

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 9232 of 2024

**Sudarsan Mandal and Another
Vs.
The State of West Bengal and others**

For the petitioners : Mr. Pinaki Ranjan Chakrabarti

For the State : Mr. Anirban Ray,
Mr. Tanoy Chakraborty

Hearing concluded on : 23.04.2024

Judgment on : 26.04.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioners are a married couple. The petitioner no. 1/husband is around 59 years of age, whereas the petitioner no. 2/wife is aged about 46 years. The petitioners' only child Anindya Mondal died at the tender age of 19 years.
2. To fulfill the void, the petitioners attempted to conceive again but failed to so conceive by normal process, when they contacted the respondent no. 4-Clinic which is a licensed clinic under the Assisted Reproductive Technology (Regulation) Act, 2021 (hereinafter referred to as, "the 2021 Act").
3. Upon medical examination, it was found that the petitioner no. 2 is medically fit and eligible to give birth to a child by the process of In Vitro Fertilization (IVF) with ovum donation. Since the petitioner no. 2

is suffering from poor ovarian reserve along with adenomyosis fibroid in uterus, there is no other option for the petitioners to become parents.

4. However, the petitioners were informed by the Clinic that since the petitioner no. 1 had crossed the age of 55, there is a legal wrangle as to their seeking to use such technology. Accordingly, the present writ petition has been filed asserting the right of the petitioners to become parents under the 2021 Act.
5. Learned counsel for the petitioners argues that since one of the petitioners, that is, petitioner no. 2 is still within the permissible age limit under Section 21(g) of the 2021 Act, the petitioners should be permitted to have a child under the said Act.
6. Learned counsel appearing for the respondent-Authorities, in his usual fairness, does not treat the present matter as an adversarial litigation but hands over a parawise comment and a set of instructions issued by the Deputy Secretary of the Government of India to the Principal Secretary (Health)/Secretary (Health) of all States regarding reasons for prescribing the age limits under Section 21(g) of the Act.
7. The limited consideration in the present case is whether the petitioners come within the purview of the Act, since both of them need donations of ovum and gamete respectively to become parents; secondly, whether the petitioners can take advantage of the 2021 Act in view of the petitioner no. 1 having crossed the upper age limit stipulated under the Act.

- 8.** Insofar as the first issue is concerned, the petitioners have annexed to the writ petition a certificate issued by respondent no. 4, which is a licensed clinic under the 2021 Act, dated February 3, 2024, authored by a Doctor of the said Clinic, which indicates that the petitioner no. 2 is 46 years old and the petitioner no. 1 is 59 years of age and they are in desperate need of a child as their only son committed suicide on October 12, 2023. It is indicated therein that the petitioner no. 2 is suffering from poor ovarian reserve along with adenomyosis fibroid in uterus for which they need IVF with ovum donation. It also indicated that due to bar of law, special permission is required.
- 9.** The writ petition also contains as an annexure a certificate separately issued by the concerned Doctor indicating the problem and prognosis explained in detail, which corroborates the certificate of the Clinic.
- 10.** Thus, it is evident that the petitioner no. 2, upon obtaining ovum from a donor as well as gamete from another donor, is capable of giving birth to a baby by the process of IVF which comes within the purview of the 2021 Act.
- 11.** A comprehensive reading of the said Act shows that the statute nowhere prevents both the spouses from taking resort to assistive reproductive technology under the Act in the event both of them are incapable of bearing ovum and gamete respectively.
- 12.** Section 2(1)(a) defines “assisted reproductive technology” as all techniques that attempt to obtain a pregnancy by handling the sperm or the oocyte outside the human body and transferring the gamete or the embryo into the reproductive system of a woman. Thus, as per

the above definition, the pregnancy can be obtained by handling sperm or oocyte outside the human body. There is no restriction to the effect that either of the two must come from the couple themselves.

- 13.** The definition of “embryo” in Clause (f) of Section 2(1), “gamete” in Clause (g) and “sperm” in Clause (r) are person-agnostic and do not necessarily refer to the commissioning couple. Rather, Clause (h) defines “gamete donor” as a person who provides sperm or oocyte with the objective of enabling an infertile couple or woman to have a child.
- 14.** In Section 24 of the 2021 Act, the duties of Assisted Reproductive Technology Clinics using human gametes and embryos have been laid out, which nowhere confine the collection of gametes to the commissioning couple themselves. Upon collection of the gametes, the assisted reproductive technology is resorted to and the embryo is implanted in the body of the female spouse.
- 15.** Thus, the first question is answered in the positive, to the effect that there is no bar in the 2021 Act to the petitioners resorting to using donated gametes (sperm and oocyte) entirely to take advantage of the assisted reproductive technology.
- 16.** Next comes the age restriction in Section 21(g) of the 2021 Act. Sub-clause (i) of Clause (g) restricts application of assisted reproductive technology services to a woman above the age of twenty-one years and below the age of fifty years. Sub-clause (ii), on the other hand, restricts the technology to a man between the age of twenty-one and fifty-five years.

- 17.** Admittedly, the petitioner no. 1/husband has crossed the upper age limit and does not qualify for gamete donation. The petitioner no. 2/wife, however, still comes within the upper age limit of 50 years, being aged about 46 years at present.
- 18.** Section 2(1)(e) defines “commissioning couple” as an infertile married couple who approach an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the services authorized of the said clinic or bank. Thus, the only qualifications are that they have to be a married couple and infertile, which qualifications are met in the present case by the petitioners.
- 19.** Again, Section 2(1)(u) defines “woman” as any woman above the age of twenty-one years who approaches an assisted reproductive technology clinic or assisted reproductive technology bank for obtaining the authorized services of the clinic or bank.
- 20.** Thus, Section 21(g) makes no difference between a woman who approaches a clinic for taking resort to such technology individually and a woman who is one of the spouses of a commissioning couple approaching a clinic for similar purposes.
- 21.** Since the Act does not discriminate between women who are married and those who are not, such distinction cannot be made in the present case as well.
- 22.** For all practical purposes, the petitioner no. 1 is, thus, debarred individually from taking resort to assisted reproductive technology services. However, the petitioner no. 2 comes within the permissible age limit of Section 21(g)(i).

- 23.** In the facts of the present case, the petitioners seek to use the sperm of a third-party donor, thus, ruling out physical participation of the petitioner no. 1, who is debarred under the Act, from seeking assisted reproductive technology services. Even the petitioner no. 2 seeks donation of oocyte from a third party donor. Thus, the bar under Section 21(g)(ii) does not come into play at all. Although the petitioners together make a commissioning couple, for all practical purposes it is the petitioner no. 2 (who comes within the permissible age limit) who will have active participation in the process, since the sperm as well as oocyte of third-party donors will be used and the assisted reproductive technology shall be applied on the petitioner no.2.
- 24.** Thus, the petitioners squarely come within the purview of the 2021 Act as there is not bar to the petitioners, even as a commissioning couple, to seek the assistance of an appropriate clinic for such purpose.
- 25.** Accordingly, WPA No. 9232 of 2024 is allowed, thereby granting liberty to the petitioners to approach respondent no. 4, an Assisted Reproductive Technology Clinic, for obtaining the services authorized of the said Clinic for the purpose of employing assisted reproductive technology services in order to conceive a child. If so approached, the respondent no. 4 shall take due steps in ensuring that the petitioners can avail such services by means of use of gametes donated by third-party donors.
- 26.** There will be no order as to costs.

- 27.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)