IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE AMIT RAWAL

&

THE HONOURABLE MR.JUSTICE P. V. BALAKRISHNAN

Tuesday, the 26th day of August 2025 / 4th Bhadra, 1947

WA NO. 2009 OF 2025

AGAINST THE JUDGMENT DATED 25.02.2025 IN WP(C) 37687/2024 OF THIS COURT

APPELLANT(S)/RESPONDENT NO.1:

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

BY ADDITIONAL SOLICITOR GENERAL SRI.SUNDERSAN AND CENTRAL GOVERNMENT COUNSEL SRI.K.ARJUN VENUGOPAL

RESPONDENT(S)/PETITIONERS/RESPONDENTS 2 TO 4:

1. **DEVAYANI S, AGED 44 YEARS WIFE OF VINOD KUMAR M C, 'M C NIVAS', KOVOOR MLA ROAD, CHEVAYUR PO, KOZHIKODE, PIN - 673017**
2. **VINOD KUMAR MC, AGED 55 YEARS SON OF M C UNNI, 'M C NIVAS', KOVOOR MLA ROAD, CHEVAYUR PO, KOZHIKODE, PIN - 673017**
3. **STATE OF KERALA, REPRESENTED BY ITS SECRETARY, MINISTRY OF HEALTH AND FAMILY WELFARE, SECRETARIAT, THIRUVANANTHAPURAM, PIN - 695001**
4. **THE DISTRICT REPRODUCTIVE & CHILD HEALTH ("RCH") OFFICER DISTRICT MEDICAL OFFICE, ERNAKULAM, PARK AVENUE, MARINE DRIVE, ERNAKULAM, PIN - 682011**
5. **SABINE HOSPITAL AND RESEARCH CENTRE PVT. LTD, REPRESENTED BY ITS MANAGING DIRECTOR, PEZHAKKAPPALLY PO, MUVATTUPUZHA, PIN - 686673**

BY ADV.SRI.AKASH.S FOR R1 AND R2

GOVERNMENT PLEADER FOR R3 AND R4

Prayer for interim relief in the Writ Appeal stating that in the circumstances stated in the appeal memorandum, the High Court be pleased to stay the Judgment dated 25.02.2025 of this Hon'ble Court in W.P.(C)No.37687 of 2024 in interest of justice.

This Writ Appeal coming on for admission on 26.08.2025 upon perusing the appeal memorandum, the court on the same day passed the following:

AMIT RAWAL & P.V.BALAKRISHNAN, JJ.

C.M.Application No.1 of 2025

&

W.A.No.2009 of 2025

Dated this the 26th day of August, 2025

ORDER

Amit Rawal, J.

C.M.Application No.1 of 2025

The present intracourt appeal is accompanied by an application seeking condonation of delay of 139 days in filing the appeal. The reasons have been assigned in paragraphs 4 to 6 of the affidavit, the same reads thus:

> "4. It is submitted that with the introduction of the ART Act and Surrogacy Act, many alleged aggrieved persons filed Writ petitions in the Hon'ble High Courts all across the country and also before the Hon'ble Supreme Court of India. The strength of the Department of Health Research is very small and has only 34 regular employees in place. There is no exclusive legal division to handle around 356 cases/petitions pertaining to the ART and Surrogacy Acts. Due to the substantial influx of court cases, the department faced challenges in

adhering to the 30 days timeline for filing an appeal. The process of preparing and filing an appeal against an impugned judgment necessitates considerable time and coordination. Despite these constraints, the Appellant has demonstrated diligence and has taken all reasonable steps to pursue the appeal without negligence.

5. The judgment was passed on 25.02.2025 and the copy thereof was received by the appellant from the Central Government Counsel through e-mail on 22.02.2025. Thereafter, the matter was processed in the file. The file was routed through the Section Officer, Under Secretary, and Joint Secretary and a decision was taken for filing an Appeal against the judgment and appearance of the learned Additional Solicitor General in this matter. Accordingly, the learned Additional Solicitor General was requested for his appearance vide appellant letter number U. 11019/16/2024-HR dated 03.04.2025. After approval of the draft appeal, on 05.04.2025, it was forwarded to the office of the Deputy Solicitor General of India, Kerala for vetting vide e-mail dated 08.04.2025. Since a number of judgments on the same pattern were passed by the Hon'ble Court, the Department also separately and concurrently sent a letter dated 01.05.2025 to the then in-charge of the DSGI Office, seeking allocation of cases to one or limited counsels

