



WP(C) No.5306/2025

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE SHOBA ANNAMMA EAPEN

FRIDAY, THE 15TH DAY OF MAY 2026 / 25TH VAISAKHA, 1948

WP (C) NO. 5306 OF 2025

PETITIONER:

[REDACTED]

S/O [REDACTED] S
O AT [REDACTED], T

BY ADVS.
SRI.ANAND GROVER (SR.)
SMT.TRIPTI TANDON
SMT.DHANUJA M.S
SRI.LEGITH T.KOTTAKKAL
SHRI.DANIEL JOSE

RESPONDENTS:

- 1 UNION OF INDIA
REPRESENTED BY SECRETARY, DEPARTMENT OF HEALTH AND
FAMILY WELFARE, ROOM NO. 402-D, NIRMAN BHAWAN, NEW
DELHI, PIN - 110011
- 2 NATIONAL ART AND SURROGACY BOARD
DEPARTMENT OF HEALTH RESEARCH, 2ND FLOOR, IRCS
BUILDING 1, RED CROSS ROAD, NEW DELHI, REPRESENTED BY
SECRETARY, DEPARTMENT OF HEALTH RESEARCH, PIN - 110001
- 3 STATE OF KERALA
REPRESENTED BY SECRETARY, DEPARTMENT OF HEALTH AND
FAMILY WELFARE, GOVERNMENT SECRETARIAT ANNEXE, 2,
THIRUVANANTHAPURAM, KERALA, PIN - 695001
- 4 DIRECTOR
SOCIAL JUSTICE DEPARTMENT, 5TH FLOOR, VIKAS BHAVAN,
PMG, THIRUVANANTHAPURAM KERALA, PIN - 695033



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5 KIMS FERTILITY CENTRE
 PART OF KERALA INSTITUTE OF MEDICAL SCIENCES (KIMS) ,
 PB NO. 1, ANAYARA P O, THIRUVANANTHAPURAM, REPRESENTED
 BY ITS MANAGING DIRECTOR, PIN - 695029

BY ADVS.
SHRI.K.ARJUN VENUGOPAL, CGC
SHRI.G.SIVASANKAR

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR HEARING ON
20.02.2026, THE COURT ON 15.05.2026 DELIVERED THE FOLLOWING:

**“CR”****JUDGMENT**

The question that arose for consideration in this case is whether a person, female at birth, whose self-perceived gender identity is male, can be permitted to undergo cryopreservation of oocytes under Section 21(g) of the Assisted Reproductive Technology (Regulation) Act, 2021 [for short, “ART Act”] before completing gender reassignment surgery.

2. The writ petition has been filed with the following prayers;

“a. Declare that Section 21 of the Act, in so far as it excludes transgender persons from the purview of the Act and limits the application of the Act only to commissioning couple and women is violative of Article 14, 15 and 21 of the Constitution of India.

b. Read down Section 21 (g) of the Act as discriminatory on the ground of sex and declare that the term "woman" and "man" in Section 21.(g) would include a "trans woman" and "trans man" respectively.

c. a writ of mandamus or any other appropriate writ order or direction directing 1st, 2nd and 3rd respondent to grant necessary permission to the 5th respondent to render assisted reproductive technology services to the trans man and trans woman including cryo-preservation so as to secure the interests of justice”

Factual matrix

3. The petitioner herein, who was a female at birth, is a transgender whose self-perceived gender identity is ‘man’ as per Ext.P1 identity card issued by the District Collector, Thiruvananthapuram. In 2023, the petitioner underwent treatments including hormone therapy and breast removal surgery; however, sex reassignment surgery was not



completed. Prior to the sex reassignment surgery, the petitioner wanted to cryopreserve his gametes so as to utilize the same for reproduction at a later stage in life; and hence, he approached the fifth respondent - an Assisted Reproductive Technology (ART) Clinic - for freezing and storing his eggs. As per Ext.P2, an ultrasonography (USG) of the abdomen and pelvis was conducted, which clearly indicates that no significant abnormalities were identified. However, when the petitioner approached the fifth respondent, they pleaded their inability, pointing out that there is no provision in the ART Act or the Rules framed thereunder, which enables them to cryopreserve the gametes of a transgender person, and hence, refused to cryopreserve the gametes. Aggrieved by the refusal of the fifth respondent to preserve the gametes on account of the ART Act and the Rules framed thereunder, which restricts/limits the benefits of the ART Act to a 'commissioning couple' or 'woman', and alleging that, such a gender-based classification is arbitrary and interferes with the choice of reproduction, the petitioner has come up before this Court.

Contentions of the first respondent

4. The first respondent - Union of India - filed a detailed counter affidavit, *inter alia*, contending that though the petitioner claims to be a transgender person, Ext.P1 identity card issued by the State



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Government reflects the petitioner's gender as 'male', not 'transgender'. It is pointed out that Section 6 of the Transgender Persons (Protection of Rights) Act, 2019 [for short, "Transgender Act"] r/w Rule 5 of the Transgender Persons (Protection of Rights) Rules, 2020 [for short, "Transgender Rules"] and Section 7 r/w Rule 5 contemplate the issuance of two types of identity cards; one issued to a transgender person under Form 5 of the Transgender Rules, and the other under Form 6. Hence, it was contended that as the petitioner has already obtained Ext.P1 identity card under Form 6, he cannot seek relief as a 'transgender person'. It is also contended that the petitioner has not stated how he intends to use gametes 'for personal use'. After undergoing sex reassignment surgery, the petitioner would no longer be in a position to avail the ART services since an IVF procedure requires a uterus for implantation of the embryo and for carrying the pregnancy to term. Under such circumstances, the only option available to the petitioner would be to resort to surrogacy using his gametes, which is also not permitted for a transgender person, under the provisions of the Surrogacy (Regulation) Act, 2021; however, no provision of the said enactment is under challenge in the present petition. As per the ART Act, the benefits of ART can be availed only by a commissioning couple (a married man and woman) or a single woman; and a single man or a transgender person does not fall within the ambit of the ART Act or the



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Rules framed thereunder. It was also contended that the ART Act was enacted by the Parliament to regulate practices of ART to prevent misuse of technology and exploitation of poor women, and to promote safe and ethical practices of ART in the country. It was also their contention that the ART Act further intends to ensure the rights and welfare of the child born through these services and also to balance the interests of the parents and the child. The intention of the ART Act is to limit the ART services to only a specific category of people, i.e., commissioning couples and single women, in the best interest of the child. In order to achieve the above objectives, the law makers have consciously decided the beneficiaries under the ART Act and thus, single men and transgender persons are not eligible to avail ART treatment. During discussion regarding the ART Act, the committees of the Parliament deliberated upon the issue and the facility of ART and surrogacy services was not extended to LGBT (T stands for transgender) community in the best interest of children born through ART/surrogacy. Ext.R1(a), the relevant extract of the 129th Report of the Parliamentary Standing Committee on Health and Family Welfare submitted to Rajya Sabha, is relied upon by the first respondent - Union of India. According to them, the prayer of the petitioner for cryopreservation of eggs cannot be granted in view of his gender identity claimed as a 'Trans Man' in view of Section 2(1)(u), 27(2)(b) and 27(6)(i) of the ART Act. It is pointed



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out that the Legislative Department, Ministry of Law and Justice, was consulted in the matter of **Aqsa Shaikh v. Union of India** [WP(C) 380 of 2024 status pending], which was filed by a single unmarried trans woman before the apex court, challenging the exclusion of single unmarried women and transgender persons from availing surrogacy services under the Surrogacy (Regulation) Act, 2021, wherein the Department has observed as follows:

"6. In this connection, it is to state that it is a well settled principle of interpretation that the provision of a statute should be understood with ordinary, natural and grammatical meaning unless there is a technical definition.

7. Therefore, while enacting the said Act, Parliament appears not to have intended to include transgender individuals within the definitions of 'couple', 'intending couple' and 'intending woman'. Thus, the definitions of 'couple', 'intending couple' and 'intending woman' do not include LGBTQIA+.

