessed 29 September 2024.

- Many of the guidelines that permit PMSR with the deceased's consent do not address cases of sudden, unforeseen death where no explicit or implied consent was provided.

136. In Sri Lanka, there are no guidelines for PMSR. This is the position even in Nepal, Bhutan and Bangladesh. In Pakistan, however, the article records that fertilization of ovum from a cryopreserved sperm after the death of the husband is strictly prohibited[62]. The publication lists out various issues that needs to be considered for ART to be used for posthumous reproduction including the question of consent, availability of resources, time duration, and psycho-social counselling. The above publication is however only in the context of the wife *i.e.*, the spouse of the deceased husband seeking release of the sperm sample. In the present case, there is no living spouse of the deceased.

Findings and Conclusions

137. A perusal of the above legal position as also the decisions which have been discussed above would show that the issue of PR or PMSR is a complex issue and there is no uniformity in the manner in which the same has been dealt with or regulated upon in different jurisdictions.

138. In the context of present case, certain cultural and societal considerations deserve to be mentioned. In India, it is not unusual for grand-parents to exclusively bring up children especially in the absence of the real parents due to separation, divorce or demise. The cultural and societal ethos does not shun grand-parents from being given custody of children as well.

[62] AK Sikary, OP Murty, and RV Bardale, 'Postmortem Sperm Retrieval in Context of Developing Countries of Indian Subcontinent' (2016) 9(2) *Journal of Human Reproductive Sciences* 82 https://doi.org/10.4103/0974-1208.183510 accessed 29 September 2024.

For example, in custody battles, in order to ensure well-being of children, Courts have handed over children to be brought up by grand-parents with visitation rights to both parents.

139. In ***Nil Ratan Kundu v. Abhijit Kundu***[63], the Respondent, the father of a minor child, filed an application under the Guardians and Wards Act, 1890, seeking custody of his son. The child was in the custody of the Appellants, who are the ***maternal grandparents***, following the death of the child's mother. The Trial Court granted custody to the Respondent, reasoning that as the father and natural guardian, he was better suited to secure the child's future. The High Court upheld this decision. However, the child refused to go with the Respondent when asked by the Supreme Court.

140. The Supreme Court, allowing the appeal, held that the subordinate courts failed to apply the well-settled legal principle that the welfare of the child should be the paramount consideration in custody cases. In this case, the Court found that granting custody to the respondent without fully considering the child's welfare was unjustified. The relevant observations are set out below:

> *"58. The approach of both the Courts is not in accordance with law and consistent with the view taken by this Court in several cases. For instance, both the Courts noted that the appellants (maternal grand parents) are giving 'all love and affection' to Antariksh but that does not mean that Antariksh will not get F similar love and affection from his father. It was also observed that appellants no doubt got Antariksh admitted to a well reputed school (St. Xavier's Collegiate School, Kolkata). But it could not be said that the father will not take personal care of his son.*

[63] 2008 INSC 920

Both the Courts also emphasized that the father has right to get custody of Antariksh and he has not invoked any disqualification provided by 1956 Act.

59. We are unable to appreciate the approach of the Courts below. This Court in catena of decisions has held that the controlling consideration governing the custody of children is the welfare of children and not the right of their parents.

…

62. In our opinion, in such cases, it is not the 'negative test' that the father is not 'unfit' or disqualified to have custody of his son/daughter is relevant but the 'positive test' that such custody would be in the welfare of the minor which is material and it is on that basis that the Court should exercise the power to grant or refuse custody of minor in favour of father, mother or any other guardian.

…

84. We have called Antariksh in our chamber. To us, he appeared to be quite intelligent. When we asked him whether he wanted to go to his father and to stay with him, he unequivocally refused to go with him or to stay with him. He also stated that he was very happy with his maternal grand-parents and would like to continue to stay with them. We are, therefore, of the considered view that it would not be proper on the facts and in the circumstances to give custody of Antariksh to his father respondent herein."

141. Coming to the facts of the case under consideration, the Petitioners' son had, while giving consent for preservation of his semen sample, clearly stated that he was willing for semen freezing for fertility preservation. The purpose was for ***`fertility preservation'*** which clearly means for the purposes of having progeny or for procreation. Thus, the consent in this case for preservation of the semen is not just implied but in fact express. The

deceased who was the owner of the sample was well aware that he was not married and he also did not have any partner. The son of the Petitioners intended for the semen sample to be used in order to bear a child. He may have hoped to live after chemotherapy but nature willed otherwise. From the consent given for semen sample preservation the deceased son's last wish can also be discerned. When he passed away, the parents being the heirs of the deceased, and semen samples being genetic material and constituting property, the parents are entitled for release of the same.

142. With the expansion of modern science enabling infertile couples to have children, the hope of grand-parents to continue the legacy of their young deceased son who specifically got his semen sample preserved, in the opinion of this Court cannot be defeated. Grand-parents are equally capable of bringing up their grand-children in a manner so as to integrate them into society. In the present case, the proposed child may be born through an identified surrogate mother or by fertilization of the sperm with a consenting lady who may be identified by the Petitioners through IVF. If the parents choose to use surrogacy, it is seen that the Surrogate Act does not deal with such a situation. If the parents opt for ART services, the ART Act, 2021 also does not deal with this situation. Hence the parents have knocked the doors of this Court for exercising of extraordinary writ jurisdiction under Article 226 of the Constitution of India.

143. Thus, in the opinion of this Court, under the prevailing Indian law, there is no prohibition against posthumous reproduction if the consent of the sperm owner or egg owner can be demonstrated. If the deceased had been married and had a spouse, the issues would not have been as complex. In the absence of a spouse, the question arises: is there any prohibition on

posthumous reproduction under the existing law? The answer is clearly in the negative. In the absence of any such prohibition, this Court is unable to read a restriction where none exists.

144. Given the settled position, as per the medical records produced by the Gangaram Hospital, the sperm constitutes property and the parents are the legal heirs of their deceased son. With no prohibition on posthumous reproduction, and consent having been given by the Petitioner's son prior to his death, the Court is of the opinion that this is a suitable case for the release of the sperm sample to the Petitioners.

145. Respondent No. 3—Ganga Ram Hospital is accordingly directed to hand over the frozen Semen Sample bearing Reg no. 2726372 dated 27th June, 2020, stored in the IVF lab into the custody of the Petitioners *forthwith*. It is made clear however that the said semen sample shall not be used for any commercial or monetary purpose.

146. The present decision shall be communicated by the ld. CGSC to the Ministry of Health and Family Welfare for the purpose of considering whether any law, enactment, or guidelines are required to address issues related to posthumous reproduction or post-mortal reproduction. Ld. CGSC to communicate the present judgment to the Secretary, MoHFW, Government of India for necessary action.

147. The present petition is allowed in the above terms, and all pending applications, if any, are disposed of accordingly.

PRATHIBA M. SINGH
JUDGE

OCTOBER 4, 2024
dk/Rahul/dn