who are well conversant in the subject matter, followed by a reminder vide letter dated 08.05.2025. Since the Writ Petition had been allotted to a Central Government Counsel, the Appeal was also to be handled by the same Counsel. Accordingly, the draft was forwarded to the Central Government Counsel concerned by an e-mail dated 21.O5'2025' The vetted draft Appeal was received from the Central Government Counsel vide e-mail dated 31.05.2025, containing substantial modifications and legal clarifications. Accordingly, a Virtual Conference was conducted on 24.06.2025 with DSGI and Central Government Counsel to discuss substantial legal points. Thereafter modified draft was sent to the Central Government Counsel on 27.06.2025 through e-mail' Another virtual conference was held with the central Government counsel on 01.07.2025 to finalize the issues. Another revised draft writ appeal was forwarded to the Central Government Counsel vide e-mail dated 09.07.2025 for finalisation. Vide an e-mail dated 24.07.2025, the Central Government Counsel returned the final vetted draft to the department with approval of the learned Additional Solicitor General, with some modifications.

6. It is submitted that the Judgment of the learned Single Judge was passed on 25.02.2025 and the Writ Appeal ought to have

been filed within 30 days, i.e. on 25.03.2025. As on 11.08.2025, there is a delay of 139 days. The delay was caused solely due to the reasons mentioned above, which were outside the control of the Appellant and were not deliberate. It is in the said situation that the instant application to condone delay is being fired. The Appellant has a meritorious case in the Writ Appeal and if the Writ Appeal is not heard on merits and allowed, it will prejudice the rights of the Appellant and have pan-India ramifications. Moreover, the treatment/procedure that has already been undergone by the petitioners in the meantime on the strength of the impugned Judgment is irreversible to the extent of the treatment/procedure already done, for which they had sufficient time, and the clock cannot now be set back in that regard. Hence, no grave prejudice will be caused to them even if the delay is condoned and the Writ Appeal is heard on merits."

2. The aforementioned application was controverted by counsel for respondents 1 and 2 by filing a counter affidavit as Bench mark in the court which is taken on record, that each and every day's delay has not been explained. The delay is

only due to administrative laches and attributed to the appellant and in support of the contention, relied upon the judgment of the Supreme Court in ***Office of the Chief Post Master General and Others v. Living Media India Ltd and Others [(2012) 3 SCC 563]***. Paragraphs 12 and 13 thereof reads thus:

> "12) It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.
>
> Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The

claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.

13) In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay."

3. We have heard learned counsel for the parties.

4. In the judgment cited supra, the appellant was seeking condonation of delay of 427 days, but the reasons given for seeking condonation were not satisfactory and lacking bona fides, much less deliberate inaction. However, from the perusal of paragraphs 4 to 6 of the application herein accompanied by an affidavit, it is evident that the explanation does not fall in the expression, 'gross negligence' 'deliberate inaction' or 'lack of bona fides', it is otherwise and therefore liberal concession has to be adopted, as per the sub-paragraph 12 of the judgment relied upon by the other side. The same reads as under:

> "Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The

> claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government."

Accordingly, we allow the application for condoning the delay of 135 days.

W.A.No.2009 of 2025

5. Mr.Sundersan, learned Additional Solicitor General, assisted by Mr.K.Arjun Venugopal, submitted that the judgment under challenge suffers from serious illegality for the reason that in the instant case, the writ petitioner/respondent, who is below the age of 50 years as per Section 21(g) of the Assisted Reproductive Technology (Regulation) Act, 2021, but her husband has crossed the age of 55 and is seeking the benefit of the Act by taking the assistance of a donor. There is no definition of donor in the Act and it only applies to the commissioning couple.

Commissioning couple would not include the definition of donor, therefore, the generic distinction drawn in the judgment impugned, that is gender-specific and not couple-specific, would not be applicable and therefore there is an abdication. In support of the contention, the judgment of this court dated 18.07.2025 in Writ Appeal No.696 of 2024 has also been relied upon.

6. Issue notice before admission. Mr.Akash, learned counsel appearing on behalf of respondents 1 and 2 submitted that the respondents had already undertaken the fertility treatment and have been hospitalized after the Act had come into force in October 2022 and the first embryo transfer was done on 15.02.2023 and underwent an IVF/ICSI procedure on 15.02.2023, but the result was unsuccessful. The 1st respondent conceived again after the second embryo transfer done on 12.03.2023, but miscarried after few weeks. One more transfer was done on 06.09.2023 and the result

was again unsuccessful. The 1st respondent again visited the hospital in January, then in July, August and September, 2024 and scans were done, but uterus was not ready for transfer and therefore, could not proceed with transfer due to husband's age factor. Moreover, the Act does not present the woman who is eligible as per the provision of 21(g) to undergo treatment by taking the assistance of donor even if her husband has crossed the age limit prescribed under the aforementioned Act. It is not couple based but gender based as rightly found by the learned Single Judge. Therefore, prays that the interim order may not be passed as it will stall the treatment already been undertaken by the respondents/petitioners.