8. Therefore, transgender persons are not covered in the aforesaid definitions under the Surrogacy (Regulation) Act, 2021. Accordingly, the administrative Ministry may defend their case in the Writ Petition pending before the Hon'ble Supreme Court of India."

5. After the enactment of the Transgender Act and the Rules framed thereunder, the rights of transgender persons are governed by the Transgender Act. Though the transgender persons have been given certain health care facilities for their welfare, the facility to avail ART and surrogacy services have not been explicitly granted under the Transgender Act. A transgender person is not even permitted to adopt a child under the Juvenile Justice (Care and Protection of Children) Act, 2015, and the Hindu Adoptions and Maintenance Act, 1956. The Larger



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Bench of the apex court, in **Supriyo @ Supriya Chakraborty v. Union of India** [2023 INSC 920], agreed that the transgender persons in heterosexual relationships have the right to marry under the existing legal framework; however, the reproductive rights of transgender persons have not been explicitly discussed. These are all matters that have a social consequence on the health of the future generation of the country, and as such, are matters of policy where the scope of judicial review is minimal. The Constitution of India mandates the State to act as *parens patriae* for the protection, well-being and welfare of all children. The rights and welfare of the children are paramount and sacrosanct, and cannot be diluted. Whether transgender persons should be allowed to avail ART services is a matter of policy, and it is for the experts to determine the impact of the same. It is well settled that a law made by the Parliament or the State Legislature can be struck down only on the grounds of (i) lack of legislative competence, (ii) violation of any constitutional provision or (iii) if the provision is arbitrary in nature. It is contended that the petitioner has not made out any of the aforesaid grounds. Though the right to natural procreation is a fundamental right, the right to avail ART services, which involves technological tools, third party commercial entities and commercial transactions, is not a fundamental right, but only a statutory right. Hence, it is contended that the restrictions imposed under the governing statute cannot be claimed



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to be violative of any fundamental right under Article 21 of the Constitution of India; and the presumption is always in favour of the constitutionality of an enactment; and the burden is on the petitioner to show that there has been a clear transgression of the constitutional principles. Thus, according to the first respondent, the writ petition is not maintainable and is devoid of any merit and is liable to be dismissed with costs.

Contentions of the fifth respondent

6. The fifth respondent has also filed a counter affidavit, wherein it is admitted that the petitioner was born as a female in all perspectives and that the petitioner's self perceived gender identity is that of a man. It is pointed out that a transgender is defined in the Transgender Act as someone whose gender identity differs from the sex they were assigned at birth; and as per Ext.P1, the petitioner has obtained a transgender ID card; and hence, the petitioner cannot be legally brought under the category of a female/woman for any service extendable to female/woman unless it is specified in the Transgender Act. It is also contended that ART banks are permitted to obtain semen from males and oocytes from females who fall within the specific age categories prescribed under Section 27 of the ART Act. Section 27 of the ART Act provides for sourcing gametes by ART; and as explained in the



Transgender Act, the retrieval of oocytes is a procedure of removing oocytes from the ovaries of a woman. The ART Act and the Rules provide for the services only to commissioning couples or female/woman and there is a lack of specific provisions with respect to fertility preservation of transgender persons. It is further contended that the petitioner is in the transitional stage of female-male as the reassignment surgery is not fully completed; and the petitioner is still having uterus and the ability to produce ovum as evident from Ext.P2; and in strict medical terms, the petitioner is still a female/woman possessing the ability to bear young offspring. However, the legal identity, as per Ext.P1, and the absence of any express provisions including categories other than commissioning couples and female/woman in the ART Act and the Rules, put a specific bar for giving ART assistance to the petitioner. It is further contended that the fifth respondent, being an institution functioning under the provisions of the ART Act and the Rules, has no authority to extend such services beyond what is expressly provided under the ART Act and the Rules.

Reply by the petitioner

7. On receipt of the detailed counter affidavit of the first and fifth respondents, the petitioner filed a detailed reply affidavit, denying all contentions raised by the respondents. It is stated that the petitioner is



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a transgender person, who was a 'female' at birth, but his self-perceived gender identity is 'male'. It is also stated that after the issuance of Ext.P3 identity card as transgender person on 01.03.2023, the petitioner received a change in gender certificate and Ext.P1 identity card as 'male' on 13.09.2023 in accordance with Section 7(2) of the Transgender Act r/w Rules 6 and 7 of the Transgender Rules. The proviso to Section 7(3) of the Transgender Act states that such change in gender and the issuance of a revised certificate under sub-section (2) shall not affect the rights and entitlements of such person under this Act. Hence, according to the petitioner, a person who undergoes change in gender and is issued a revised certificate under Section 7(2) of the Transgender Act retains the rights and entitlements of a transgender person under the Transgender Act; thus, he is entitled to seek reliefs and demand the right to equality and non-discrimination as a transgender person. The petitioner wants to cryopreserve his gametes so as to utilize the same for reproduction at a later stage in life, which is permitted under the ART Act. It is pointed out that Ext.P4 Standard Operating Procedures for Medical Treatment of Transgender Persons [for short, "SOP"] specifically provides for fertility preservation including cryopreservation of embryo and oocytes for transgender persons (female to male), which enables transgender persons to exercise the option of cryopreservation of eggs or conception and



pregnancy before undergoing complete gender affirmation surgery. According to the petitioner, the transgender persons including the petitioner are eligible to seek services for fertility preservation including cryopreservation of oocytes; and they have utilized ART services in Kerala to preserve their oocytes before undergoing gender affirmation surgery and becoming a parent/father. It is pointed out that the apex court in **A (Mother of X) v. State of Maharashtra** [2024 INSC 371], recognized that the term 'woman' embraces within its fold, non-binary and transgender persons like the petitioner, in the context of pregnancy and reproduction, which includes access to ART services. It is also pointed out that in **Supriyo** (*supra*), the apex court affirmed the right of transgender persons in heterosexual relationships to marry under existing law including personal laws which regulate marriage. Therefore, according to the petitioner, a transman/transgender man like the petitioner can marry a cis-gender woman or a transgender woman. It is also pointed out that in upholding transgender person's right to marry, the apex court rejected the notion that marriage laws apply to biological men and women alone. According to the petitioner, neither the category of single woman nor commissioning couple under the ART Act is foreclosed and thus, he is eligible to seek ART services for preservation of gametes; and any other interpretation of the ART Act would be violative of Articles 14, 15 and 21 of the Constitution of India.



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It is alleged that the first respondent is adopting a narrow and restrictive view of the ART Act, contrary to its object and purpose. As regards Ext.R1(a) produced by the first respondent, it is in relation to 'live-in-couples' and 'same-sex-couples', who were not allowed to avail ART services under the ART Bill; and there is no reference to transgender individuals and/or to transgender persons who are lawfully married, being excluded from the ART Act in Ext.R1(a) report. It is stated that the petitioner, being a transgender person, is guaranteed the fundamental right to equality and non-discrimination and the right to privacy, dignity and autonomy under Articles 14, 15 and 21 of the Constitution of India. The petitioner relied on the judgment of the apex court in **National Legal Services Authority (NALSA) v. Union of India and Others** [(2014) 5 SCC 438], wherein it was held that the recognition of one's gender identity lies at the heart of the fundamental right to dignity and that self-determination of one's gender is protected within the realm of personal liberty under Article 21 of the Constitution. It is also pointed out that Section 2(k) of the Transgender Act recognizes a person as 'transgender', 'whether or not such person has undergone sex reassignment surgery'; and the Transgender Act does not stipulate that a person must forgo their reproductive rights in order to be recognized as a transgender person. Section 45 of the ART Act makes it clear that the provisions of the Transgender Act 'shall be in



addition to, and not in derogation of any other laws for the time being in force'. Thus, the provisions of the ART Act including those in Sections 2(1)(u), 27(2)(b) and 27(6)(i) will have to be read and applied in a manner that is consistent with the provisions of the Transgender Act as well as the judgments in **NALSA** (*supra*) and **Supriyo** (*supra*). It is further stated that the opinion of the Legislative Department has neither been considered nor accepted by the apex court in **Aqsa Shaikh** (*supra*), which is pending. It is alleged that the observations/advice of the Legislative Department to the administrative Ministry in the said petition have no bearing on the present case; and the exclusion of transgender persons from the ART Act, which has the effect of effacing their reproductive rights and freedoms amounts to discrimination, is unconstitutional and unlawful. According to the petitioner, the question of adoption does not arise in the present case; and the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2015, or the Hindu Adoptions and Maintenance Act, 1956, relating to adoption are not relevant for the adjudication of the writ petition. It is further stated that the right to make reproductive choices is a facet of the right to personal liberty under Article 21; and it is settled law that although a statute is presumed to be constitutional, once its constitutionality is assailed, the burden is on the State to show that the law satisfies the test laid down under Article 21, i.e., procedural and substantive



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fairness.