7. In support of the aforesaid submission, two Single Bench judgments of the Calcutta High Court in **Shyamoli Saha and Another v. The State of West Bengal and Others [WPA No.237776 of 2024]** and in **Sudarsan Mandal and Another v. The State of West**

Bengal and Others [WPA No.9232 of 2024] have been cited. **Sudarsan Mandal** (supra) is an identical case, wherein one of the spouses had crossed the permissible age as prescribed under Section 21(g) of the Act and the woman who intended to conceive with the help of the donor has been permitted in the absence of any bar under the Act.

8. W.A.No.696 of 2024 referred by the Union of India against the judgment of Single Bench dated 19/12/2022 in W.P.(C) No.24058 of 2022, this Bench vide judgment dated 18.07.2025, heard the matter *in extenso* and by relying upon various judgments, in paragraphs 10 to 14 held as under:

> "10. We have heard the learned counsel for the appellant and appraised the paper book. There is no dispute to the preposition culled out in the judgment of State of Himachal Pradesh (supra), for it is settled law that the courts cannot transgress its power while exercising the power of judicial review under Article 226 of the Constitution of India while issuing a slew of directions which tantamount to legislating the law, which is the domain of the legislature. Paragraph 3.14 of the

erstwhile guidelines, no doubt provided the age for a women to undergo the treatment and there was no age limit prescribed for the men to avail the services of the procedure under the ART.

11. The sole purpose of the Act was to provide existing Assisted Reproductive Technology and to prevent its misuse and mandating the clinics and the banks for registration either through the National or with the State Registration Departments, so that, the clinics strictly abide by the provisions of the Act 42 of 2021, effective from 25.1.2022.

12. There was no necessity for issuing directions to alert the Government to consider the predicament of persons undergoing treatment under the erstwhile guidelines by incorporating a transitional procedure, as it is evident that such treatment was cycle-based, depending on the woman's menstrual cycle, and could not continue for infinite period. Only those persons who were in the midst of treatment under the erstwhile guidelines and were able to conceive would have been satisfied; others are required to fulfill the conditions envisaged under Act 42 of 2021, including the age limit prescribed under Section 21(g). For example, a patient, particularly a male patient above the age of 55 years, who had undertaken a cycle with the

age of 55 years, who had undertaken a cycle with the assistance of a woman above the age of 50 years, and had either completed one cycle or was in the midst of a cycle but failed to conceive, would be expressly barred from availing the facility under the provisions of the new Act.

13. The aims and objectives of the Act are based on expert reports, age expectancy, and the reproductive stages of both women and men. Once the aforementioned age limit, i.e., the provisions of Section 21(g) was under challenged and upheld, in our considered view, the learned Single Bench ought There was no not to have issued the directions (supra). requirement to issue such directions directing the appellant to incorporate the aforementioned provisions in the already enacted and promulgated Act.

14. The direction No.1 would be construed only for the purpose of the patients, who had availed the ART services under the erstwhile guidelines and once the one cycle is over, it cannot be permitted to continue under the old cycle as by that time, the new Act with effect from 25.1.2032 had already come into force. Since the National Board has already deliberated upon the directions and found the provisions of the Act to be intact the aforementioned directions, in our considered view have become otiose."

9. No doubt the learned Single Bench in the judgment under challenge and as well as the judgments of the Calcutta High Court have permitted one of the spouses, that is the woman, to proceed ahead under the ART Act for conceivement with the help of the donor, by interpreting the provisions of 21(g) on a gender basis and not on a couple basis. But we are afraid that the said findings would not be applicable in case the definition of woman and commissioning couple, as well as the provisions of 21(g) are read in 'conjunction'. In other words, *prima facie*, all the judgments deal with the interpretation of the provisions of the Act in isolation and not conjunctively.

10. We are of the view that the matter requires a detailed argument and consideration. Accordingly we admit the writ appeal.

11. Post this matter for final hearing on 24.09.2025.

W.P.(C) No.2009 of 2025

15

In the meantime, the judgment under challenge is ordered to be stayed.

Sd/-

AMIT RAWAL, JUDGE

sd/-

P.V.BALAKRISHNAN, JUDGE

Scl/