8. I have heard Sri.Anand Grover, the learned Senior Counsel for the petitioner, assisted by Smt.Tripti Tandon, Sri.Legith T. Kottakkal and Smt.Dhanuja M.S.; Sri.K.Arjun Venugopal, the learned Central Government Counsel; Sri.Shameer P.M., the learned Government Pleader; Sri.G.Sivasankar, the learned counsel for the fifth respondent.

Submissions on behalf of the petitioner

9. The learned Senior Counsel appearing for the petitioner submitted that the petitioner, who was a female at birth and later identified as a transgender person, was issued Ext.P3 transgender certificate in accordance with Section 6 of the Transgender Act. Subsequently, after undergoing hormonal therapy and breast removal surgery, he was issued Ext.P1 certificate recognising his identity as a 'man' under Section 7 of the Transgender Act. While so, the petitioner, seeking to preserve his oocytes, approached the fifth respondent, where an ultrasonography was conducted, revealing no abnormality as per Ext.P2 report. However, the fifth respondent refused to cryopreserve the oocytes citing the provisions of the ART Act and the Rules, which, according to them, do not permit cryopreservation of oocytes of a transgender person. According to the learned Senior Counsel, the petitioner is not only a man but also a transgender person in accordance



with law. It was argued that, being a transgender person, the petitioner is entitled to preserve his oocytes, and that it is a misconception to treat him solely as a male and not as a transgender person. The learned Senior Counsel further argued that while considering the validity of a statute, to save the statute from being rendered unconstitutional, the court can apply the test of 'reading down' as laid down in **B.R.Enterprises v. State of U.P.** [(1999) 9 SCC 700], which reads as follows:

“..... Thus, where there are two possible interpretations, one invalidating the law and the another upholding, the latter should be adopted. For this, the courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of legislation, may be beneficial, penal or fiscal etc...”

10. The learned Senior Counsel pointed out that the ART Act is a beneficial statute intended to aid ethical practices relating to ART services for addressing the issues of reproductive health, where ART is required for becoming a parent or for freezing gametes, embryos, embryonic tissues for further use; and in order to save it from being rendered unconstitutional, it must be given a 'purposive interpretation', consistent with its object and the constitutional guarantees of equality and non-discrimination. The learned Senior Counsel also relied on Section 45 of the ART Act, stating that the provisions of the ART Act 'shall be in addition to, and not in derogation of any other laws for the



time being in force'. The argument of the learned Senior Counsel is that the ART Act must be interpreted to include the broad definition of transgender person. According to the learned Senior Counsel, since the petitioner is a transgender person as per Section 2(k) of the Transgender Act, though the petitioner obtained a certificate reflecting change in gender as 'male', he still retains the rights and entitlements of a transgender person. The learned Senior Counsel also pointed out that Section 7(3) of the Transgender Act prohibits discrimination against the transgender person by any person or establishment. The learned Senior Counsel also stressed on Section 3(d) of the Transgender Act, which prohibits the denial, discontinuation of, or unfair treatment in healthcare services. According to the learned Senior Counsel, the ART services are healthcare services; and hence, the petitioner ought not have denied the right to preserve his oocytes. The learned Senior Counsel further pointed out that as per Section 15(d) of the Transgender Act, the Government is required to bring out a health manual for sex reassignment surgery; and the Union of India has issued Ext.P4 SOP, by which a right has been given to the transgender persons; and the SOP, being a measure taken under the statute, has legally binding force. Ext.P4 SOP is a statutory measure taken by the Central Government under Section 15(d) of the Transgender Act; and as the petitioner is a transgender person, he is entitled to receive



information and access fertility preservation techniques including cryopreservation of gametes before he decides on complete gender reassignment surgery. The words in the SOP, "Fertility preservation should be as per prevailing law/Assisted Reproductive Technology (ART) Act" is a reference to the age criteria prescribed in the ART Act for availing ART services.

11. It was also the argument of the learned Senior Counsel that the ART Act includes transgender persons and must be interpreted as such. According to the learned Senior Counsel, the petitioner is seeking to cryopreserve his gametes so as to utilize the same for reproduction at a later stage in life, which is permitted under Section 29 of the ART Act; and the contention of the Union of India that the petitioner will need services under the Surrogacy (Regulation) Act, 2021, in future are in the nature of speculation, surmises and conjecture and cannot be the basis to deny the petitioner the option of cryopreservation of oocytes under the ART Act. It is also the contention of the learned Senior Counsel that there is no exclusion of transgender persons in the ART Act for availing ART services, for becoming a parent or for freezing gametes, embryos etc., whether as an individual or as a couple, due to 'social' or 'medical' concerns. Any other interpretation of the ART Act would render the statute arbitrary and unconstitutional. It was also argued by the learned



Senior Counsel that the term 'woman' in Section 2(1)(u) as well as Section 21(g) of the ART Act includes a transgender person like the petitioner, especially since he has the reproductive organs of a woman to be able to utilize facilities for cryopreservation of gametes under Section 29 of the ART Act. In support of the said contention, the learned Senior Counsel relied on the judgment in **A (Mother of X) v. State of Maharashtra** [2024 INSC 37] and submitted that there is no reason why the expression 'woman' under the ART Act should not be interpreted to include persons like the petitioner, particularly when, akin to the MTP framework, ART services also fall within the domain of reproductive healthcare. According to the learned Senior Counsel, the State is under an obligation to ensure the availability of facilities relating to sexual and reproductive health of good quality, including access to ART services. It was also the argument of the learned Senior Counsel that the words 'commissioning couple' in Sections 2(1)(e) and 21(h) of the ART Act include transgender persons, who enter into marriage and are unable to conceive through the natural process. It was also pointed out that in **Supriyo** (*supra*), the apex court unanimously upheld the transgender persons' right to marry a person of opposite sex, whether cisgender or transgender, under the existing laws governing marriage; and in upholding transgender persons' right to marry, the apex court rejected the notion that marriage laws apply to 'biological'



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men and women alone. The learned Senior Counsel also submitted that the petitioner is covered by the phrase 'patients' defined in Section 2(1) (n) of the ART Act; and since the ART Act was enacted prior to **Supriyo** (*supra*), the ART Act will have to include married transgender couples within the meaning of 'commissioning couple'. It was also pointed out that in **NALSA** (*supra*), the apex court held that international conventions including the Yogyakarta Principles, which the court found not inconsistent with the various fundamental rights guaranteed under the Indian Constitution, must be recognized and followed. According to the learned Senior Counsel, as per Principle 24 of the Yogyakarta Principles, everyone has the right to find a family without discrimination on the basis of sexual orientation or gender identity; and thus, the fifth respondent is required to enable transgender persons like the petitioner to access ART services without any discrimination in order to realize his right to find a family. The learned Senior Counsel also relied on **Zahhad v. State of Kerala** [2025 (4) KHC 128] and argued that this Court recognized that the well-being of a child born to transgender parents is not threatened by the gender identity of the parents, but rather by the stigma and prejudice prevailing in society against transgender persons, and accordingly, directed the authorities to issue a birth certificate to the child recording the names of the petitioners using the gender-neutral term 'parents' instead of 'mother' and 'father'. Hence, it was



argued that there is no legal restriction on a transman bearing a child through natural means. According to the learned Senior Counsel, the Parliamentary Standing Committee had not intended to exclude transgender persons from the ambit of the legislation; and the report of the Parliamentary Standing Committee is not the view of the Parliament. It was also argued that the plain meaning of words used in a Statute has to be taken into consideration; and the excerpts from the report of the Parliamentary Standing Committee of the ART (Regulation) Bill, 2020, are in relation to 'live-in couples' and 'same-sex couples', who were not allowed to avail ART services under the ART Bill. It was further argued that the provisions of the ART Act, as well as the deliberations of the Parliamentary Standing Committee, indicate that the legislature had no intention to exclude transgender persons from the purview of the ART Act. Any other interpretation of the ART Act would be violative of Articles 14, 15 and 21 of the Constitution. The learned Senior Counsel also submitted that the opinion of the Legislative Department given in **Aqsa Shaikh** (*supra*) has not been considered by the apex court, which is still pending. The observations of the Legislative Department have no bearing as far as the present case is concerned. The learned Senior Counsel argued that if the ART Act is interpreted to exclude transgender persons, it would be violative of Articles 14, 15 and 21 of the Constitution. The learned Senior Counsel relied on the judgment of



the apex court in **NALSA** (*supra*), wherein the apex court held that the transgender persons are entitled to equality and equal protection of law under Article 14 of the Constitution. It was also held that the expression 'sex' in Article 15 includes gender identity; and any denial or exclusion based on a person's gender identity as a transgender person constitutes 'discrimination' within the meaning of Article 15 of the Constitution. The right to choose and reproductive freedom is also a fundamental right under Article 21 of the Constitution as held in **Suchita Srivastava v. Chandigarh Administration** [(2009) 9 SCC 1]. It was also argued that if the petitioner did not assert his transgender identity, he would have been able to access ART services from the fifth respondent and cryopreserve his gametes as a 'woman'. The stand taken by the Union of India that the petitioner, who is a transgender person, must forfeit his right to reproductive freedom in order to secure his right to gender identity, is patently absurd and unconstitutional. No citizen can be compelled to waive one fundamental right to avail another. In order to obtain a certificate under Section 7 of the Transgender Act, the statute does not mandate surgery to remove one's reproductive organs. The petitioner herein obtained a certificate reflecting change in gender as 'male' after undergoing breast removal surgery. It was, thus, argued that Section 21(g) of the ART Act should be read in such a way to include transgender persons to save it from being declared



unconstitutional. According to the learned Senior Counsel, Ext.P3 certificate issued under Section 7 of the Transgender Act should not have been a basis for cryopreservation of the oocytes of the petitioner. Self determination of one's gender identity is 'rights affirming' and not a basis to deny one's right. The learned Senior Counsel also argued that the petitioner being a transgender person, cannot be discriminated against. Being a transman does not mean that the petitioner is not a transgender person. As per Section 7 of the Transgender Act r/w Rule 2(1) of the Transgender Rules, a person, who has undergone counselling, only can receive a certificate indicating change in gender. Thus, body modification is not a necessary condition for receiving a certificate reflecting change in gender under Section 7 of the Transgender Act; and hence, there is no physical/bodily difference between a person, who obtained a transgender certificate, and a person, who obtained a certificate reflecting change in gender. The learned Senior Counsel posed a question as to whether, in the event the petitioner were to suffer from cervical cancer - a condition increasingly prevalent among women - he would be denied treatment on the ground that he has obtained a certificate indicating a change in gender to 'male'. It is submitted that the petitioner is facing extreme mental distress on account of cessation of hormonal therapy and the consequent mis-gendering. The petitioner, who identifies as a transman,



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has expressed that menstruation is a distressing and painful experience for him and that it exacerbates gender dysphoria. Compelling the petitioner to procreate naturally by having sexual intercourse with a male person, conceiving and carrying the pregnancy to term is akin to subjecting him to cruel, inhuman and degrading treatment. According to the learned Senior Counsel, an ART clinic like the fifth respondent can cryopreserve eggs as per the provisions to the ART Act and Rules. It is further submitted that as per Section 22(1) of the ART Act, clinics and banks can cryopreserve human embryos and gametes; and hence, the fifth respondent also can cryopreserve the eggs of the petitioner. It was further submitted that the petitioner is not seeking to be a donor of oocytes/gametes for use by someone, but is seeking to cryopreserve own eggs for his personal use. When the petitioner approached the fifth respondent for cryopreservation, he was never asked to go to an ART bank. The fifth respondent conducted the medical test and found no abnormality. However, the fifth respondent did not proceed with the procedure after the petitioner shared his certificate reflecting change in gender, which, according to the learned Senior Counsel for the petitioner, is plain and simple discrimination on the basis of gender identity and violation of Articles 14, 15 and 21 of the Constitution and Section 3 of the Transgender Act. If the petitioner had not disclosed the fact that he obtained Section 7 certificate reflecting change in gender to



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'male', neither the first respondent nor the fifth respondent would have refused cryopreservation of the eggs of the petitioner. The right to choose and reproductive freedom is also a fundamental right under Article 21 of the Constitution. The learned Senior Counsel relied on the judgment of the apex court in **Justice K.S. Puttaswamy v. Union of India** [AIR 2017 SC 4161], wherein it was held that fundamental right to privacy includes “decisional autonomy of individuals to make personal reproductive choices”. According to the learned Senior Counsel, this includes the petitioner’s choice and decision to procreate on his own terms and not as dictated by the respondents. It cannot be refused on the basis of the petitioner’s gender identity in the light of Articles 14 and 15 of the Constitution of India. According to the learned Senior Counsel, the term 'woman' in Section 21(g) of the ART Act must be read in the manner that is consistent with Articles 14, 15 and 21 of the Constitution of India. A literal reading, which includes persons like the petitioner on the basis of their self-identified gender, even though he retains the reproductive organs of a woman so as to be able to fit the biological criteria for cryopreservation of oocytes, will render the provision unconstitutional. If the term 'woman' in Section 21(g) of the ART Act cannot be interpreted in such a way by including persons other than cis-gender women, who may require access to ART, including non-binary persons and transgender men among other identities, the said



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provision may be struck down as violative of Articles 14, 15 and 21 of the Constitution of India.

Submissions on behalf of the first respondent (Union of India)

12. *Per contra*, Sri.K.Arjun Venugopal, the learned Central Government Counsel, argued that the ART services is only a statutory right governed by the ART Act and Rules framed thereunder; and the right to natural procreation is a fundamental right, whereas the right to avail ART services is only a statutory right. According to the learned Central Government Counsel, Sections 27(2)(a) and 27(2)(b) of the ART Act use the term 'males' and 'females'; and Section 27(6)(i) uses the term 'woman'. Form 10, as per Rule 13(f)(v) of the ART Rules, also uses the term 'woman'. It is pointed out that the term 'woman', as defined under Section 2(1)(u) of the ART Act, does not include a 'transman' or a 'man' holding an identity card issued under Section 7 of the Transgender Act. Hence, according to the learned Central Government Counsel, the petitioner, whose gender is 'man', cannot seek retrieval or cryopreservation of gametes under the ART Act. The learned Central Government Counsel relied on the judgment of the apex court in **M/s. Hiralal Ratanlal v. STO** [AIR 1973 SC 1034], wherein it was held that, “In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that we have to see at the



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very outset is what does that provision say? If the provision is unambiguous and if from that provision, the legislative intent is clear, we need not call into aid the other rules of construction of statutes.” The learned Central Government Counsel also relied on **B.Premanand & Others v. Mohan Koikal & Others** [AIR 2011 SC 1925] in support of the literal rule of interpretation. It was also argued that where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule. The learned Central Government Counsel also relied on **Prakash Nath Khanna v. CIT** [2004 (9) SCC 686], wherein it was held that the language employed in a statute is the determinative factor of the legislative intent. The legislature is presumed to have made no mistake. The presumption is that it intended to say what it has said. Even if it is assumed that there is a defect or an omission in the words used by the legislature, the court cannot correct or make up the deficiency. It was also argued that where the legislative intent is clear from the language, the court should give effect to it. It was also contended that the exclusion of a transgender person from the ART Act was a serious policy decision taken by the Parliament. He also relied on Ext.R1(a) report of the Parliamentary Standing Committee on Health and Family Welfare and contended that the suggestion to bring LGBTQ (lesbian, gay, bisexual, transgender, queer) within the purview of the ART Act was not



accepted by the Parliamentary Committee at the time of finalization of the Bill. It was argued that as per Ext.R1(a), the Department of Health Research had objected to the said suggestion stating that the definition has been provided after consultation with experts and that the Bill provides ART services to 'married couple (man and woman)' and 'single woman'. According to the learned Central Government Counsel, since the petitioner has obtained a certificate under Section 7 of the Transgender Act, he cannot seek relief as a transgender person. Since the Constitution of India mandates the State to act as *parens patriae* for the protection, well-being and welfare of all children, the Parliament has consciously excluded the transgender persons from the ART Act. In the writ petition, the petitioner challenges the vires of Section 21 of the ART Act, which will be applicable when a cryopreserved gamete is sought to be used to obtain pregnancy. However, the above provisions relating to retrieval or cryopreservation of gametes and the definition of 'woman' have not been challenged by the petitioner. It was also the contention of the learned Central Government Counsel that for striking down the provisions of law or for declaring any rule as ultra vires, specific pleading to challenge the rules and asking of such relief ought to be made, that is conspicuously missing in the present writ petition. In the absence of such a pleading, the Union of India did not have an opportunity to rebut the same. It was also another contention that when



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there is no challenge, no 'reading down' is possible. A statutory provision cannot be read down in the absence of a challenge to the vires of the said provision. In order to substantiate the said contention, the learned Central Government Counsel relied on the judgment of the apex court in **Authorized Officer, Central Bank of India v. Shanmugavelu** [(2024) 6 SCC 641], wherein it was held that the courts should make every effort to preserve the validity of legislation and should only declare a law invalid as a last resort. It was also contended that reading down cannot be resorted to when the plain language of the provision is clear. In support of the said argument, the learned Central Government Counsel relied on the judgment of the apex court in **Delhi Transport Corporation v. DTC Mazdoor Congress** [AIR 1991 SC 101]. It was also pointed out that though the petitioner has challenged the constitutionality of Section 21 of the ART Act, contending in Ground B of the writ petition that the Transgender Act is discriminatory and violative of constitutional provisions since Section 21 authorizes ART clinics to perform ART services only to a commissioning couple or woman, and the same has excluded transman and transwoman from the purview of the Transgender Act denying reproductive right of transgenders, during the course of argument, the learned Senior Counsel for the petitioner submitted that there was no exclusion of transgender persons, who may seek ART for becoming a parent or for



freezing gametes, embryo etc., whether as an individual or as a couple, due to social or medical concerns. Thus, the contention of the learned Central Government Counsel is that if the petitioner, as a transgender person, is covered under the ART Act, the prayer in the writ petition ought to have been for a writ of mandamus to the authorities who are refusing to perform their statutory duty, whereas, Section 21 of the ART Act is challenged in the writ petition, stating that the ART Act excludes transgender persons. The oral arguments had no nexus to the contentions raised in the writ petition and were contrary to the pleadings; and an argument note cannot be treated as a pleading. The learned Central Government Counsel further argued that Ext.P4 SOP is not issued under Section 15 of the Transgender Act; and the nodal Ministry for 'Welfare of Transgender Persons' is the Ministry of Social Justice and Empowerment, Department of Social Justice and Empowerment, as per the Government of India (Allocation of Business) Rules, 1961. The said Ministry has notified the Rules. However, the nodal Ministry for the ART Act, as per the 1961 Rules, is the Ministry of Health and Family Welfare, Department of Health and Family Welfare. Ext.P4 SOP has been issued by the Ministry of Health and Family Welfare and not the nodal Ministry for the Transgender Act. Ext.P4 SOP does not mention anywhere that it is issued under the Transgender Act and there is no reference at all to the Transgender Act in the SOP. The



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SOP is only in the form of a guideline for health professionals and it cannot confer or take away any right of a citizen. The SOP clearly mentions that fertility preservation 'should be' done as per the ART Act; and hence, there is no conflict between the ART Act and SOP; and if at all, there is only an internal inconsistency in the SOP. The SOP can only be treated as an Executive Decision and not even a Delegated Legislation/Rule. The rule-making provision in the Transgender Act is not Section 15, but Section 22 mandates that such rules should be laid before both houses of the Parliament. Assuming, while denying, that there is conflict between the SOP and the ART Act, the ART Act will prevail. Since the petitioner holds Ext.P1 identity card as per Section 7 of the Transgender Act and Rule 7 r/w Form 6 of the Transgender Rules, he cannot be treated as 'woman' in order to avail ART services. The learned Central Government Counsel, relying on the judgment of this Court in **National Cadet Corps & Others v. Hina Haneefa & others** [2024 (3) KLT 126] and the judgments of the Bombay High Court in **Vithal Manik Khatri v. Sagar Sanjay Kamble & Others** [Manu/MH/1221/2023], submitted that this Court as well as other High Courts in the country had decided on the effect of holding a Section 7 certificate in Form 6 identity card. The learned Central Government Counsel also contended that there is no restriction in the ART Act on availing ART services before obtaining a certificate under Sections 5



and 6 of the Transgender Act r/w Rule 5 and Form 5 of the Transgender Rules; and there is no restriction under any law on the petitioner resorting to natural reproduction. The learned Central Government Counsel, thus, contended that the right to avail ART services is only a statutory right; and hence, restrictions imposed under the governing statute cannot be claimed to be violative of any fundamental right under Article 21 of the Constitution of India.

Submissions on behalf of the fifth respondent (KIMS Fertility Centre, ART Clinic)

13. The learned Standing Counsel for the fifth respondent argued that the writ petition itself is premature for the reason that the petitioner has not approached the ART bank for preservation of the oocytes, whereas, according to the petitioner, he has approached only the fifth respondent, which is only a clinic. It was argued by the learned Standing Counsel for the fifth respondent that the petitioner has challenged Section 21 of the ART Act on the ground of personal difficulty allegedly caused to him; however, it is settled law that individual inconvenience cannot be a ground to invalidate a statutory provision duly enacted by the Parliament. The cause of action for approaching this Court is an expression of inability of the fifth respondent to cryopreserve the petitioner's oocytes. However, the



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petitioner, after approaching several hospitals, approached the fifth respondent only on 03.07.2024. According to the petitioner, the ART clinics and the ART banks are the commercial entities created and controlled by the Transgender Act and Rules; and there is no possibility or probability to decline the demand of a client/customer/patient for any service by these two types of commercial entities and that happens only when the purpose is illegal. The learned Standing Counsel for the fifth respondent contended that the fifth respondent is not an ART bank, but an ART clinic; and it does not come under Section 2 of the ART Act; and it has no authority to store gametes. It was also argued that cryopreservation of gametes, as per the ART Act, has to be done only by ART banks, which is authorized to undertake collection, storage and supply of gametes, whereas the ART clinic is permitted only to carry out ART procedures using gametes obtained from an ART bank. If the fifth respondent deviates from the statutory scheme, it will attract penal consequences under Section 37 of the ART Act. The fifth respondent, being an ART clinic, is statutorily barred from undertaking cryopreservation of oocytes as sought by the petitioner. The petitioner approached the fifth respondent for the first time in July, 2024; and from September, 2023, the gender status of the petitioner stood changed as 'male' as per Ext.P1; and hence, extraction of oocytes from a person, whose legal status is male, is not contemplated or permitted



under the existing statutory framework. The SOP relied on by the petitioner originated only in 2024, whereas the petitioner commenced hormone therapy and related treatment in 2021. Even if the SOP is considered to be valid and binding, it cannot have retrospective application to the petitioner's case. The writ petition is mainly based on redressal of personal grievance. The question as to whether transgender persons are included or excluded under the ART Act and Rules is rendered irrelevant as far as the present case is concerned since at the time when the petitioner sought cryopreservation of oocytes, the petitioner's gender identity was 'male'. Hence, the only issue to be considered in this writ petition is whether oocytes can be lawfully extracted and cryopreserved, even by an ART bank, from a person like the petitioner whose legal status is that of a male. According to the learned Standing Counsel for the fifth respondent, the answer to the afore question is "No". Hence, the fifth respondent sought for a dismissal of the writ petition with compensatory costs.

Analysis:

14. I have given my thoughtful considerations to the arguments advanced by the learned counsel for the parties. As already stated, the issues to be decided is whether the petitioner, who is female by birth and whose self-perceived gender identity is a man, but whose



reproductive organ, viz., uterus, is intact, can be permitted to undergo cryopreservation of oocytes under Section 21(g) of the ART Act before completing the gender transition and whether the denial of right to preserve the oocytes is violative of Section 21(g) of ART Act and Article 21 of the Constitution of India. The petitioner, whose self-perceived gender identity is 'male' as per Ext.P1, seeks for cryopreservation of his oocytes for using the same at a later stage of life. For a clear understanding of the issue involved, it is appropriate to extract the relevant statutory provisions.

15. Section 2(k) of the Transgender Act defines the term 'transgender person' as follows:

“(k) “transgender person” means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.”

The petitioner claims to be a 'transgender person' and has obtained Ext.P3 certificate to that effect. Thereafter, he secured Ext.P1 certificate recording change in gender to 'male'. There is no dispute that his self-perceived gender identity is 'male'. But, as per Ext.P2 USG report, it is evident that the petitioner retains a uterus and has regular menstruation. However, it is admitted that the petitioner has undergone breast removal surgery and hormonal therapy, and is awaiting a



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complete hysterectomy, including removal of the ovaries. Hence, prior to undergoing sex reassignment surgery, the petitioner sought to cryopreserve his oocytes by availing ART services.

16. The general duties of ART clinics and banks are set out in Section 21 of the ART Act. Clause (g) of Section 21 specifies the circumstances under which such clinics may provide ART services, which reads as follows:

21. General duties of assisted reproductive technology clinics and banks. —

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(g) the clinics shall apply the assisted reproductive technology services, —

(i) to a woman above the age of twenty-one years and below the age of fifty years;

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

Thus, it is discernible that ART services are available only to a commissioning couple or a woman. The terms 'commissioning couple' and 'woman' are defined under Section 2(1) of the ART Act as follows:

“2. Definitions. — (1) In this Act, unless the context otherwise requires, —

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(e) “commissioning couple” means an infertile married couple who approach an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the services authorised of the said clinic or bank;

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(u) "woman" means any woman above the age of twenty-one years who approaches an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the authorised services of the clinic or bank."

17. The petitioner, who approached the fifth respondent - an ART clinic - for cryopreservation of oocytes, was denied ART services for the reason that the petitioner is in possession of Ext.P1 certificate, wherein his gender is shown as 'male'. According to the petitioner, though he had obtained Ext.P1 certificate indicating change in gender as a transgender, he is still having uterus and menstrual cycle. However, on a perusal of the definitions of 'commissioning couple' and 'woman' in the Act, it is seen that the term 'transgender' is neither included nor excluded. The challenge in the present writ petition pertains to the denial of cryopreservation of oocytes to the petitioner, whose self perceived gender identity is male, but who is a biological woman; for more clarity, a person with an intact uterus and regular menstrual cycle. According to the petitioner, such denial is arbitrary, illegal, and violative of Articles 14, 15 and 21 of the Constitution of India.

18. Sections 6 and 7 of the Transgender Act deal with 'Issue of certificate of identity' and 'Change in gender', which read as follows:

6. Issue of certificate of identity.—(1) The District Magistrate shall issue to the applicant under section 5, a certificate of identity as transgender person after following such procedure and in such form and manner, within such time, as may be prescribed indicating



the gender of such person as transgender.

(2) The gender of transgender person shall be recorded in all official documents in accordance with certificate issued under sub-section (1).

(3) A certificate issued to a person under sub-section (1) shall confer rights and be a proof of recognition of his identity as a transgender person.

7. Change in gender.—(1) After the issue of a certificate under sub-section (1) of section 6, if a transgender person undergoes surgery to change gender either as a male or female, such person may make an application, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone surgery, to the District Magistrate for revised certificate, in such form and manner as may be prescribed.

(2) The District Magistrate shall, on receipt of an application along with the certificate issued by the Medical Superintendent or Chief Medical Officer, and on being satisfied with the correctness of such certificate, issue a certificate indicating change in gender in such form and manner and within such time, as may be prescribed.

(3) The person who has been issued a certificate of identity under section 6 or a revised certificate under sub-section (2) shall be entitled to change the first name in the birth certificate and all other official documents relating to the identity of such person:

Provided that such change in gender and the issue of revised certificate under sub-section (2) shall not affect the rights and entitlements of such person under this Act."

It is also important to refer to Rule 6 of the Transgender Rules specifying the procedure for issuance of the certificate of identity for change of gender, which reads as follows:

6. Procedure for issue of a certificate of identity for change of gender.—(1) If a transgender person undergoes medical intervention towards a gender affirming procedure, either as a male or female, such person may apply in the Form 1, along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution in which that person has undergone the said medical intervention, to the District Magistrate for the issue of a revised certificate of identity.

(2) The District Magistrate shall, on receipt of an application



referred to in sub-rule (1) shall verify the genuineness of the said medical certificate, which shall not include any physical examination.

(3) The applicant shall be a currently residing in the area under the jurisdiction of the District Magistrate as on the date of application and an affidavit to this effect shall be submitted along with the application in Form 1 and no additional evidence shall be called for.

19. Though Section 7 of the Transgender Act states that a transgender person, who has undergone surgery to change gender, shall make an application along with a certificate issued to that effect by the Medical Superintendent or Chief Medical officer of the medical institution for revised certificate in such form and manner prescribed, Rule 6 of the Transgender Rules states that a transgender person, who has undergone medical intervention towards a gender affirming procedure, shall apply in Form 1 along with a certificate issued to that effect by the Medical Superintendent or Chief Medical Officer of the medical institution, for the issue of a revised certificate of identity. However, 'medical intervention' is defined in Rule 2(i) of the Transgender Rules as follows:

“(i) "medical intervention" includes any gender affirming medical intervention undertaken by an individual to facilitate the transition to their self-identified gender, including but not limited to counseling, hormonal therapy, and surgical intervention, if any;”

As per the Transgender Rules, in order to obtain a certificate, a person has to undergo counselling, hormonal therapy and surgical intervention, if any. According to the petitioner, he has undergone only breast



removal surgery, and his reproductive organs remain intact. Upon obtaining Section 6 certificate, the petitioner applied for Section 7 certificate; and his self-perceived gender was changed from 'transgender' to 'male' as per Ext.P1. The proviso to Section 7(3) of the Transgender Act states that the issue of revised certificate under subsection (2) shall not affect the rights and entitlements of such person under this Act.

20. According to the learned Central Government Counsel, since there was a change in gender as 'man', the petitioner is no longer a 'transgender person'; and being a 'man', he is entitled only to the rights and entitlements of such person, i.e., 'man', under the Transgender Act. It was also the case of the learned Central Government Counsel that after obtaining a certificate reflecting change in gender, the petitioner cannot be claimed to be a 'woman' and seek cryopreservation of oocytes, which is available only to 'woman' and 'commissioning couple'. As per the provisions of the ART Act, any woman above the age of twenty-one years or commissioning couple can approach an ART clinic or bank for obtaining ART services. Though in the writ petition, it was their specific case that Section 21(g) of the ART Act excludes transgender persons from the purview of the ART Act, during hearing, it was argued that Section 21(g) has to be read in such a way to include



'transwoman' and 'transman', relying on the judgment in **NALSA** (*supra*). In **NALSA** (*supra*), the rights of transgenders, who are neither male nor female, were identified and recognized as 'third gender' with all legal and constitutional protection. They were also granted a right to live a life with dignity and legal protection of laws in all spheres of State activity. Since the term 'person' is a gender neutral term, there is no difference of opinion regarding the afore aspect that the transgender persons are included in the third gender and their human rights are to be protected.

21. Ext.P4 SOP relied on by the petitioner is issued for medical treatment of transgender persons, the relevant portion of which reads as follows:

"Fertility Preservation in Transgenders (Female to Male)"

Established method for fertility preservation includes cryopreservation of embryo and oocytes for females. Ovarian tissue cryopreservation is also a successful technique for fertility preservation and no longer experimental, however, has limited availability and is possible only after attaining puberty. Transgender patient wishing for TAH and salpingoophorectomy should be informed about the option of fertility preservation and informed decision for surgery may be taken thereafter. Fertility preservation should be as per prevailing law/Assisted Reproductive Technology (ART) Act. Transgender and gender diverse people with a uterus who wish to carry a pregnancy should undergo preconception care and prenatal counselling regarding need to stop temporarily gender affirming hormones like testosterone, labor delivery breast feeding and postpartum support. Contraception methods for those who engage in sexual activity that can result in pregnancy should be discussed."

Ext.P4 SOP does not have any reference to the provisions of the Act. In



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the SOP, instructions are given to the gynaecologists and mental health professionals to give awareness to the transgender person before undergoing a total hysterectomy and gender reassignment surgeries. Even in the SOP, it is stated that fertility preservation should be as per the prevailing law or the ART Act. Hence, in order to claim their right, the petitioner cannot rely on Ext.P4 SOP, which is only an internal communication issued by the Government of India, Ministry of Health and Family Welfare.

22. Though Section 21(g) of the ART Act is challenged in the writ petition, the petitioner has not challenged the provisions prescribing 'cryopreservation', defining the term 'woman', the provisions of Surrogacy Act, etc. A perusal of Section 27(2) of the ART Act reveals the use of the terms 'males', 'females' and 'woman'.

23. The Transgender Act came into force in 2019 and the ART Act came into existence only in 2021. Section 45 of the ART Act reads as follows:

“45. Application of other laws not barred. — The provisions of this Act shall be in addition to, and not in derogation of, the provisions of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (57 of 1994) and the Clinical Establishment (Registration and Regulation) Act, 2010 (23 of 2010) or of any other law for the time being in force.”

Section 45 of the ART Act makes it clear that the provisions of the Act



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are in addition to, and not in derogation of, any other law for the time being in force.

24. The petitioner raised a challenge in the writ petition that the transgenders are excluded from the ART Act. There is no challenge to the definition of 'woman' as well as retrieval and cryopreservation under the ART Act. Unless there is a challenge to the definition of 'woman' under Section 2(1)(u) of the ART Act, the statutory provisions cannot be struck down; and the petitioner cannot claim for striking down Section 21(g) of the ART Act, stating that it excludes transgenders from the purview of the Act, and claim that Section 21(g) of the ART Act is violative of Articles 14, 15 and 21 of the Constitution of India as it stands now. Since there is no proper challenge put forth by the petitioner in the writ petition, this Court is not inclined to decide on the issue regarding the constitutional validity of Section 21(g) of the ART Act; and it is thus left open, leaving the right of the petitioner to challenge the same in a properly instituted writ petition.

25. On considering the issue in question, I am inclined to adopt a different view; and hence, the issue as to whether transgenders are included or excluded does not arise for consideration. As per the ART Act, in order to avail the ART services, the person should be a woman or a commissioning couple. Only a woman who is biologically female and



who can bear offspring or produce eggs can avail the ART services. As per Section 2(1)(u) of the ART Act, 'woman' means any woman above the age of twenty-one years who approaches an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the authorised services of the clinic or bank. Though the person is a woman, if for any reason the uterus is not intact, such person may not be able to avail the ART services. Hence, it is mandatory that in order to avail the ART services, the 'woman' in Section 2(1)(u) should be a biological woman. In the ART Act, 'woman' is defined as any woman above the age of 21 years; and no further explanation or definition of the term 'woman' is provided therein. The ART Act does not specify as to who all are included in the term 'woman'.

26. While referring to the Oxford Standard Dictionary, the term 'woman' is defined as 'An adult human female'. The word 'female' referring to the sex is defined in the Oxford Standard Dictionary as 'a person who can bear offspring or produce eggs'.

27. In Merriam Webster, the word 'woman' is defined as 'an adult female person'. The term 'female' is defined in the afore dictionary as 'the sex that typically has the capacity to bear young or produce eggs'.

28. Admittedly, the ART services can be availed only by a biological woman whose uterus is intact, with fallopian tubes and



ovaries. The definition of 'biological woman' in the medical parlance is a person having female organs such as breasts, uterus, fallopian tubes, ovaries, vagina etc. Thus, only a person with biological sex as a woman can avail the ART services. Biological sex is different from gender identity. Thus, the definition of 'woman' in the ART Act can only be that of a woman who is biologically a woman. Sex and gender are conceptually and legally distinct. While sex denotes biological attributes, gender encompasses identity, expression and social experience. Sex also refers to biological attributes such as chromosomes, hormones and anatomy. Gender refers to a person's deeply felt internal identity and social role. In the present case, as per Ext.P2, the abdomen and pelvis ultrasonography report, the uterus, ovaries etc. of the petitioner are intact. There is no challenge to Ext.P2. Exts.P2 and P3 are the certificates issued under the self-perceived gender identity, that has got nothing to do with the biological identity unless and until the reproductive organs are removed from the body of the petitioner. There is no restriction for the petitioner to conceive naturally, which cannot be insisted since the self perceived gender identity of the petitioner is male.

29. The judgment of the apex court in **A (Mother of X)** (*supra*) relied on by the petitioner is regarding the medical termination of a



pregnant person. In **Supriyo @ Supriya Chakraborty** (*supra*), the apex court has given marriage rights to the transgender person considering it as a third gender. This Court, in **Zahhad** (*supra*), directed the authorities to issue gender neutral birth certificate terming as parents instead of 'mother' and 'father'. All these judgements relied on by the petitioner pertain to different issues concerning transgender persons and are not applicable to the present case.

30. The Union of India relied on the judgments in **Shanmugavelu** (*supra*) and **Delhi Transport Corporation** (*supra*) to contend that no reading down is possible when the provision is unambiguous. They also relied on the judgements in **National Cadet Corps & Others v. Hina Haneefa & Others** [2024 (3) KLT 126], **Vithal Manik Khatri v. Sagar Sanjay Kamble & Others** [Manu/MH/1221/2023] and **Anjali Guru Sanjana Jaan v. The State of Maharashtra** [MANU/MH/0004/2021] in support of their contentions that there cannot be any discrimination after obtaining Section 7 certificate reflecting change in gender, but all those cases were in respect of the rights of the transgenders regarding employment, right to contest election and the right to file a complaint under the Protection of Women from Domestic Violence Act, 2005.

31. The fact remains that the petitioner is biologically a woman despite the breast removal surgery. Further, there is no restriction in a



transman marrying a transgender or a cis-woman; and they can procreate naturally. The right to privacy of a person has to be protected as held in **Justice K.S.Puttaswamy** (*supra*). Once the petitioner has decided to change his gender as 'man', he cannot be asked to procreate naturally and give birth to a child. Exts.P2 and P3 are certificates issued in view of the self perceived gender identity of the petitioner, which has got nothing to do with the biological sex, until the total abdominal hysterectomy is done. International Principles reinforce the distinction. The Yogyakarta Principles define gender identity as 'A person's deeply felt internal and individual experience of gender'. These principles distinguish gender identity from biological sex.

32. A three-judge Bench of the apex court, in **Suchita Srivastava** (*supra*), held as follows:

"...There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Art.21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children.

The petitioner, being a biological woman, has all the rights to preserve the oocytes since the apex court in **Suchita Srivastava** (*supra*), has



held that the right to reproduction is a fundamental right under Article 21 of the Indian constitution, right to life. There is naturally inbuilt motherhood in a woman. It is the biological and the neurological systems that prepare a woman's body and brain for caregiving. The female adult body undergoes various processes including the menstrual cycle. It is the monthly hormonal process a female body goes through to prepare for a possible pregnancy. The endometrium builds up each month to create a nutrient-rich place for an embryo. If no embryo implants, the body does not need that lining. Hormone levels fall, causing blood vessels in the lining to constrict and the tissue to break down and shed. It is after undergoing all these hormonal processes, a menstrual cycle happens. For many, the menstrual cycle is painful, but for some not. The petitioner is also undergoing all these natural hormonal processes. As long as the reproductive organs are intact, there is nothing wrong in the petitioner seeking retrieval of oocytes. The petitioner, biologically being an adult female person, has got the right to seek retrieval of oocytes, denial of which will amount to violation of right to life that includes right to reproduction, under Article 21 of the Constitution of India.

33. Since, issues regarding transgenders were dealt with in detail in this case, I find it appropriate to consider the necessity in bringing



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forth a health manual. A duty is cast upon the Government to take measures to bring out a Health Manual related to sex reassignment surgery in accordance with the World Professional Association for Transgender Health guidelines. Section 15(d) of the Transgender Act reads as follows:

“15. Healthcare facilities.— The appropriate Government shall take the following measures in relation to transgender persons, namely:—

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(d) bring out a Health Manual related to sex reassignment surgery in accordance with the World Profession Association for Transgender Health guidelines;”

However, no guidelines have been framed by the Government so far though there is Ext.P4 SOP. Ext.P4 SOP is at the instance of the Government. They cannot, however, claim ignorance of the SOP and argue that the SOP is issued by another Department, namely MOF (Ministry of Health, Family and Welfare). The Transgender Act came into force in the year 2019 with effect from 10.01.2020. So far, the Government has not cared to issue any guidelines even after a lapse of six years, thereby placing the transgender persons in peril. In Ext.P4 SOP, it is clearly stated that the transgender patients wishing for TAH (Total Abdominal Hysterectomy) and salpingoophorectomy should be informed about the option of fertility preservation and informed decision for surgery may be taken thereafter. In the present case, the petitioner



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had stated that no awareness was given to the petitioner by any authority before he obtained Section 7 certificate under the Transgender Act or before the removal of breasts. It is the bounden duty of the appropriate Government to give proper awareness to the transgender persons regarding preservation of their oocytes or sperms, before they start treatment for change in their gender. No document has been produced by the respondents to prove that any such awareness or counselling was provided to the petitioner before he was subjected to the procedure for gender change.

34. Further, it is the case of the petitioner that though the petitioner approached the fifth respondent ART clinic for retrieval of oocytes and cryopreservation, they failed to provide the same stating that the petitioner is a transgender. According to the fifth respondent, cryopreservation of gametes not connected to an infertility treatment cycle falls within the domain of an ART bank and not an ART clinic like the fifth respondent; and any deviation from the same will attract penal consequences under Section 37 of the ART Act. The learned Senior Counsel for the petitioner, relying on Section 22 of the ART Act, argued that ART clinics are also permitted to cryopreserve oocytes, and that when the petitioner approached the fifth respondent, it was never asked by the fifth respondent to approach an ART Bank.



35. In order to decide whether preservation of oocytes other than for infertility treatment cycle is permissible by an ART clinic, it is necessary to refer to Subsections (b) and (c) of Section 2(1) of the ART Act, which read as follows:

“2. Definitions. — (1) In this Act, unless the context otherwise requires, —

xxxx

(b) “assisted reproductive technology bank” means an organisation which shall be responsible for collection of gametes, storage of gametes and embryos and supply of gametes to the assisted reproductive technology clinics or their patients;

(c) “assisted reproductive technology clinic” means any premises equipped with requisite facilities and medical practitioners registered with the National Medical Commission for carrying out the procedures related to the assisted reproductive technology;”

Thus, as defined under the ART Act, the ART bank is an organisation responsible for collection of gametes, storage of gametes and embryos and supply of gametes to the ART clinics or their patients. As far as the ART clinic is concerned, it is defined as any premises equipped with requisite facilities for carrying out procedures relating to ART. Hence, there is no doubt that the authority to cryopreserve oocytes is with the ART bank and not with the ART clinic.

36. As discussed earlier, the petitioner was not given any awareness regarding the cryopreservation of the oocytes or the consequences of the removal of reproductive organs. If awareness was given to the petitioner by the hospital authorities or the Government,



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the petitioner could have taken steps to cryopreserve the oocytes. It is also the case of the petitioner that he underwent hormone therapy and also mastectomy. In order to complete the process, the petitioner is required to undergo gender-affirming surgery, which includes the removal of the uterus; and thus, the petitioner approached the fifth respondent for cryopreservation of oocytes. Since the fifth respondent did not permit the petitioner to cryopreserve the oocytes, he temporarily discontinued the hormone therapy. However, the petitioner has the right to live with dignity and the reproductive rights are also guaranteed under Article 21 of the Constitution of India. Merely because the petitioner had approached an ART clinic instead of an ART bank, it would not be appropriate to deny such benefit to the petitioner. Considering the peculiar facts of the present case, I find it appropriate to direct the petitioner to approach the nearest ART bank for the purpose of cryopreservation of his gametes.

37. I place on record my appreciation for the valuable assistance rendered by the learned counsel appearing for the parties, as well as by my Research Assistant, Ms. Haseena Hassan, in this case.

Conclusion:

Accordingly, the writ petition is partly allowed as follows:



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- a) The petitioner is directed to approach the ART bank of the petitioner's choice; and the said ART bank shall take steps to retrieve the oocytes of the petitioner and cryopreserve the same in order to utilize it for reproduction at a later stage in life.
- b) The challenge regarding the constitutional validity of Section 21(g) of the ART Act is left open.

Sd/-

SHOBA ANNAMMA EAPEN
JUDGE

bka/-



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APPENDIX OF WP(C) NO. 5306 OF 2025

PETITIONER EXHIBITS

Exhibit P1 A TRUE COPY OF THE TRANSGENDER IDENTITY CARD
ISSUED BY THE DISTRICT COLLECTOR,
THIRUVANANTHAPURAM, DATED 13/09/2023

Exhibit P2 A TRUE COPY OF THE ABDOMEN AND PELVIS
ULTRASONOGRAPHY REPORT DATED 3/07/2024

RESPONDENT EXHIBITS

Exhibit R1(a) TRUE COPY OF THE RELEVANT EXTRACT OF THE
129TH REPORT OF THE PARLIAMENTARY STANDING
COMMITTEE ON HEALTH AND FAMILY WELFARE
SUBMITTED TO RAJYA SABHA ON 19.3.2021

PETITIONER EXHIBITS

Exhibit-P3 A TRUE COPY OF THE TRANSGENDER IDENTITY CARD
ISSUED BY THE DISTRICT COLLECTOR,
THIRUVANANTHAPURAM, DATED 01/03/2023

Exhibit-P4 A TRUE COPY OF THE 'STANDARD OPERATING
PROCEDURES FOR MEDICAL TREATMENT OF
TRANSGENDER PERSONS', GOVT. OF INDIA,
MINISTRY OF HEALTH AND FAMILY WELFARE, DTE.
GENERAL OF HEALTH SERVICES VIDE F.NO.
Z.28017/43/2024-SAS-III (FTS 8281793)'

Exhibit-P5 A TRUE COPY OF 'NEWS REPORT FROM KOCHI
TITLED "TRANSPERSON WHO PRESERVED EGGS
BEFORE SURGERY IS DAD" THAT APPEARED IN THE
TIMES OF INDIA ONLINE EDITION DATED
02.02.2024